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Publication: *Missouri Law Review*

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Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice

Robert P. Mosteller*

I. INTRODUCTION

In this Article, I examine an important connection between society's concern with innocence – fueled by numerous wrongful convictions revealed by newly available DNA testing – and past and future progressive changes in criminal justice practices and policy. In *Why Defense Attorneys Cannot, But Do, Care About Innocence (Caring About Innocence)*, I argued that, while the drive to protect the innocent has the potential to divide progressives in their support of indigent defense if targeting reforms only at the innocent is seen as possible, concern for innocence should instead drive a renewed effort to secure adequate funding for representing all those accused of crime.¹

Defense attorneys, and especially defenders of the indigent who have little or no control over client selection, assist many defendants who are guilty. Nevertheless, the essential point that excellent defense services protect the innocent has been recognized with admittedly varying levels of intensity by quite different observers. Attorney General Janet Reno stated the point very directly: “In the end, a good lawyer is the best defense against wrongful conviction”² Professor William Stuntz made a similar observation, although his focus was accuracy rather than innocence: “*Gideon* and the reasonable

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1. Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1 (2010). Others have noted the potential of innocence to support increased indigent defense funding. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1036 (2006) (“Apart from the constitutional right [to effective counsel], for many people this concern can be an extremely compelling argument for having a functional strong defense.”).

2. OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NAT'L SYMPOSIUM ON INDIGENT DEFENSE 2000: REDEFINING LEADERSHIP FOR EQUAL JUSTICE vii (2000); see also Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 928-29 (2004) (arguing that well-funded defense counsel is essential to avoid wrongful convictions and prevent miscarriages of justice).

doubt rule are essential to any adversarial system that takes accuracy seriously.”³ What is needed now in an age that values innocence is to understand that this argument is more than a theoretically sound abstraction. Good indigent defense is important, and indeed necessary, innocence work. It must be done well, or we betray our basic values: to provide justice regardless of poverty and to protect the innocent. The innocent should not be erroneously charged, but, if they are, they at least deserve to have a full and fair trial, which gives our imperfect system its best chance of avoiding error.

Professor Stuntz’ different concentration on accuracy instead of innocence raises a question of the appropriate focus of the issue.⁴ Innocence protection and accuracy are not identical, and system responses may diverge depending on what goal is given greater importance. Greater protection against convicting the innocent often increases errors, allowing the guilty to escape punishment, and may even decrease “fact-finding precision” in terms of total volume of error.⁵ Good defense work does not necessarily improve overall accuracy. However, our legal tradition does not treat all errors equally and instead prioritizes avoiding unjust convictions rather than erroneous acquittals.⁶ It is not necessarily correct that excellent defense work improves

3. See William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 75 (1997) (referring to *Gideon v. Wainwright*, 372 U.S. 335 (1963), which granted indigent defendants the right to counsel and is understood shorthand for effective representation, and to the requirement that proof in criminal cases be established beyond a reasonable doubt, which recognizes that defendants should prevail even if they cannot prove innocence).

4. Judge Richard Posner recognized the importance of excellent defense work to protect the innocent: “The total suffering of the innocent will not be reduced unless the courts both invalidate statutes that impose severe punishments and insist on generous funding of criminal defense lawyers.” RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 162 (1999). However, he ultimately reached an overall conclusion of limited funding as the efficient outcome. *Id.* at 164. He expressed the possibility that the present bare bones system of indigent representation may be optimal, assuming that the lawyers who represent the indigent are good enough to reduce the likelihood of convicting the innocent to a very low level. *Id.* He reached this conclusion by balancing his assumed (or hoped for) result that an acceptably low level of erroneous convictions occur presently against the prospect of spending more for public representation. *Id.* at 163-64. He acknowledged that spending more on representation would further reduce the level of erroneous convictions but noted it would also allow more guilty defendants to win acquittal because of the improvement in representation. *Id.*

5. See Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 508, 512 (1973) (making this observation in the context of comparing the qualities of the inquisitorial and adversarial system, the latter placing somewhat higher barriers to conviction than the former system).

6. The strong commitment to err on the side of protecting the innocent is captured in the adage that it is better that ten guilty men be acquitted than one innocent man be convicted, which is found in the writings of both Matthew Hale and William

criminal justice system accuracy if erroneous acquittals are counted on par with erroneous convictions. However, with the understanding that erroneous convictions are far more serious than are erroneous acquittals, excellent defense work achieves greater accuracy in terms of the satisfaction of society's values.

A major point of my earlier article, *Caring About Innocence*, is that innocence cannot be known, and often not even subjectively believed, in many of the types of cases that resulted in erroneous convictions of the innocent as revealed by DNA evidence.⁷ I will address that basic point with greater care in this Article with a focus on the false assumption – which, ironically, DNA exonerations might encourage⁸ – that typical defense work generally does not involve cases where defendants might really be innocent. Assuredly, defense work is about more than innocence, but innocence protection is a key element of it. A widely shared, albeit erroneous, assumption, even by relatively sophisticated observers, is that insiders in the criminal justice system, and defense attorneys in particular, can and do actually know which clients are innocent or likely to be innocent.

The most daunting problem with reducing erroneous convictions is that many of these cases are indistinguishable from “garden variety” cases in which the client appears to be and is in fact guilty of the charged offense. The innocent are often found in cases that do suggest reasonable doubt and the possibility of innocence but where the objective facts do not necessarily show that innocence is probable. The one type of case that defense attorneys rarely or only momentarily face is that of the *obviously* innocent client. For those who doubt the accuracy of this final claim, I suggest the relatively obvious point: if anyone in the system – defense attorney, prosecutor, or police

Blackstone. See SIR MATTHEW HALE ET AL., PLEAS OF THE CROWN: A METHODICAL SUMMARY 289 (1678); 4 WILLIAM BLACKSTONE, COMMENTARIES *352. This sentiment does contain a limitation on how much loss of total accuracy is permitted by the ratio of one to ten, and the same sentiment can be stated using a higher ratio. See, e.g., Rinat Kitai, *Protecting the Guilty*, 6 BUFF. CRIM. L. REV. 1163, 1167-68 (2003) (discussing authors who set the appropriate ratio between one to five through one to one thousand); William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 333 n.17 (1995) (describing also the statements of Jeremy Bentham, both noting the various ratios used and deriding the excessive sentiments in some). Although no doubt the commitment is not unlimited, few would suggest the ratio is properly one to one, and erroneous convictions are to be no more avoided than erroneous acquittals. Moreover, the societal response to DNA exonerations suggests that contemporary public attitudes truly do treat the prospect of unjustly punishing the innocent as substantially more important, and perhaps preeminent, among goals that serve the general cause of procedural fairness in criminal trials. See generally FRANK R. BAUMGARTNER ET AL., THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE (2008) (describing how the stories of exonerations of those on death row through DNA transformed American attitudes toward the death penalty).

7. Mosteller, *supra* note 1, at 64.

8. See *infra* text accompanying notes 73-74.

officer – knows the defendant is innocent, that case will be immediately dismissed upon discovery of the clear evidence of innocence upon which such knowledge is based.⁹

Since the problematic cases of unjust convictions do not come with obvious markings of innocence, defenders must necessarily represent the guilty well if they are to represent effectively all those who are innocent because they are unable to separate the two in many situations. Defenders could not even attempt a serious effort to separate the guilty from the innocent before trial without substantial effort, which would be impossible in the current funding environment because resources would not permit it. If one either believes in the fundamental importance of an adequate defense in the American adversarial system or places importance on protecting the innocent and accepts the assertion that, in the real world, criminal cases are characterized by uncertainty, support for adequate funding for indigent defense necessarily follows. Indeed, there is no realistic alternative. Theoretically, more selective strategies to protect the innocent may be formulated, but they do not withstand careful scrutiny in light of the complicated features of relevant cases in which innocence may be found. Therefore, adequate funding for indigent defenders should be a central principle for all who value protecting the innocent from unjust convictions.¹⁰

In this Article, I examine the uneasy relationship between the contemporary concern with protecting the innocent and the need for adequate funding for representing indigent defendants, who, I accept, are predominately guilty. Even though defenders in their day-to-day work do not find it easy to talk about innocence because it is virtually impossible to continue representing all clients with vigor if innocence were the immediate concentration of defense

9. The Duke Lacrosse case tests the limits of this claim in that a fair assessment of the facts available to the local prosecutor showed innocence long before the attorney general dismissed the charges and declared the defendants to be innocent. See Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice"*, 76 FORDHAM L. REV. 1337 (2007) (describing both the attorney general's action and report of the objective facts to lead to his action and also the evidence available to the local prosecutor at various stages in the proceedings prior to relinquishing control to the attorney general).

10. I do accept one limiting qualification to my broad claim. If the person who is concerned about innocence restricts that concern to only individuals who are not repeat offenders or are not guilty of some crime, substantial limitation on limiting the provision of defense services to protect this more selective group of innocent defendants starts to become practical. In many cases, it may reliably be determined based on past adjudicated conduct that the individual currently facing charges likely committed the offense, and in others it will be possible to determine that he or she is guilty of some crime. Limiting effort in such cases is not inherently improper in a world of scarce resources, but it is not consistent with our historical commitment to convict only for the charged criminal conduct and not to judge based on who the person is or what he or she may have done in the past. See Mosteller, *supra* note 1, at 6-10, 41-43.

work, the message must be communicated that the work of defenders is critically important in protecting the innocent. Innocence protection is a central component of the argument for adequate defense funding. This is not only because it is politically necessary, but also because it is fundamentally true. I will critique two different proposals by very talented and well-meaning academics, who, I argue, are seriously misguided because they assume defenders or the indigent defense system can either meaningfully separate the innocent from the guilty at an early stage or separate the truly innocent from those with a reasonable doubt of guilt.

Innocence might be used as a “wedge issue” by some to divide deserving innocent defendants from undeserving guilty ones and thereby divide progressives and undermine support for reforms benefitting defendants generally,¹¹ but that is obviously not the intent of these reformers. If any make that cynical use of society’s admirable priority of protecting the innocent, little stated in this Article would matter. By devoting greater attention to the practical impossibility of separating the innocent from others before trial, I hope to avoid concern for the innocent becoming an impediment to fixing the problems that can be remedied by adequate defense funding. Indeed, that concern should be harnessed to increase funding for defenders. However, neither avoiding damage nor reaping benefits from society’s proper concern for innocence protection can occur unless two potential erroneous arguments are addressed and corrected. First, despite the misguided assumption of some, innocence cannot be known effectively beforehand in the types of cases that result in unjust convictions. Second, innocence protection could not be achieved through narrowly targeted efforts if defenders were directed to represent fully only the apparently innocent instead of providing adequate resources for the defense of all clients.

In Part II of this Article, I address my central factual claim that innocence is not knowable in the problematic cases that currently produce erroneous convictions. Instead of appearing to be innocence cases, these problematic cases raise doubts about guilt, and the defense usually presents them to the jury as cases of reasonable doubt. Tried by well-funded adversaries, a percentage of these cases will result in erroneous convictions of the innocent, but fewer of them. And the innocent indigent defendant will receive all that society can guarantee in a system where humans deal with uncertainty – a fair proceeding. In addition, much defense work provides fairness to those without financial means who are guilty and who ultimately acknowledge their guilt.

In Part III, I examine a proposed partial solution to inadequate funding: a specific application of rationing, or a rational triage system, whereby inade-

11. In politics, a “wedge issue” is defined as “a political issue that divides a candidate’s supporters or the members of a party.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1418 (11th ed. 2003). See generally Mosteller, *supra* note 1, at 30-40, for a discussion of the potential use of innocence as a “wedge issue” that might divide progressive criminal law reformers.

quate resources are put to the best possible use. I examine specifically a proposal by Professor Darryl Brown that attempts to prioritize representation of the likely innocent.¹² I conclude that his proposal, even if logically justifiable and plausible as a professional goal of public defenders, can provide no practical guidance that would meaningfully offset inadequate resources. Moreover, the apparent promise for more efficient allocation of resources can undermine arguments for adequate defense funding by suggesting that the priority cases can be defended well only if defenders focus their efforts on clearly observable pretrial indicators of likely innocence.

In Part IV, I highlight one of the most realistic and workable proposals, one that Professor Norman Lefstein has long advocated.¹³ That idea is the creation of a federally supported center to evaluate and finance improvements and reform in state indigent defense. This proposal is significant and politically practical, and it would benefit greatly from the support of the innocence movement by recognizing that defending all adequately is critical to avoiding unjust convictions of the innocent. I also address Professors Joseph Hoffmann and Nancy King's recent support for this reform.¹⁴ However, I strongly disagree with their apparent quid pro quo of severely limiting federal habeas that acknowledges the importance of protecting the innocent but does so inadequately.

Much like Professor Brown's flawed proposal, theirs is a sincere and theoretically interesting suggestion that relies on the contemporary focus on the importance of innocence, but it is misguided in linking broader funding to further restriction of federal habeas review. With increased funding, federal habeas review would be limited under their proposal exclusively to cases involving compelling proof of innocence, death penalty cases, and watershed changes in criminal procedure. Those defendants who can present clear and convincing evidence of innocence obviously should be given relief, but conscientious prosecutors not only refrain from charging such individuals in the first place, when it is known pretrial, but also find ways to free innocent defendants when the evidence comes to light even after conviction. Innocence is most frequently manifested in nothing more than a reasonable possibility of innocence or in substantial doubt that guilt has been shown, and to require more than that demands greater certainty than is typically possible. It also would undercut a fundamental command of our system: a conviction cannot

12. See Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 801 (2004) [hereinafter Brown, *Rationing Criminal Defense Entitlements*]; see also Darryl K. Brown, *Defense Attorney Discretion to Ration Services and Shortchange Some Clients*, 42 BRANDEIS L.J. 207, 207-08 (2003/2004) (arguing that defense attorneys all engage in some practice of prioritizing work within their caseloads and that benefits can be gained by acknowledging the process and making it more rational).

13. See Lefstein, *supra* note 2, at 928-29.

14. See Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 791 (2009) (setting out proposal).

stand when it results from a fundamentally unfair trial of a potentially innocent citizen.

In Part V, I explore preliminary strategies that public defenders can develop, using innocence to buttress the case for increased funding. I recognize that such efforts are figuratively “playing with fire” because there is real potential for a focus on innocence by defenders to be turned against the cause of defending all people adequately. As a matter of overall historical data and probabilities for current cases, indigent criminal defendants are overwhelmingly guilty.¹⁵ I also accept that those who make this argument and work as defenders must engage in a type of schizophrenic activity of caring about innocence while representing clients who are usually guilty. However, the difficulty in overtly caring about innocence is not because the innocence protection argument is false and made only to win political support. Rather, the difficulty lies in the day-to-day work of defending; when the value of one’s work depends on helping the demonstrably innocent, the defender would be pushed toward depression or almost inevitably shape determinations about who should receive a vigorous defense based on a perception of who is likely innocent. I contend the only practical way to defend and protect all those who are innocent is to provide a vigorous defense and the prospect of a fair trial to all. However, the professional duty of defenders to avoid concentrating on innocence in their daily work does not necessitate abandoning the hope of winning broader support for defending by linking this work and its commitment to a vigorous defense for all to its critical function in protecting the innocent.

Increasingly, my view is that those who understand the importance of adequate defense funding must directly address the issue of its relationship to innocence protection, because it cannot be avoided or finessed. Leaving aside those who would use the issue explicitly as a wedge to divide progressives, many well-meaning scholars are drawn to innocence protection without supporting robust funding for defense work in general. The theoretical possibility of being more accurate, with the added benefits of avoiding unnecessary public expense and freeing the innocent, is simply too attractive to not be pursued if that theoretical promise is not overcome by a careful explanation of the harsh reality of actual defense representation.

Although I have no clearly formulated proposals, I suggest defenders begin discussing strategies to meet and harness contemporary interest in protecting the innocent to increase funding. I suggest one strategy to examine is how support can be gained for the cause of adequate defense funding by presenting the accounts of those shown to be innocent by excellent defense work.¹⁶ Such accounts have been compiled through DNA exonerations in the

15. Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1168 (2005).

16. The documentary film MURDER ON A SUNDAY MORNING (2001), which depicts the trial of a Florida teenager for murder and acquittal through the work of his

post-conviction context, but I firmly believe that, as a group, defenders have many powerful stories to tell that could aid the cause of adequate funding. This effort is worth attempting. I suspect that in every jurisdiction there are stories in run-of-the-mill cases of innocent clients, which convey the message that adequate defense is important across the board. In the death penalty debate, the impact of both DNA exonerations and the human stories of those who were unjustly convicted provide evidence that powerful examples can matter.¹⁷

II. THE WORK OF DEFENSE ATTORNEYS AND THE DAUNTING PROBLEM OF RECOGNIZING INNOCENCE

In this Article, I focus on funding for public defenders. In the United States, defenders may be appointed on a case-by-case basis, defend a group of cases under a contract system, or work as public defenders.¹⁸ I concentrate primarily on public defenders for a number of reasons, including my work at a very fine and relatively well-funded defender organization, the Public Defender Service (PDS) in Washington, D.C.

A. Absent Action of a Rogue Prosecutor or Police Officer, No Trial Occurs and No Innocent Defendant Is Erroneously Convicted When the Prosecution Knows the Defendant to Be Innocent Before Trial

Although there are cases where a prosecutor pursues a case despite knowing, under prevailing professional norms, that the defendant is innocent or where a police officer frames an innocent individual,¹⁹ such cases are fortunately quite rare, are not the subject of this Article, and are not something adequate defense funding plans need to address. Instead, as noted in the Introduction, there is no prosecution when anyone in the system has objectively verifiable proof of innocence. Cases move forward and arrive in the defend-

public defenders and subsequent demonstration of innocence, provides an example of one such story.

17. See generally BAUMGARTNER ET AL., *supra* note 6.

18. Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for all criminal Defendants*, 31 AM. CRIM. L. REV. 73, 83 (1993).

19. As noted earlier, the prosecution of the three defendants in the Duke Lacrosse case by Durham District Attorney Mike Nifong proves an example of such an aberrant case of unjust prosecution where objective evidence available to the prosecution reasonably established innocence. See Mosteller, *supra* note 9, at 1341-64 (describing the evidence available to the prosecutor indicating both the innocence of the three lacrosse players he prosecuted and the weaknesses in his case, concluding that objective evaluation of the evidence could not reasonably have supported the prosecution, and speculating that it continued because of strong political motivations to do so).

er's caseload because the evidence obtained during the investigation revealed apparently credible evidence showing a strong likelihood that the identified suspect is guilty. When prosecutors have time to conduct basic case review before charging, cases are generally dismissed when clear evidence of innocence is encountered, and, even if innocence is not clear, other cases are abandoned that involve such evidence because of poor prospects for conviction under the beyond-a-reasonable-doubt standard.

I begin quite consciously with the issue presented in DNA exonerations. These are not a representative cross-section of innocence cases but rather ones where clarity is possible because error may be definitively proven.²⁰ In these cases, biological trace evidence was left behind by the true perpetrator and the wrong person was charged and convicted. DNA exoneration cases are known colloquially as "who done it" cases where the prosecution got identity wrong and where later available definitive scientific evidence showed the error with clarity. Many of these cases involve a single perpetrator who committed a violent crime against a stranger.

By necessity, such cases always involve some type of erroneous identification, frequently an error in eyewitness identification produced through procedures arranged by investigators. Cases involving eyewitness identifications of the wrong person constitute an important group for attention and study, particularly because of the later clarity and certainty of the innocence of the falsely identified and subsequently convicted individual. However, as discussed below, those cases are but a subset of all cases where innocence may be involved. Thus, to focus on false identification cases and their distin-

20. Professors Sam Gross and Barb O'Brien state my point even more strongly. They contend that "[a]lmost everything that we do know [about false convictions] is based on information about exonerations, and it is clear that exonerations are highly unrepresentative of wrongful convictions in general." 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, 958 (2008). They explain:

The problem with these explanations [of why the false conviction occurred] is that they are post hoc and frequently tautological. For most exonerations, the main evidence for the occurrence of one or another of these factors is the exoneration itself. In a typical case, we only know that a rape defendant's confession was false because postconviction DNA evidence now proves that he is innocent. We cannot use a factor to predict or prevent false convictions if that factor can be identified only after we learn that a false conviction has occurred.

Id. at 932. Their "main message is gloomy" about learning much more about the reasons for false convictions or how to avoid them. *Id.* at 958. *But cf.* Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 16, 23-30 (2009) (agreeing that much of the narrative literature on false convictions does not reveal much information about the cause of false conviction but disagreeing that the prospects of learning more about the causes is inevitably "gloomy").

guishing factors to the exclusion of others would mean not only to devote fewer resources to those other cases but also to give those other cases less importance than appropriate in helping to ensure an adequate defense for all who are, or reasonably may be, innocent.

Throughout this Article, I use personal experiences from my seven years of criminal defense work at PDS to illustrate points and support my analysis. I recognize that this public defender organization, because of its relatively generous funding, is not typical, and my experiences and attitudes may have been unique to me and not broadly representative. I do believe, however, that these experiences convey useful insights into commonly encountered problems, and I have had the opportunity in over a quarter century in the legal academy to try to fit them into the operation of the criminal justice system. Accordingly, while I find my experiences instructive, I do not assert that they necessarily prove any point. However, I do believe my experiences have some value when generalized, as I present them here, and at a minimum should provide recurring fact patterns that provide a useful context for analysis.

As a public defender, I started every case with the assumption that clear indicators of innocence would have been pursued had the investigators or the prosecutor noticed them.²¹ Except for the defendant and the investigatory leads he or she can provide, the prosecution has greater access to witnesses and to information about the crime than does the defense. I did a substantial amount of investigation in tandem with investigators, and both student-volunteer investigators and members of a small professional staff worked separately, but at my direction.

The first group of innocence cases I examine are the well recognized problematic category of eyewitness identification evidence, which was in-

21. Perhaps this was a result of an unrealistic idealism or perhaps because I was opposed by prosecutors from the United States Attorneys' Office, who I generally found capable, conscientious, and well-intentioned. As noted later, that office required that one-witness, stranger-identification cases have some corroborations beyond the witness' identification. See *infra* Part III.B. However, the evaluations were not conducted by a truly neutral party nor by one inclined to give weight to the particular defendant's interests, which limited the effectiveness of the independent check. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 915-17 (2009) (arguing for the need to separate the function of prosecuting cases, which are adversary in nature, from decisions, such as charging a defendant with a crime, which contains elements of adjudication, and citing the benefits of separation of function within United States Attorneys' Offices in some jurisdictions as providing the potential for some degree of separation in function nationwide). These evaluations would generally be made with a modicum of detachment by members of the grand jury unit who had no responsibility for winning a conviction and with the understanding that their decision could be subjected to scrutiny in front of a jury, and, therefore, clear weaknesses in proof might be exposed and prove professionally embarrassing to the person responsible for the charging decision.

volved in many of the DNA exonerations. Generally, what the defense “knows” about eyewitness identification issues, both regarding the witnesses and police conduct, comes secondhand from the prosecution during discovery or shortly before trial in an eyewitness identification suppression motion. I found that in serious cases, many eyewitnesses who were to testify in the prosecution’s case were reticent to talk with the defense, as were many of the police officers who conducted the identification procedures.²²

1. Limited Defense Access to Witnesses and Evidence

What researchers have learned from careful study of the identification process suggests that, even if the eyewitness is accessible to the defense, defense counsel’s conversations with that witness would likely be relatively unhelpful in unearthing error.²³ Eyewitnesses generally pick the person in the array that most resembles the perpetrator.²⁴ Therefore, in most situations, the

22. The U.S. Supreme Court, in *United States v. Ash*, 413 U.S. 300, 321 (1973), concluded that the defendant was not entitled under the Sixth Amendment to have counsel present to witness identification procedures any more than he was entitled to presence at other witness interviews when the defendant was not also participating. The Court also found that independent investigative efforts by the defense and cross-examination were sufficient. *Id.* at 315. I do not claim that identification witnesses were less willing to be interviewed than other witnesses who were testifying for the prosecution. I do contend, however, that I had no sense how to learn during later interviews about the types of subtle suggestive actions taken by investigators. For witnesses who failed to consciously perceive subtle improprieties, unearthing that evidence was obviously challenging. If the witness recognized that a potentially problematic procedure had been conducted, I would expect that witness, who was already likely apprehensive about talking with a defense attorney, would be even more cautious about revealing information that might suggest inappropriate action by a police investigator or mistakes by the identifying witnesses.

While a number of eyewitnesses did talk with me and/or my investigator, another class of problematic witnesses – informants – were even more inaccessible. Sometimes their identities or even existence was not revealed until trial. Often they were in custody, and information about them was restricted except as a matter of subpoena once the trial process was underway. If identified and located, they were generally unwilling to talk or would overtly lie, which they would explain on cross-examination as being motivated by their fear of the adverse consequences from the defendant of revealing the truth of their role and that the defendant already knew the truth of the criminal transaction from his or her own involvement.

23. *Cf.* *United States v. Wade*, 388 U.S. 218, 230-31 (1967) (noting that witnesses are likely able to detect suggestive influences that may occur at a lineup and that victims of violent crime may be antagonistic toward the defendant).

24. *See generally* Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 618-19 (recounting research conclusions that witnesses often pick the person from a lineup or photo array who most resembles the perpetrator, whether or not the actual perpetrator or his or her picture is present there, through a

defendant does in fact resemble the real perpetrator. Also, while factors that lead to erroneous eyewitness identification are relatively well identified, their presence or absence does not tell us that any of the identifications are necessarily correct or incorrect.²⁵ For example, erroneous identifications are more likely in poor conditions, but some of the identifications made under poor conditions are accurate. Finally, over time, many eyewitnesses' memories can change, so that they erroneously believe their opportunity to observe was better than it actually was and that they are more certain of their identification than they actually were.²⁶

The investigator who arranged the identification is likely to provide even less revealing information when interviewed by the defense. As scientific experimenters determined and demonstrated with eyewitness identification in criminal cases, investigators who know the desired result may skew the outcome. With photo identifications, for example, the person who displays the photographs may unconsciously or purposefully provide hints, which may be subtle, to the witness as to which picture to select.²⁷ Those who act unconsciously will not know that there is anything to reveal upon inquiry by the defense. Those who consciously provide suggestions likely do so to secure what they conclude is a just result, and, for multiple reasons, they are unlikely to reveal imperfections in the procedures. Thus, defense efforts to investigate a stranger's identification of a client, which is a problematic type of evidence, will often fail to unearth evidence of the problems or will uncover only a higher than ordinary chance of an honest mistake, which does not establish innocence. Only in extraordinary situations will defense investigation of the identification process reveal clear evidence of innocence.

The defense does have superior access to the defendant and her version of events, along with leads and the names of potential witnesses. It is, of course, possible for the defendant to provide compelling, indeed irrefutable, evidence of innocence. Biological trace evidence is left by the perpetrator in some crimes, but such exculpatory evidence is usually not in the defendant's

process of relative judgment; and using that result to argue for a sequential presentation of suspects to inhibit the relative judgment process).

25. Cf. Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 469-78, 494-95 (1996) (discussing the distinction between social science research that leads to "diagnostic" results and those which show only factors associated with a phenomenon or those making a type of result more likely or less likely, and arguing that one reason for the frequent rejection of eyewitness identification experts by courts is that such evidence does not indicate which identifications are correct but rather only reduces confidence in those conducted under flawed conditions).

26. See, e.g., Richard A. Wise et al., *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 816-17 (2007).

27. See Wells, *supra* note 24, at 629-30 (describing the numerous ways, some intentional, some unconscious, that investigators who know the identity of the target in a photo array can influence the witness' choice and arguing for a "double blind" identification process to lower the risk of suggested identifications).

possession. On the other hand, modern technology sometimes creates a type of digital “trace evidence,” such as surveillance photos at bank machines,²⁸ which are sometimes available to the defense and have the potential in selected situations to reveal innocence in the same manner as does DNA exoneration evidence.²⁹ However, in most situations, defense evidence, while useful, may be contested. A good example is that of an alibi provided by family members or friends – people who generally are the most likely to have been with an innocent defendant at the time of the crime but also the ones who would be the most likely to lie for the defendant or to innocently resolve uncertainties in their memory in the defendant’s favor. Thus, even after fully exploring and developing the defense evidence, the defense attorney cannot usually know that an innocent client is truly innocent.

2. Imperfect Information Sources

The path to an accurate account of even the innocent client’s alibi may not be direct, and initial erroneous statements can work to convince both investigators and defense counsel that the defendant/client is a liar and therefore more likely guilty. Ronald Cotton, who spent years in prison before being exonerated on a rape conviction, gave an erroneous alibi to the police

28. See Robert P. Mosteller, *Evidence History, the New Trace Evidence, and Rumblings in the Future of Proof*, 3 OHIO ST. J. CRIM. L. 523, 534-37 (2006) (discussing the advent of this new type of “trace evidence”). GPS tracking and stored history or electronic toll records can show definitively the location of a particular vehicle, although not ordinarily the identity of the driver or any passengers. Cell phone tracking and use history are also other frequently available forms of this evidence that can prove or disprove selected propositions to levels of virtual certainty. See Kenworthy Bilz, *Self-Incrimination Doctrine is Dead; Long Live Self-Incrimination Doctrine: Confessions, Scientific Evidence, and the Anxieties of the Liberal State*, 30 CARDOZO L. REV. 807, 821 (2008) (noting the use of “locational tracking” technologies, including GPS units, cell phones, and automatic toll paying devices for linking suspects to crime scenes and debunking alibis); *Who Knows Where You’ve Been? Privacy Concerns Regarding the Use of Cellular Phones as Personal Locators*, 18 HARV. J.L. & TECH. 307, 310-11 (2004) (describing law enforcement uses of cellular phones to establish the defendant’s location at the time a crime was committed).

29. The power of the evidence, however, is dependent on the fact being established, such as the time of the crime, being also firmly fixed. As one of the Duke Lacrosse defendants found, his irrefutable time stamped bank photo evidence potentially lost some or all of its power when a new interview with the alleged rape victim altered the timeline of the rape. See Mosteller, *supra* note 9, at 1402-03 & n.296 (describing re-interview of alleged victim by a prosecution investigator in which, *inter alia*, the timeline of the crime was altered, a change that appeared to the defense as designed to undercut the “air tight” alibi evidence that his attorney had earlier provided to the prosecution to the “victim’s” initial timeline).

when first interviewed.³⁰ The police quickly disproved it by contacting the alibi witness Cotton named, who correctly denied being with him at the critical time.³¹ During the process, the police became more confident of Cotton's guilt.³² Cotton gave a different erroneous alibi to his own attorney, which made the attorney entertain his own doubts about Cotton's claimed innocence when he learned that it too was erroneous.³³ Finally, Cotton provided his counsel with the version presented at trial through family member witnesses, which the jury erroneously rejected because of what they apparently perceived, as did many observers, as abundant independent evidence of his guilt.³⁴

As in the Cotton case, defense counsel do not usually even subjectively "know" that their innocent clients are innocent, and they typically lack any strong objective evidence of innocence. Of course, some indicators may point in the direction of innocence. There may be figures on what percentage of defense counsel believed their clients were clearly innocent in the cases that subsequently became DNA exonerations, but I am not aware of such data. As far as innocence is concerned, typically the most that can be said pretrial is that an objective view of the evidence might well leave a reasonable doubt of guilt and could even present the possibility of innocence. Others

30. *Frontline: What Jennifer Saw* (PBS television broadcast), available at <http://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/moseley.html>.

31. *Id.*

32. *Id.*

33. See Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 72 n.35 (2003); EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 43-44 (1996). According to his attorney, Cotton then provided another erroneous alibi before providing the apparently accurate one that the jury, despite its truth, rejected. See *Frontline: What Jennifer Saw*, *supra* note 30 (providing transcript of interview with defense attorney Phillip Moseley).

34. See *Frontline: What Jennifer Saw*, *supra* note 30. While the innocent often have nothing to fear by talking openly to the police because their statement of innocence will be verified and they will be released, this proposition is not always accurate. The police have typically settled on a prime suspect at the time of an interrogation, and the suspect's erroneous statements may not be taken as matters of poor memory but rather as evidence of intentional deception that supports guilt. One difference between the effect of an erroneous statement to the police and the same type of erroneous statement made by Ronald Cotton to his attorney is that the latter should never be revealed to the jury and therefore cannot be considered by it as circumstantial evidence of guilt. However, the willingness of defense attorneys to present what was Cotton's third alibi in testimony to the jury may be cited by those who cite the lack of defense interest in innocence or the truth as evidence of defense insensitivity to either. It is part of abundant support for the erroneous proposition that vigorous defense work within established ethical boundaries is fundamentally not in service of the cause of innocence. Had Cotton's defense prevailed at trial, justice would have been served and years of unwarranted incarceration would have been avoided for this innocent defendant.

may provide a different construction of these experiences, but I find them to support my general proposition that, even in cases where DNA absolutely proved innocence, no one in the prosecution knew it, and the defense attorneys with day-to-day access to the client very often did not sense at the time that these cases were different from other triable cases involving clients who proclaimed their innocence but who were, nevertheless, likely guilty.

*B. Clients Who Lack Potentially Dispositive Evidence of
Innocence or Exoneration and at Most Are "Clearly"
Not Guilty Beyond a Reasonable Doubt*

In *Caring About Innocence*, I purposefully concentrated on cases of demonstrable innocence, which were "who done it" cases, where, typically, either a lone individual committed the crime and the actual perpetrator was subsequently identified or the client was definitively excluded by DNA analysis or other evidence as the potential perpetrator.³⁵ These cases of clear exoneration were used to illustrate my points without the ambiguity created if the reader entertains doubts about the defendant's innocence. When defense counsel do not know or even suspect that the client is innocent in advance of the fortuitous discovery of exculpatory evidence, it highlights the reality of the "perception of innocence" problem.

Cases involving defenses based on self-defense, the level of intent or knowledge possessed by the defendant, or innocent association with those who admittedly committed the charged crime will, by contrast, rarely allow a neutral observer to determine that the defendant was in fact innocent.³⁶ As to

35. See Mosteller, *supra* note 1.

36. Some authors who try to develop novel procedures or thought experiments to better divide the innocent from the guilty recognize the greater difficulty in determining innocence when the first two categories are involved. Professor Tim Bakken divides innocence claims between those where a factual dispute as to which the fact-finder must apply a legal rule and those that do not involve any principle of law but rather universally objective facts. See Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547, 553-54 (2008). Professor George Thomas recognizes that, even for a very effective "truth machine," when guilt turns on issues of mens rea, the nature of facts and truth become "fuzzy." See George C. Thomas III, *"Truth Machines" and Confessions Law in the Year 2046*, 5 OHIO ST. J. CRIM. L. 215, 227 (2007). The latter class of cases that turns on whether the individual is involved at all or sufficiently in the crime to be culpable may involve interpretation of a legal issue based on rather clearly established objective facts, which are matters of judgment and interpretation. These cases may also principally involve credibility determinations between two interested witnesses with conflicting versions of events, one an informant or incentivized witness who may be lying to gain benefits from the prosecution and the other the defendant who may be lying to avoid conviction. All are very different from the archetypal DNA exoneration or proof that the defendant was innocent because he was in another country when the crime was committed. See Bakken, *supra*, at 554.

such inherently debatable cases, I could not then or now know or prove the innocence of my clients. Furthermore, given my immersion in the criminal justice system in an urban court system where the working assumption for all professional participants is that “everyone is guilty,”³⁷ I did not immediately assume the innocence of any client.³⁸

In *A Picture's Worth A Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, Professor Steve Duke and his co-authors argue that, while the DNA exonerations are important and emphasize the unreliability of identifications by strangers, they are unrepresentative of the majority of criminal cases in the American criminal justice system and do not touch on likely sources of inaccuracy and innocence that are far more common: mistakes in transmission of conversational evidence.³⁹ Professor Duke does not minimize the significance of eyewitness errors. Although accurate data is impossible to obtain and estimates are fraught with uncertainty, he estimates that eyewitness identification errors account for several thousand false convictions yearly⁴⁰ and argues that contested eyewitness testimony is involved in as little as three percent of felony cases.⁴¹ Moreover, erroneous identification testimony, which was highlighted as a source of error by DNA exonerations, most often plays a key role in violent crimes committed

37. See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1393-94 (1997) (observing that the criminal justice system operates on the general assumption of guilt); Givelber, *supra* note 15, at 1171 (“Defense counsel may also subscribe to the dominant assumption [and assume guilt] because any other view might render their work emotionally and practically unsupportable.”).

38. Whether because of that experience or a personality trait, I do not quickly or lightly move to the conclusion that problematic prosecution cases that appear in the media, such as the poorly handled child abuse cases of the 1970s and 1980s, necessarily involved entirely innocent defendants.

39. See Steven B. Duke et al., *A Picture's Worth A Thousand Words: Conversational versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 2-6 (2007).

40. See *id.* at 6. He provides a “ball park” estimate of a total of 4,000 unjust convictions a year out of the roughly one million felony convictions in state and federal court, basing this number on a set of data that begins with the FBI’s estimate that of the cases where DNA results were definitive and identity was contested, approximately 25% of those who had been identified were cleared. See *id.* at n.21 (citing Peter Neufeld & Barry C. Scheck, *Commentary by Peter Neufeld, Esq. and Barry C. Scheck*, in CONNORS, *supra* note 33, at xxviii-xxix (explaining that 2,000 identifications were erroneous of the 8,000 cases examined)). Duke makes a series of assumptions, and as noted above, he acknowledges that the estimate is only a rough approximation.

41. See *id.* at 1-6 (setting out the broad contours of the research and the logical argument regarding the sources of error, although not necessarily the types of errors that may be documented as occasionally erroneous identifications can be).

against strangers, which constitute a relatively small percentage of cases involving violence and an even smaller percentage of felony cases.⁴²

Duke contends that, as a matter of logic and correctly categorized experience, erroneous conversational testimony is the source of many more unjust convictions.⁴³ Although I have a different emphasis, I believe Duke recognizes a basic, important point: innocence can also be found in cases other than those involving the identification of the true perpetrator by some definitive means that demonstrates the accused is innocent. Indeed, it is likely that far more innocent defendants are convicted erroneously in those other categories of cases, regardless of whether contested eyewitness identification cases are the most problematic type in terms of percentages of errors. However, such other cases are not attention grabbers, and cannot be, because usually no one can definitively establish that any error actually occurred.

In *Caring About Innocence*, I briefly discussed the case of a client who I considered to be an example of a “not guilty” rather than an innocent client.⁴⁴ This client either forcibly raped a woman or was the victim of a false allegation by the apparent victim when a dispute arose subsequent to the sex act. I used the designation of “not guilty” because I did not know whether he was innocent, even after the prosecutor dismissed his case based on new information I provided to him. This was because the truth remained ambiguous in that it depended on the intentions, private actions, and conversations between two individuals who recounted conflicting versions of what transpired. I did not state in the earlier treatment of this case that I subjectively believed he might well be innocent because of the excellent relationship we had and how his statements about ancillary facts were corroborated by my investigation. I omitted those impressions because they were my subjective reactions and conflicted with my general unease with defense attorneys treating seriously their imperfect personal judgments of innocence, and also because I was cognizant of the criminal justice system’s frequent mistreatment of, and skepticism toward, “imperfect” victims of rape.⁴⁵

Also among my clients who were generally charged with violent crimes were those who clearly did the alleged act but may have been innocent because they acted in self-defense and those who may not have been criminally

42. *See id.* at 3-4.

43. *See id.* at 1-3.

44. *See* Mosteller, *supra* note 1, at 43-44 (describing this client as “Client Not Guilty,” rather than ascribing an “Innocent Client” label).

45. The false claim by the accuser in the Duke Lacrosse case is a reminder that not all claims of rape are true. *See generally* Mosteller, *supra* note 9 (describing the demonstration of the untruth of the accusation against the three lacrosse players). However, it does not suggest that they are either a substantial percentage of false accusations made, nor does it negate the picture of the difficulty of rape victims achieving justice. *See, e.g.*, ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* (1999) (discussing how the adversarial nature of a rape trial creates difficulty for rape victims seeking justice).

involved but could not show that definitively because they associated with individuals who definitely committed the crime. These cases may be usefully combined as a group of cases that involve clients, who cannot be shown to be innocent, but who may be, and who a jury might appropriately acquit as “not guilty.” Indeed, despite the unusual juxtaposition of words, I term some of them “clearly” not guilty beyond a reasonable doubt.

C. Examples of “Not Guilty” Cases

1. A Plausibly Innocent Client with an Implausible Story of the Events

I provide one further specific example of a not guilty, although perhaps not innocent, client who I represented. I was appointed to represent him by a superior trial judge who called PDS and said that a veteran attorney was needed to replace a lawyer who had withdrawn. The office frequently received such calls. The judge expected that the rigor of our representation would aid the resolution of the case, whether by a guilty plea or trial.

I learned that this client had turned down what appeared to be a fair plea offer to the charge of assault with intent to rape a child and that he had fled the jurisdiction. As a result of his flight, he faced an additional felony charge upon his capture for failing to appear for a scheduled court proceeding and, as a result, he was certain to remain incarcerated as a demonstrated flight risk pending the outcome of the case. The prior lawyer had been replaced because the defendant asserted that this lawyer had inadequately represented him.⁴⁶ The defendant claimed that he fled because he was innocent and would not plead guilty under the offered plea bargain, but did not want to face trial with such poor representation. After accepting appointment and meeting the client, I learned that the case would not be easy to win but was potentially triable, as it involved contestable issues that became even more contestable after investigation. However, despite a number of observations that were contrary to what would be anticipated for a guilty client, I never assumed the client was innocent of the attempted sexual offense, because that was not the way I approached cases. Although innocence was possible, he was almost certainly not clearly guilty. The immediately intriguing fact I learned was that when the police responded to a call reporting a crime, it was my client who first approached their marked police car as it arrived with the siren blaring. My client was bleeding heavily from a slashed face. He recounted being attacked by a man with a knife inside the apartment building.

46. I had no contact with the prior counsel, do not know his or her identity, and have no idea whether his or her representation was fully sufficient to the stage the case had progressed when the client fled. The trial judge reached the conclusion, as I understood it, that the relationship had ruptured and a new lawyer was needed. The file I received contained only discovery documents.

The man who had slashed my client also met the police, but he gave the police a very different story of what had happened. He acknowledged inflicting the injury but claimed that he did so in defense of his daughter upon finding my client inside his apartment attempting to sexually assault her. The father explained that he had left the door unlocked when he went elsewhere in the apartment building. Despite the injury inflicted on my client, the police accepted the version given by the father, the man who committed the assault, in part because of the unsatisfactory explanation my client gave of why he was at the doorway of the father's apartment and the absence of an alternative reason for the father to commit assault. The police subsequently charged my client based on the father's story.

Following my appointment to the case, the prosecutor made a new plea offer, which, because of my client's flight, was substantially less favorable than the earlier one, and my client was entirely uninterested in accepting it. I did not need to believe that he was innocent to understand that he felt he had been wronged by the knife wound and that he would not budge from his emotional opposition to accepting a guilty plea. We discussed accepting the plea, but it never appeared to be a real possibility. The length of the expected sentence under the revised plea was also much closer to the maximum he would face if convicted than it had been under the original plea offer, and the difference did not justify the extensive effort it would have taken to convince my client to reconsider his firm rejection of it. I would have faced one major obstacle in concluding that my client was innocent, if that had been a matter I had considered. The client never provided a satisfactory explanation for why the father, who inflicted the injury, would have attacked my client outside the apartment door if nothing more than what my client described had occurred.

When I received discovery and got a report from my student investigator regarding his visit with the father and his wife, a plausible but hardly certain explanation emerged.⁴⁷ From discovery, I learned that an external button from my client's coat, which was in evidence, had been found inside the apartment but that all the blood from his injury was located in the hallway. While examining the coat, I noticed that, when a different external button popped off, a smaller button that served as backing on the inside of the coat also fell from the coat. Therefore, a smaller button should either have been left at the scene or still be attached to the coat, and it was not on the coat or in the evidence bag from which the coat was removed. The existence of the smaller button had not previously been noted by the police or the prosecutor, and, without alerting them to the potentially significant missing button, I learned that neither had an explanation for its absence, despite the police investigator's claim to have carefully examined the interior of the apartment.

47. As I recall, my investigator did not even attempt to interview the child because her parents were only grudgingly willing to speak with him, and I had advised him to not broach the subject unless it was volunteered because the prosecutor had informed me that, because of age and mental development issues, he did not feel it was feasible to attempt to use her as a witness.

However, no such search of the hallway was made, since no evidence should have been located there under the father's story, other than the blood left as my client, the alleged attacker, exited the apartment.

I do not claim that the absence of the expected evidence conclusively proves anything, since items are apparently missed in standard felony investigations, despite police claims of careful work. Indeed, it seems particularly likely that the button might have been missed since the police believed the issue of guilt had been clearly established by the evidence already secured. However, I saw the unexplained absence of the small button and blood in the apartment as undercutting the evidence corroborating my client's presence inside the apartment. The large button could easily have been picked up from the hallway and planted inside the apartment after the assault to corroborate the bogus sexual assault story. However, the blood could not be moved, and the small button could easily have been overlooked in the moments before the police arrived. The missing button was the linchpin of the innocence argument I would make to the jury.

The answers my investigator received provided some modestly useful information about how little detail the witnesses would give on what had happened inside the apartment, but the most useful information was his observation of the child's mother's stupor during the interview. He told me that she was incredibly lethargic and nodded off during the interview. My investigator believed her condition strongly suggested drug use. A dispute over a drug transaction might provide a plausible explanation of all the events that were lacking from my client's version of events. However, the prosecutor seemed unaware of any possible drug involvement by the witnesses or my client.

The interview became even more useful when the prosecutor called to warn me that I would be ill advised to call my investigator as a witness regarding the interview because the prosecutor had been told the witnesses only talked to the investigator because he denied working for the defense and claimed to be working for the prosecutor. I do not know what my investigator said, but I knew his training on this point was clear. The investigator had been told in training that under no circumstances was he to misrepresent the fact that he was working for the defense, and while not getting any information was acceptable, misleading a witness regarding his identity to get an interview would mean immediate dismissal. More significantly, his report attached copies of the PDS investigator identification form signed by each witness. At the top of those forms was the PDS letterhead, my client's name as the defendant, my name as his defense attorney, and the investigator's name. Thus, I had corroboration that an accurate identification was given in written form.⁴⁸

48. The investigator had followed his training instructions and had given each witness the first carbon copy of the form, retaining the original and the second carbon copy. This procedure is designed to give the witness a record and to allow detection

In the prosecution's case at trial, the child's mother testified first. Early in my cross-examination, she claimed that my investigator had not identified himself, that he had not shown her an identification form, and that she had not signed such a form or been given a copy of it. Upon seeing the form, she grudgingly acknowledged that the signature was hers but continued to deny receiving a copy. Her husband testified next, but his claims about the investigator were much more muted, as he asserted a lack of real understanding of the investigator's relationship to the defense or prosecution and claimed not to remember signing a form or getting a copy of it. He acknowledged that the investigator identification form shown to him during cross-examination bore his signature. Finally, the police explained the physical evidence found, and, during cross-examination, the apparent absence of the small button corresponding to the larger button found in the apartment was developed. No additional explanation concerning the missing button was provided.

In the defense case, the investigator testified and detailed his proper identification to the witnesses as a defense investigator. He also described the wife's unusual behavior. My client testified and gave his account of the unprovoked attack that he had recounted to the police and had always given to me. During cross-examination, the prosecutor emphasized through his questioning that my client had no real explanation for the attack. Overall, my client communicated both his total denial of touching the child, stating that he had never seen her there, and his clear emotional sense that he was the victim. He also admitted his flight from the jurisdiction and explained that he fled because he feared being convicted for a crime he did not commit, much as he had said in his explanation to the court when, upon return to the jurisdiction, he requested new counsel.

The jury returned a not guilty verdict on the sexual assault charge and a guilty verdict on the charge of willful failure to appear, and my client was given a modest term of imprisonment for that low-level felony. Was this client innocent of the attempted sexual assault? I do not have any way to clearly know the truth, but he was appropriately found not guilty. I doubted that if he was innocent of the sexual assault that he was being honest when he stated that there was no drug-related activity or other interchange between him and the girl's father before he was injured, but I had no grounds for my doubt about the client's version of events other than my judgment that it was improbable.⁴⁹

of any subsequent alteration of the form. The witnesses never produced their copies of the identification form at trial.

49. Clearly, my subjective doubt about the accuracy of my client's version is not the equivalent of knowledge he was going to perjure himself, particularly since this was the same version he gave to the police and to me in every conversation I had with him. I fully credited my investigator about his accurate and full description of his identity to the prosecution witnesses, and assumed the prosecution witnesses may well have falsely claimed his misidentification to justify themselves in answering the prosecutor's question as to why they chose to talk with a defense investigator when

2. Clarence Gideon – A Case of No Clear Guilt but Not Apparent Innocence

*Gideon v. Wainwright*⁵⁰ is another case that falls in this category of lacking clear guilt and is therefore a case of reasonable doubt, but it does not fall in the innocence category. Although usually not viewed in the context of innocence, *Gideon* presents another case where the defendant might have been innocent. However, the defendant appeared more likely guilty than innocent, and the best characterization of the facts are that they allow reasonable doubt. At his first trial, without counsel, Clarence Gideon was convicted of the felony of breaking and entering a pool hall with the intent to commit a misdemeanor, and he was sentenced to five years in prison.⁵¹ He was acquitted at his second trial after the U.S. Supreme Court ruled that he had a constitutional right to assistance of counsel provided at public expense.⁵²

Gideon was no stranger to crime, admitting during cross-examination that he had four other felony convictions, including multiple theft offenses.⁵³ He denied entering the pool hall⁵⁴ but admitted on cross-examination to having more than \$25.00 in change in his pocket,⁵⁵ which was circumstantially incriminating since the pool hall operator testified that a cigarette machine and juke box had been broken into and the coins stolen.⁵⁶ Gideon's lawyer presented no alibi witnesses or other evidence beyond Gideon's own testimony that would have established Gideon's innocence. Instead, he pointed the accusing finger at the witness who claimed to have seen Gideon in the pool hall, raising questions about Gideon's version of events and criminal record.⁵⁷

they mentioned giving an interview to someone the prosecutor knew he had not sent to speak with them at their apartment.

50. 372 U.S. 335 (1963).

51. *Id.* at 336-37.

52. *Id.* at 345.

53. See ANTHONY LEWIS, *GIDEON'S TRUMPET* 236 (1964). In a twenty-two page letter to his attorney, Abe Fortas, Gideon recounted convictions that began when he was an adolescent in Missouri where he was convicted of burglary and sent to reform school for three years. *Id.* at 65-67. As an adult, he was convicted in Missouri of robbery, burglary, and larceny, and sentenced to prison. *Id.* at 67. Later, he was convicted of stealing government property and sentenced to federal prison in Ft. Leavenworth, Kansas. *Id.* Next, he was convicted in Missouri for burglary and larceny and sentenced again to prison, from which he escaped but was captured some years later and returned to prison. *Id.* at 68. Then, he moved to Texas, where he acknowledged pleading guilty to a crime and being sentenced to prison. *Id.* The conviction reviewed by the Supreme Court occurred in Florida. *Id.* at 70.

54. *Id.* at 235.

55. *Id.* at 235-36 (acknowledging having a large amount of change in his pocket, which he indicated came from gambling). The detective who arrested Gideon said the amount of money on Gideon was \$25.28 in coins. *Id.* at 233.

56. *Id.* at 59, 232-33.

57. *Id.* at 230-32, 235-37.

The defense case did not try to prove Gideon's innocence but rather invoked a defense based on reasonable doubt that centered upon the weakness of the state's proof. The jury acquitted Gideon after about an hour of deliberation.⁵⁸ In reading Anthony Lewis' account of that trial,⁵⁹ it is impossible to know that Gideon was innocent, and, although he had a plausible claim that he was innocent based on his own testimony,⁶⁰ it is much more likely that his acquittal was just because of the weak nature of the state's case, particularly its questionable key witness.⁶¹

These last two cases are examples of a substantial group of cases where the clients cannot be known to be innocent particularly at the pretrial stage because the available evidence is ambiguous, and often remains so, even at the conclusion of the trial. They may even be "clearly" not guilty beyond a reasonable doubt, but they cannot be said to be even highly likely innocent.

58. *Id.* at 237.

59. *Id.* at 229-38.

60. *Id.* at 236-37 (giving Gideon's denial of guilt and his explanation for the large number of coins in his pockets).

61. *Id.* at 230-32 (describing cross-examination of the eyewitness, which raised questions about the accuracy of the eyewitness' testimony, suggestions of his commission of the crime, and both his admission that he had a felony record and his admission that he had denied having such a record when he testified at Gideon's initial trial). Although *Gideon* is a legendary case that represents injustice corrected in the public's mind and for many likely a companion image of an innocent defendant wrongfully convicted, the facts do not show Clarence Gideon to have been so clearly innocent. Conversely, Robert Anthony Williams, the accepted murderer in *Brewer v. Williams*, 430 U.S. 387 (1977), was not so clearly guilty. Although unnoticed in the ordinary treatment of the case, which involves an abduction and murder of a child to which the mentally ill defendant confesses, there was a plausible case of innocence, at least after one views the case from the post-DNA exoneration perspective that mentally unstable defendants may actually confess to crimes they did not commit. As described by Professor Yale Kamisar, Williams' lawyers had at least an arguable, perhaps a plausible, case if they could have substantiated some evidence they were given between the two trials suggesting the murderer was sterile while Williams was not, and that the murder was committed by a man with a prior history of sexual molestation who was assigned to clean the YMCA washroom where the murder occurred. See Yale Kamisar, *Foreword: Brewer v. Williams – A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209 (1977). Their theory was that Williams discovered the body and panicked because of his status as an escapee from a mental institution with his own history of sexual molestation, removed the body from the YMCA, and falsely confessed to the murder when confronted with evidence of his guilt and a skillful questioner who used the "Christian burial speech." *Id.* at 210 n.4. The plausibility of Williams' innocence is not great by my standards, but it differs little from my reaction to the plausibility of Gideon's innocence. In my experience, the chief difference lay in the unlikelihood of persuading the jury to take Williams' story seriously regarding the murder of a child, as opposed to the similarly implausible evidence regarding the insignificant charge Gideon faced, which made him a very sympathetic litigant, given his five year prison sentence, even if not likely an innocent one.

Nevertheless, they certainly might be innocent, but their cases contain no evidence, like a DNA exoneration, that proves such innocence as knowable fact.

D. Defense Work for the Guilty

In addition to cases I handled that involved clients I would now categorize as innocent and those where there was objective evidence to support reasonable doubt, which might also reflect innocence or nothing more than a lack of clear proof of guilt, the majority of my work involved clients who were apparently guilty. I technically did not “know” whether virtually any of my clients were guilty until shortly before their guilty plea was entered. My clients may have been unrepresentative, but I observed that while clients in minor cases sometimes freely acknowledged their guilt and were eager to resolve the case if I could obtain a reasonable offer, those charged with serious crimes proclaimed their innocence unless pressed quite hard and given a reason why abandoning their claim was in their interest.⁶²

Given that I had no confession from my clients until after I presented the advantages of the plea offer, I have some trouble accessing at this point whether I actually “knew” most of my clients were guilty, a proposition that as a matter of realism I do not question. In cases where the prosecution’s evidence was apparently overwhelming and where my investigation found no flaws, I had no reason to assume innocence or even much chance of it and operated on the premise that the client was guilty. One sobering point from DNA exonerations is that the evidence in some of those cases was apparently so strong at the trial level that guilt would have been my operating premise in those cases too.

1. Negotiating an Acceptable Plea Offer

Leaving aside for the time being whether I knew any of my non-confessing clients were guilty and assuming they all were, I clearly did most of my work for the guilty. My work consisted largely of working through the evidence to secure the most favorable plea bargain the prosecution would offer, helping my client assess his or her prospects of prevailing if the case went to trial, and then usually advising and convincing my client to accept the bargain, thus acknowledging guilt for the crime. This was the major role of all lawyers at PDS⁶³ and is the role of most public defenders. Defense law-

62. My clients often made statements that appeared circumstantially inconsistent with innocence, such as giving a series of different alibis when investigation showed problems with a previous one, but no client came close to making a statement like that in *Nix v. Whiteside*, 475 U.S. 157, 160-61 (1986), where the defendant acknowledged that he intended to lie in his testimony.

63. Because of our willingness to encourage guilty pleas rather than to try to strongly encourage all our clients to take their cases to trial, one private attorney

yers frequently play the role of negotiators between the two principals – the prosecutor who controls the terms of the offer and the defendant who makes the decision whether to accept or reject it. In those cases in particular, my role was also to assist my client in the sentencing process, which the U.S. Supreme Court has explicitly held is a stage at which the defendant enjoys the constitutional right to effective assistance of counsel.⁶⁴ For clients who had not committed violent offenses and had relatively minor criminal records, this work, if done well, had the greatest marginal impact of any service a talented and well-funded attorney could do.

2. Trying Failed Pleas and Largely Hopeless Serious Cases

Another activity I performed for apparently guilty clients that cumulatively amounted to a substantial element of my work was preparing the defense case and presenting it at trial after my clients did not accept the prosecutor's plea offer. Many of the trials I had in serious cases and all of my first-degree murder trials involved strong prosecution cases and, from my perspective, went to trial out of necessity rather than choice. I took pride in the quality of my effort in all my well-trying cases but took no joy from assisting in the acquittals of individuals I thought to be likely guilty. However, because the United States Attorneys' Office did factor the quality of the opposing counsel into its plea offers, defense victories and even well-presented cases mattered for my future clients in terms of the prosecution's plea offers.

3. Preparing and Litigating Motions to Suppress Evidence

A final activity that sometimes is cited as a drain on time and resources that might otherwise be available to the defense for assisting the innocent⁶⁵ are motions to suppress evidence, which I filed in many felony cases that proceeded into the trial preparation stage.⁶⁶ My personal experience was that

mockingly stated the office could maintain its PDS shorthand but should change its name from Public Defender Service to Plea Delivery Service.

64. See *Glover v. United States*, 531 U.S. 198 (2001) (finding the right to ineffective assistance of counsel applied to sentencing determination under the federal Sentencing Guidelines, where potential error increased the defendant's sentence at least six months).

65. See Stuntz, *supra* note 3, at 37-46, 75 (arguing how the advent of procedural rights that he contends are largely divorced from guilt or innocence and can be litigated separate from trial and with relatively little labor-intensive investigation help reduce the limited time and resources devoted to litigating the merits of the case).

66. This small part of the practice was something that I very much enjoyed, because it incorporated material from the law school courses that I found most interesting and involved integrating sometimes complex legal doctrines with fact development and effective presentation. Despite my interest in it, motions practice is but a tiny part of basic criminal litigation.

the activity posed only a minimal drain on defense resources. While I filed what I considered sound and occasionally innovative motions to suppress evidence, the entire activity occupied a relatively small percentage of my time in investigation, motion preparation, and the actual conduct of litigation. The motions were usually rather easily filed but were generally not a good mechanism to challenge the prosecution's case because they were rarely successful. Most of the filed motions were never litigated and played no useful role in the outcome because the client entered a guilty plea well before the motions would have been litigated, which would occur just prior to jury selection.⁶⁷

I most consistently litigated motions to exclude impermissibly suggestive identification evidence, which go to issues related to the possibility of innocence. I did not litigate these motions with any realistic hope of winning, despite the clear propriety of filing them because of the suggestiveness of virtually every photographic identification process when examined carefully.⁶⁸ The law is so tilted against the defense prevailing that these motions

67. The actual litigation of motions could occupy a larger percentage of a lawyer's time in a court system that sets motions practice at a different point in the litigation process than that of the specific felony trial system in Superior Court in Washington, D.C. — which was on the eve of trial in felony cases. In misdemeanor cases at that time, motions hearings in all pending cases were set before a single motions court judge and litigated separately from the individual trials. One of the very few dispositive Fourth Amendment suppression motions I litigated was in such a misdemeanor case, where a low level drug seller was arrested and searched as he approached a car to apparently deliver drugs to the driver. As he walked toward the car, he was arrested on a signal from an informant. However, the court concluded that this signal was an insufficiently corroborated communication from an unidentified and unreliable informant. This client was among those in non-serious cases who freely admitted their obvious guilt. His case was dismissed after the drugs were suppressed.

I note above that under the procedure utilized in Washington, D.C., in felony rather than misdemeanor cases, consumption of resources was minimized. That was a fortuity of the practice in felony cases. However, my point is not that motions practice never consumes major resources or that defense efforts on the behalf of clients to win meritorious motions cannot detract from a focus on innocence. Instead, I suggest attention should be placed on reorienting the adjudication system to minimize unnecessary resource consumption while permitting the protection of constitutional rights and effective service to clients whose rights were violated under the laws and should be treated equally with clients who have the wealth to retain effective counsel.

68. Whether a photograph array was actually suggestive as perceived by the witness is virtually impossible to discern. However, most arrays that I observed had obvious flaws when carefully examined, such as the suspect's photograph being from his recent arrest photograph commonly as the chief suspect in the crime as opposed to the filler photographs of individuals of similar appearance that were typically selected from a group of easily accessible photographs to the detective who arranged the array. Difference in the recency of the photograph produced two immediate potential suggestive elements. First, the date shown on the photo for the fillers was often years before the crime as opposed to the uniquely recent date for the suspect's photo.

were almost universally denied.⁶⁹ However, the motions hearings always provided an opportunity to explore, outside the jury's presence, the details of police conduct and the weaknesses of the witness' opportunity to observe. Developing this testimony allowed the presentation during trial of those facts, which were often otherwise unavailable from the information provided in discovery or by investigation when eyewitnesses and police officers declined either to speak at all to the defense or refused to describe the events in detail. I cannot claim to generalize PDS motions practice to that of all defenders, but the practice I observed does not support the argument that excellent motions practice on behalf of likely guilty clients is a major detriment to the protection of innocent clients.

*E. Innocence Is Not Fully Knowable and No Clear Categories
Separate the Innocent from Those with Reasonable Doubt or from
Those Who Are Guilty*

My critical, overall point in this section is that while a higher prospect of innocence can sometimes be discerned, in most cases that survive police investigation and prosecutorial screening, innocence cannot be confined to an easily defined group of cases. It may be more frequent when certain markers are present, but there are likely more instances of unjust convictions spread throughout the broader array of cases than just within the suspect categories.

The adage goes: "Gold is where you find it."⁷⁰ The same is true for innocence. Clarence Gideon may have been innocent, but we will never know. Given his background, whether his case would have been a good place to search for innocence is questionable. Cases may usefully be classified as those of likely innocence, those where doubts may be arguably present, those of likely guilt, and those of almost certain guilt. However, some cases in

Second, picture quality often differed as the photos aged. As noted earlier, I had no ability to gauge whether a witness would have noticed these features rather than the person's appearance, but the suggestibility flaws were conceptually obvious.

69. See Mosteller, *supra* note 9, at 1380-87 (discussing the inadequacy of the case law defining the scope of protection against impermissibly suggestive identification procedures as a basis for remedy and the difficulty of imposing the only authorized remedy of exclusion of all identification evidence by the witness that typically would mean a dismissal of charges).

70. Although geologists focus the search to likely areas to find gold, this was the adage of miners with which geologists would roughly agree because of the element's wide and not fully predictable dispersal. See TE ARA, ENCYCLOPEDIA OF NEW ZEALAND, <http://www.teara.govt.nz/en/gold-and-goldmining/2> ("Gold, any miner will tell you, is where you find it – as the Cornish miners said, 'Where it be, there it be.' Many geologists would agree, but they would also add that gold is likely to be found only in certain areas."); see also GOLD IS WHERE YOU FIND IT (Warner Bros. 1938); Elizabeth Hines & Michael S. Smith, *Gold is Where You Find It: Placer Mining in North Carolina, 1799-1849*, 21 J. EARTH SCI. HIST. 119 (2002).

each category will overlap with the adjacent one, and cases may move between categories based on more extensive defense or prosecutorial investigation.⁷¹

The unique aspect of the DNA exoneration cases is that there is no particular feature or set of features to characterize the evidence that leads to an erroneous conviction. Those same factors – eyewitness identification, informants, and forensic evidence – appear in many cases where the result is accurate. The unique element of these cases is that DNA trace evidence of a dispositive fashion is present but remains entirely untested or inadequately examined, and only when examined with appropriate new techniques does it show the defendant to be innocent. In other words, the unique factors or critical indicators are not visible in advance to categorize the cases. Thus, the commonality between these cases is not an observable factor at all but rather the fortuity that subsequently new science is developed, and as a result DNA evidence becomes available to demonstrate that the charged defendants are innocent.⁷² Moreover, the clarity of proof in the DNA exoneration cases may even help to create the widespread erroneous assumption that, where a defendant is innocent, there will generally always be concrete proof of innocence. As one of the cases I describe below shows,⁷³ and as others have noted,⁷⁴ many cases, such as a typical armed robbery case based on witness identification with no injury, no recovered proceeds, and no other trace evidence, can result in the arrest and conviction of the wrong person without there ever being concrete proof of that fact.

In the next section, I examine one interesting effort to focus defense efforts on cases where the clients have the best chance of being innocent. This

71. Objective observers might place cases in the category of “likely guilt” when the case has no relation to innocence. In terms of percentages, a relatively small percentage of all those charged with crimes are innocent, but among cases where the objective evidence indicates they are very likely guilty, the percentage is no doubt smaller still. My point is that the presence of innocence changes gradually between perceived categories and that the definition of categories is neither obvious nor immutable.

72. Looking to the characteristics of the outcome group (here DNA exoneration) and trying to use that to define a sorting system (here the types of evidence that in those cases was in error, such as eyewitness identification) suffers from what social science researchers term “research on the dependent variable.” See Mosteller, *supra* note 25 at 481-82 (noting that in such situations the researcher sees only the features present in the study group and cannot determine, even from the frequent presence of any feature, that they differentiate the observed group from others).

73. See *infra* text accompanying notes 118-123.

74. See Gross & O’Brien, *supra* note 20, at 938 (“There are very few exoneration among convictions for nonhomicidal crimes of violence for which DNA evidence is of no value, for example, robbery. There are virtually no exoneration for the misdemeanors and nonviolent felonies that constitute the vast majority of all criminal convictions, and probably include the majority of false criminal convictions as well.”).

proposal challenges the lesson that the previous section offers, which is that only excellent defense of all will ensure that all innocent individuals are provided a full opportunity to avoid unjust conviction.

III. THE FALSE PROMISE OF MORE EFFECTIVE USE OF DEFENSE RESOURCES BY PRIORITIZING DEFENSE ATTORNEY EFFORTS TO FOCUS EFFORTS ON LIKELY INNOCENT DEFENDANTS

Securing effective defense services by those charged with crimes is a difficult task, even for those with adequate funds to hire their own attorney. In fact, having adequate funds does not even assure success in the challenging task of selecting a truly skilled lawyer.⁷⁵ However, having the funds to hire an attorney reduces the difficulty of one of the ordinary problems of agency.⁷⁶ These are problematic situations where evaluation by the principal of the agent's performance is complicated by the fact that the agent possesses specialized skill and performs a task that is often as much art as science.⁷⁷

The difficulties of securing adequate representation are more substantial for the majority of those charged with crime. Most criminal defendants are either indigent or "near poor." Over eighty percent of felony defendants are indigent and qualify for counsel compensated at public expense.⁷⁸ The "near poor" have just enough resources to be disqualified from receiving appointed counsel but generally can afford only a marginally skilled lawyer⁷⁹ with limited investigative services.⁸⁰ For indigents who do not provide payment for their lawyers' services, agency difficulties are vastly increased and a type of

75. See Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 745-46 (describing the case of Richard Glossip, who, despite spending a substantial sum of money to hire a lawyer, received ineffective assistance of counsel that required reversal of his death penalty conviction).

76. See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309 (1983) (noting that "[c]onflicts of interest (agency costs)" between clients and lawyers are troubling throughout the criminal justice process).

77. See *id.*

78. See Uphoff, *supra* note 75, at 748.

79. See *id.* at 753 & n.70 (citing some of the many stories describing horrific representation by lawyers hired by those able to pay only a modest retainer).

80. See *id.* at 781 ("[T]he reality for many indigent defendants and the working poor who have retained counsel is that they will have little or no investigation done in their cases."). Based on the assumption of such limited investigative resources, Professor Tim Bakken has suggested that innocent defendants in the current system are effectively forced to plead informally with prosecutors to investigate their claims of innocence and take their chances at trial with presenting inconsistent defenses of innocence and reasonable doubt. See Bakken, *supra* note 36, at 550. Although I note elsewhere that investigation by the defense may not prove innocence in many cases, see *supra* Part II.A, reasonably well funded defenders give the defendant a third option of developing proof of innocence to either present to the prosecutor or to use at trial.

general conflict of interest arises regarding the amount of effort the lawyers expend.⁸¹ In an adequately funded office like PDS, attorneys attempt to replicate the decisions that clients would make for themselves in terms of purchasing services, and they aim to equalize the productivity of their labors and the savings in prison time across clients in their caseload.⁸² Others have suggested different systems for allocating defense services in offices with heavy caseloads and therefore result in a more restricted defense effort,⁸³ these suggestions often take the form of “triage” and effectively deny adequate representation.⁸⁴

81. See Schulhofer & Friedman, *supra* note 18, at 74-79 (arguing that agency conflicts of interest are particularly persistent for indigents because the lawyer must be paid by someone other than the client); Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 251-57 (1997) (noting the persistent difficulty of conflicting performance incentives for indigent defenders and contending that when the client bears the cost of litigation a level of rationality likely exists that is missing when the public provides attorney compensation).

82. See Mosteller, *supra* note 1, at 46-47.

83. See Margareth Etienne & Jennifer K. Robbennolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295, 320 (2007) (describing lawyers who defend criminal cases and work under heavy caseloads as managing them by “triage,” which focuses attention on the cases most likely to go to trial or that are the most winnable); John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1289-91 (1994) (suggesting a set of categories “to guide triage in the allocation of focus” in representing misdemeanor defendants); Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 914-18 (2005) (criticizing Professor Mitchell’s proposal for representing clients by categorizing cases factually and legally based on reference to apparently similar cases previously encountered as “an unethical response of public defenders to under-funding, overloading, and the resulting incompetent representation”); John B. Mitchell, *In (Slightly Uncomfortable) Defense of “Triage” by Public Defenders*, 39 VAL. U. L. REV. 925, 936-37 (2005) (arguing that his system of triage based on rational principles and ethical theory is preferable to haphazardly allocating defense services and that triage is a reality of the limited funding for public defenders, which is an inevitable consequence of competition for limited public funding by a range of worthy public needs).

84. See Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake*, 1997 ANN. SURV. AM. L. 783, 784, 816 (noting the indifference to injustice by judges, lawyers, legislators, and the public that leaves many of those most in need of legal assistance without counsel at all and too often with grossly inadequate counsel, while observing that “[t]he most fundamental reason for the poor quality or absence of legal services for the poor in the criminal justice system is the refusal of governments to allocate sufficient funds for indigent defense programs”); Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1181 (2003) (describing a common strategy of triage, which is to “plead out” the overwhelming majority of cases quickly in order to conserve time to investigate and defend a few); Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177, 192 (2008) (noting that one

A. *A Proposed Rationing System Founded on Defense Priority to Advantage Likely Innocent Clients*

Professor Darryl Brown has proposed a system for rationing defense services based on innocence, which I examine further.⁸⁵ His proposal is intended to provide guidance to publicly funded defenders for a triage system targeted at providing greater resources for likely innocent defendants.⁸⁶ His system is designed for defenders working with a middle range of funding.⁸⁷ Above these offices, in terms of funding and services provided where his system of triage is unnecessary, are defender offices with sufficient resources to permit individual attorneys to exercise ordinary professional judgment in allocating time and resources.⁸⁸ Below the defender offices where Brown argues his system would prove helpful are offices that are so lacking in resources that effective representation is impossible and therefore rationing cannot be meaningfully accomplished.⁸⁹ Brown argues that attorneys in the middle range of funding should prioritize allocation of resources on defendants who are likely factually innocent rather than on cases that have the highest prospect of litigation success, regardless of innocence.⁹⁰

long-term danger of learning to be a lawyer in a system that accepts the model of triage in representation is to treat triage as if it were the actual representation of clients); Jeff Rosenzweig, *The Crisis in Indigent Defense: An Arkansas Commentary*, 44 ARK. L. REV. 409, 412 (1991) (describing "a sort of uninformed legal triage" that some lawyers in woefully inadequately funded systems are forced to practice if not using their own funds to supplement representation in death penalty cases under which defenses are ignored).

85. See Brown, *Rationing Criminal Defense Entitlements*, *supra* note 12, at 816-18.

86. *Id.* at 820-21.

87. *Id.* at 815-16.

88. *Id.* at 815. At PDS, the funding was sufficiently generous so that judgments were made simply using ordinary professional judgment under Brown's view. Others who work in the federal public defender system have had similar experiences. See Inga L. Parsons, "Making it a Federal Case": *A Model for Indigent Representation*, 1997 ANN. SURV. AM. L. 837, 840 (describing her good fortune to work as a public defender "in the federal system where the culture of lawyering was based on traditional notions of adversarial advocacy and manageable case loads"). I have indicated an allocation system that attempted to allocate services in line with what a lower middle class individual would secure with their own funds. See Mosteller, *supra* note 1, at 46-52.

89. See Brown, *Rationing Criminal Defense Entitlements*, *supra* note 12, at 815.

90. *Id.* at 815-17. Brown identifies a second goal that he believes should theoretically also help guide resource allocation. *Id.* at 818. That is directing resources "toward charges and clients who have the most at stake or are likely to gain the greatest life benefit." *Id.* At the first step, the principle indicates more should be done to assist those facing serious charges rather than minor ones. *Id.* With regard to life benefit, he suggests that young offenders with little criminal involvement, for example, might have better life prospects than older ones with long records, but he reaches

Brown's central premise bears kinship to that of scholars such as Professor Stuntz, who argues that in a world of limited resources, defense lawyers' efforts to litigate even meritorious constitutional claims, such as motions to suppress evidence unconstitutionally seized under the Fourth Amendment, have the effect of displacing attorney investigation.⁹¹ The indirect result is less fact investigation of the merits, less litigation on the merits, and increased convictions of innocent defendants.⁹² Brown argues that under his proposed system of allocation, defense attorneys should forego litigating a meritorious suppression motion for a client who was likely guilty "if it comes at the cost of representation efforts on behalf of a client more likely to be innocent, even if the latter's chances of ultimate success are lower."⁹³

the conclusion that those types of preferences would likely be too fraught with ethical difficulties and would limit the second principle to wrongful harm threatened by the state in terms of the seriousness of the charges. *Id.* at 818-19. He also argues both indications of likely innocence and case seriousness should guide trial judges in making their discretionary rulings regarding resource allocations for experts and other defense services under *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Id.* at 834.

91. See Stuntz, *supra* note 3, at 45, 75; see also Darryl K. Brown, *Criminal Procedure, Justice, Ethics, and Zeal*, 96 MICH. L. REV. 2146 (1998) (commenting on the choices for defenders suggested by Stuntz' article); cf. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1590 (2005) [hereinafter Brown, *Rise of Accuracy*] (contending that chronic underfunding of defenders is a legislative response to constrain the effectiveness of defense counsels' commitment because their commitment is not to accuracy but to their clients, many of whom are guilty). See *infra* note 128 and accompanying text.

92. See Stuntz, *supra* note 3, at 45, 75; Brown, *Rise of Accuracy*, *supra* note 91, at 1590.

93. See Brown, *Rationing Criminal Defense Entitlements*, *supra* note 12, at 821. Theoretically, suppression motions of some claims should help protect both, and, indeed perhaps the innocent more than the guilty, such as motions to suppress unnecessarily suggestive identifications under due process. See *Manson v. Brathwaite*, 432 U.S. 98, 113 (1977) (using the totality of circumstances test that balances improper suggestiveness against indicators of reliability). Other grounds for suppression, such as motions to suppress involuntary confessions, should help both guilty and innocent defendants. For example, Fourth Amendment claims that suppress clearly incriminating information would disproportionately help the guilty. Professor Garrett's analysis of two hundred DNA exonerations showed that 28% of those with eyewitness evidence offered against them filed a constitutional claim regarding the evidence, and 50% of those with confession evidence in their cases sought its suppression. See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 76 (2008). Courts granted relief to the defendants in none of those cases. *Id.* One defendant raised and won a claim involving eyewitness identification testimony, forensic evidence, confessions, or informant testimony. *Id.* This claim dealt with informant testimony. *Id.*

Garrett suggests that the failure of more defendants to prevail on claims related to the evidence that helped convict them resulted from relatively few such constitutional claims because those doctrines cover relatively little of the problematic evidence that led to erroneous convictions. *Id.* at 76-77. However, he notes that those

His proposal requires acceptance of the premise that the role of the defense attorney assigned to the indigent defendant is to give primary attention to preventing wrongful convictions. Brown argues that preventing erroneous convictions is “a central goal of constitutional commitments to due process and fundamental fairness”⁹⁴ and “accords with the underlying vision of the defense attorney’s role in *Strickland*.”⁹⁵ Such a priority is plausible but is neither a central principle of the right to counsel under the Sixth Amendment⁹⁶ nor the established view under professional ethics rules.⁹⁷ The suggestion that we can preliminarily decide who is guilty simply does not fit with the Sixth Amendment, which grants all defendants certain procedural rights, including a trial and adequate counsel at that trial, before they are declared guilty.⁹⁸ Moreover, I believe many who work as defenders would not accept

that were brought were rarely found meritorious by the courts. *Id.* at 77. I believe his claim is accurate. *See also* Uphoff, *supra* note 75, at 802-10 (describing the myth that defendants are protected by too many rights). This data on the low level of success in motions to suppress cannot, however, be used to support that claim since the definition of the group – those exonerated after erroneous conviction by DNA – precludes the granting of a dispositive motion to suppress.

94. *See* Brown, *Rationing Criminal Defense Entitlements*, *supra* note 12, at 817.

95. *See id.* at 821 (referring to *Strickland v. Washington*, 466 U.S. 668 (1984)).

96. *See* *Miranda v. Clark County*, 319 F.3d 465, 470 (9th Cir. 2003) (stating that the constitutional requirement is “that every criminal defendant receive adequate representation, regardless of innocence or guilt”); *see also* *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (stating that historically the state and national constitutions have operated on the premise that “every defendant stands equal before the law”).

97. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.3 & cmt. (2006) (demanding “reasonable diligence,” which means that a lawyer must “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf”).

98. Justice Scalia expressed the view that clarity of guilt is irrelevant to the procedural guarantees developed by the Framers of both the Sixth Amendment’s right to jury trial and to confrontation in *Crawford v. Washington*, as follows: “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.” 541 U.S. 36, 62 (2004). With regard to the right to counsel, Scalia draws a distinction in *United States v. Gonzalez-Lopez* between the core meaning of the right to counsel and effective assistance, which requires prejudice and is linked to the entitlement to a fair trial. 548 U.S. 140, 146-48 (2006). Brown could be correct that the line of authority that emanates from *Gideon*, which entitles indigent defendants to counsel, is limited so that likely innocence may be considered in the provision of counsel. *See* Brown, *Rationing Criminal Defense Entitlements*, *supra* note 12, at 816-18. However, I find *Gideon*’s sweeping declaration that the right to an attorney is fundamental to our system of justice incompatible with that suggested limitation. *See Gideon*, 372 U.S. at 344 (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”). Moreover, I believe acknowledging that such judgments about likely guilt can legitimately affect the effort of appointed counsel is inconsistent with its basic

replacing the main goal of representing all of their clients' best interests, regardless of guilt or innocence, with the goal of advantaging those who are likely innocent and devoting less effort to those identified as more likely guilty.⁹⁹ I put those two fundamental objections to one side. My immediate concern is whether the triage system Brown proposes, which promises improved representation to the likely innocent, would be helpful in allocating resources that might provide a partial solution to inadequate defense resources.

Brown presents an initial picture of a series of what he calls "default rules" for rationing defense resources that are simple and are derived from the lessons learned about wrongful convictions through DNA exonerations.¹⁰⁰ He would have defense attorneys concentrate on cases with (1) eyewitness identification issues; (2) jailhouse informants; (3) police officers and prosecutors with poor reputations for fairness; (4) materials that can or have been subjected to DNA testing and the more problematic types of forensic science results, such as fingerprint analysis, firearms identification, and bite marks; and (5) confessions with "contextual indicators" suggesting potential problems, such as youth or marginal intellectual abilities of the suspect, prolonged questioning, special government interest in a high-profile crime, or lack of other substantial evidence of guilt.¹⁰¹

His categories seem to be plausible indicators of particularly worthy cases for extra effort, and the listed categories appear most prominently in DNA exonerations as the types of evidence that unjustly convict innocent defendants. When I first encountered his proposal, I viewed it as intriguing. Using my personal experience with defense work and years of studying the criminal process, I tried to determine how his system might aid either criminal defense generally or innocence protection in particular. Despite some real effort with the thought experiment, I cannot find the benefit in targeting the use of resources, and, in the end, I am left with a nagging feeling that despite the good intention of the proposal, it would have an overall negative impact on both defenders and on innocence.

mandate and corrosive to our adversary system's central feature that the defendant has a right to have his or her guilt determined at trial by a jury, and certainly not preliminarily by counsel.

99. See Mosteller, *supra* note 1, at 60-64 (arguing that lawyers representing indigents depend upon the sustaining importance of representing individual clients for motivation and that a day-to-day focus on innocence would be so inconsistent with their motivations as to be professionally and personally destructive).

100. See Brown, *Rationing Criminal Defense Entitlements*, *supra* note 12, at 823.

101. See *id.* at 823-25.

*B. Problems of Information Access for Cases that Survive
Prosecutorial Screening*

I engaged in the thought experiment by imagining I was a trial attorney attempting to focus my efforts using Brown's factors. Perhaps as a result of unrealistic idealism, or perhaps because the prosecutors I encountered were principally from the U.S. Attorneys' Office in Washington, D.C., I started my work on a case with the assumption that clear indicators of innocence had already been noted and such cases had likely already been flushed from the system. That office, for example, had a policy of skepticism about one-witness stranger identifications and required some corroboration independent of or in addition to an ordinary identification before the suspect in such a case would be charged. Although prosecutors often viewed "getting an identification" as a task rather than a test, they employed this perspective only if they were confident for other reasons that the suspect was guilty. They knew the potential devastating impact on the jury of either an identification of another individual besides the suspect in the lineup or a non-identification. Thus, except for flukes, prosecutors should logically already examine for the purpose of avoiding error many of the potential flaws in this class of identification cases that Brown highlights. Instead of relying on this effort by the prosecutor, Brown suggests that identification cases be examined carefully by defense counsel with an emphasis on innocence determination rather than client-centered interest in acquittal.¹⁰²

The prosecution also has greater access to information pertinent to such determinations than does the defense.¹⁰³ Eyewitnesses are often reticent to talk with the defense, and so are many police officers. Generally, what one learns about eyewitness identification issues regarding both the witness and police conduct comes secondhand from the prosecution during discovery, or shortly before trial in an eyewitness identification suppression motion. While a number of eyewitnesses did talk with my investigator, informants were even more inaccessible. Sometimes their identity, or even their existence, was not revealed until trial. Often they were in custody, and information about them was restricted except as a matter of subpoena once the trial was under way. Different factors affect the accessibility of evidence regarding the other types of cases Brown lists where he would have the defense concentrate its efforts because of likely innocence,¹⁰⁴ but unfortunately the defense does not have an

102. *Id.* at 816-22 (describing a system that prioritizes representation to exonerate the innocent rather than giving priority to cases with the highest chance of success or concerns that are solely centered in the client's interest).

103. I conducted a large amount of investigation accompanied by a student investigator or another attorney and am not suggesting that the defense does not have the independent capability to find evidence and develop leads. However, the prosecution's efforts have substantial resource and institutional advantages.

104. See text accompanying *supra* note 101 (listing types of cases where DNA exonerations were concentrated).

informational advantage as to any of those types of cases. As noted earlier, defense investigative effort with eyewitnesses may prove very useful in developing traditional avenues of cross-examination that undercut the witness' credibility but rarely demonstrates innocence.¹⁰⁵

While the defense may not have superior access to evidence generally, it obviously should have superior access to the defendant at this stage in the process. The defendant can provide leads, witness names, and his or her own version of events. If defenders were to concentrate on innocence, they would focus not only on the objective evidence of innocence from the defendant but also subjective conclusions gleaned from and about the client. These subjective impressions might operate largely independent of the case characteristics Brown recognizes, and if probable innocence is the guiding principle, such impressions would often overwhelm insights based on Brown's case characteristics. Brown does not appear to rely on such information gained by the defender, which, I presume, is because its use would entail many difficulties, such as the conceptual and practical challenge of avoiding assessment of the defendant's character and the danger of substituting stereotyping for investigation. However, given the low likelihood of finding provable innocence based on any of Brown's case characteristics, absent discovery of something like stranger DNA, I have difficulty envisioning how defense counsel would allocate resources based on likely innocence while ignoring subjective impressions of whether the client is innocent.

*C. Overlap with Existing Client-Centered, Trial-Oriented Defense
Motivation to Develop Persuasive Jury Presentations*

To be helpful, Brown's suggested emphasis must assist defenders in focusing their inquiry beyond what they would do naturally, unguided by those factors. The system thus should suggest different lines of inquiry and effort because of the innocence focus rather than the course of action that would be undertaken simply by developing the case that would be most persuasive to the jury.¹⁰⁶

Under such analysis, most of the characteristics identified by Brown overlap the considerations that most defense attorneys already employ without any special concentration on innocence. Many of Brown's indicators

105. *See supra* notes 23-25 and accompanying text.

106. An explicit presentation to the jury regarding the defendant's possible innocence is often almost necessary for a chance of success in a jury trial of the most serious crimes. If feasible, I preferred a presentation that provided a plausible chance of the client's innocence rather than one based purely on possible reasonable doubt about the government's proof. Developing the possibility of innocence was not a separate guide but was rather part of an effective presentation. Indeed, it appeared almost a necessary part of trial strategy to satisfy the jury when the crime was a serious one, such as a vicious assault or a homicide, and the victim was an ordinary citizen, rather than, for example, a drug dealer.

correspond to plausible defense presentations that have the potential to persuade the jury that a reasonable doubt exists or that the prosecution may be misdirected. Colloquially, cases of this type are potential winners at trial because the possibility of innocence can be understood by the jury through almost exactly the same thought process a defense attorney would utilize in determining that the case was potentially triable. The reason they are potential winners relates to, but is not fully dependent on, objective evidence of innocence and not on whether the defender subjectively believes the client is innocent. A point that should be obvious but perhaps needs to be articulated explicitly is that, except as it affects ethical responsibilities, what the defense attorney believes to be true but cannot demonstrate through evidence is actually irrelevant for trial purposes because it cannot be presented to the jury.

Cases that turn on eyewitness identification have produced numerous erroneous convictions.¹⁰⁷ They are frequently excellent cases to take to trial because the defendant has a plausible chance of prevailing. Therefore, these cases should be targeted for resource allocation separately from Brown's focus on likely innocence. Similarly, those cases that turn on informants, and particularly jailhouse informants, are often plausible winners at trial.¹⁰⁸ The same overlap between effective trial strategy and innocence defense is found with problematic confessions. Among cases where the defendant confessed, those where the defendant is young or of marginal intellectual ability, those where questioning was prolonged, and those that exhibit the other factors Brown mentions present the best prospects that the jury will reject the confession's incriminating power.

The primary reason that all of these cases would be seriously examined by competent defense attorneys as potential trial cases is because the likelihood of innocence is intuitively comprehensible and potentially persuasive to the jury. That does not mean the defendant is innocent or that the cases are easy to win, nor does it convince a veteran public defender that the defendant is likely innocent. However, innocent defendants will frequently be "tucked away" somewhere among the group of largely guilty defendants. Neither the actual impact of Brown's system on current defense counsel conduct nor its ameliorating effect on the limitations on defense resources is clear after further inspection. Resource benefits would likely be gained only if defense counsel make other types of judgments on more subjective and potentially harmful grounds.

107. See Garrett, *supra* note 93, at 76 (reporting that eyewitness identification evidence was involved in 79% of the 200 DNA exoneration cases analyzed).

108. Informant testimony was involved in 18% of the 200 DNA exonerations Professor Garrett examined. See *id.* at 76, 86.

*D. The Twin Problems of Broad Categories and
the Dispersion of Innocence Cases*

Despite the system's narrowing of the field of primary concern to certain types of issues, the total number of cases remaining in Brown's five categories is substantial. The largest category of cases is that involving eyewitnesses. That category can be extremely broad, since almost all cases involve some identification process, or it can be very narrow if it involves single-witness or stranger eyewitness cases.

If the categories in Brown's system are narrowly defined, they would aid in the allocation of scarce defense resources. However, another equally serious problem arises because innocence is not limited to any easily and clearly defined category. As a result, any narrowly focused system inevitably causes defense counsel to ignore a substantial number of potentially meritorious cases that do not fit the narrow criteria. Moreover, the system may come to accept the remaining errors because it has been assured that the defense counsel conducted a cost-effective rationing to emphasize cases where innocence is most likely. Finally, because innocence is broadly distributed across objective categories, the companion danger of ignoring cases where innocence is frequently found rises to unacceptable levels if the focus is narrowed as much as efficiency would demand.

For example, Brown would give cases dealing with "jailhouse informants," which are indeed a particularly suspect group, more scrutiny.¹⁰⁹ The giving of higher scrutiny to this type of informants has its benefits, because such testimony is relatively unusual, allowing meaningful focus of effort. However, virtually the same incentives and opportunities for fabrication can exist for a witness who is not a member of that specific class of informants. Associates of the defendant-target who are not confined may face longer periods of future incarceration than do jailhouse informants, who, by definition, are currently incarcerated. If these associates have access to the target who is free in the community, they can just as easily invent an incriminating conversation with him as can a jailhouse informant, and they can also invent observations of his participation with them in a crime, which jailhouse informants could not plausibly do.¹¹⁰

I have written about a North Carolina case in which I believe injustice was done in sentencing a defendant to life in prison for a crime that another defendant confessed to his attorney that he committed alone.¹¹¹ Despite that

109. Brown, *Rationing Criminal Defense Entitlements*, *supra* note 12, at 824.

110. See Robert P. Mosteller, *The Special Threat of Informants to the Innocent who are not Innocents: Producing "First Drafts," Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 554-57 (2009) (discussing different types of informants and factors that can render the distinctions inconsequential).

111. See *id.* at 520-22.

revelation, the situation has not yet been corrected.¹¹² This defendant, Lee Wayne Hunt, was convicted based on testimony from two jailhouse informants, but the principal evidence came from a witness who allegedly participated in the crime and was in and out of confinement thereafter but never talked to Hunt while confined.¹¹³ The witness would not be considered a jailhouse informant but was substantively identical to one, in terms of the dangers of false testimony induced by strong incentives to protect his freedom. Hunt's case would apparently be excluded from extra scrutiny under Brown's system, because, in addition to actual jailhouse informants, non-jailhouse informants testified.

The problem of developing categories that are workable but are neither too broad nor too narrow is not unique to Brown's pretrial defense triage inquiry. The proposal I make as a partial remedy for the type of errors that occurred in Lee Wayne Hunt's case confronts that same difficulty.¹¹⁴ The challenge is to designate, at the pretrial stage, the class of problematic informant cases to receive prosecutorial review. If too broad in focus, the effort would either be rejected out of hand or might be so frequent as to become superficial and/or pro forma. If the class is too narrow, it would be of no practical value except in the extraordinary case that, by its very selection, would already be on its way to solution. Finally, the markers have to be visible to the observer without effectively completing the review in order to determine whether the case fits within the category to be reviewed. I settled upon cases where the only direct evidence of guilt came from informants of all types.¹¹⁵

I describe my effort, not because it reaches a clearly correct result but instead to indicate that I appreciate the difficulty of the task of developing a system to identify potentially problematic cases with possibly innocent defendants for further review. My point is that I cannot envision how that process can be done by defense counsel at the outset of the case. The review I suggest for prosecutors would occur at the end of their investigative process, before they proceed to trial. Distinguishing potential innocence cases from the others at the outset of the case is an impossible task as a practical matter.

Brown's proposal does not suggest how defense attorneys should approach cases that contain both evidence in an identified category and similar evidence outside the confines of that defined category, cases that contain evidence only from specific identified categories but include multiple categories, or those that are based on both an identified category and other indepen-

112. *See id.* at 528-48 (describing the facts of the case).

113. *See id.* at 528-35 (describing the testimony and the incentives of two non-jailhouse informants and two typical jailhouse informants, with the key evidence being provided by an alleged accomplice rather than from the jailhouse witnesses).

114. *See id.* at 565-77 (discussing a set of reforms to reduce the damage caused by informant testimony).

115. *See id.* at 564 n.213; *see also id.* at 573-74 (describing the inquiry to be conducted pretrial by prosecutors for this category of cases).

dent, totally non-suspect evidence. The well-known North Carolina case of Darryl Hunt, who was exonerated by DNA evidence that ultimately identified the actual rapist,¹¹⁶ involved multiple eyewitness identifications and many other types of incriminating evidence.¹¹⁷ Despite the multiple, apparently reinforcing, incriminating strands of evidence, Hunt was innocent. Brown does not provide a guide as to whether such a case should be given special scrutiny because it involved eyewitness identification or whether it should be triaged to a lower level of defense effort because of the combination of multiple identifications and other types of incriminating evidence. Because Brown's system may not give special attention to such problematic cases, that system appears to offer little effective assistance in identifying meritorious cases for targeting defense resources on likely innocent defendants.

E. The Almost Inevitable Result of Linking Inherently Unreliable Subjective Defender Beliefs in Client Innocence to Defense Effort in an Innocence-Based Rationing System

If defense counsel are directed to prioritize their efforts explicitly to achieve innocence protection, limitations on those efforts would result from their subjective assessment of those clients who appeared to be, from all available information, likely innocent, rather than from the use of Brown's categories. The mindset inevitably encouraged by implementing an innocence-based system for pretrial selection of cases to vigorously defend would diminish the prospects of justice for a group of innocent defendants that are most in need of excellent representation: those defendants who are innocent but have no clear or obvious proof and only a plausible case. Such defendants may or may not have a winning personality, and they may or may not have prior convictions similar to the charged offense. Both personality and prior convictions could become decisive factors in whether they receive special attention as likely innocent. A defense attorney responding positively to clients with winning, persuasive personalities who claim innocence is virtually unavoidable as a human reaction if the attorneys are directed to give special priority to those who are likely innocent. Additionally, it would be hard to ignore character evidence, such as prior convictions, in a fully rational system that prioritized likely innocence rather than effective representation of all defendants.

116. See Richard Willing, *Suspects Get Snared by a Relative's DNA*, USA TODAY, June 8, 2005, at 1A. Indeed, DNA from a relative of the actual perpetrator ultimately led to the identification of the rapist. *Id.*

117. See *State v. Hunt*, 457 S.E.2d 276, 281-82 (N.C. 1994) (describing, *inter alia*, testimony of motel employees who identified Hunt and described his suspicious use of a public bathroom, leaving behind substantial amounts of blood and several additional identifications on the way, in affirming a later-established erroneous conviction).

In *Caring About Innocence*, I described a client who was charged with an armed robbery based on what I was told were solid identifications by three eyewitness-victims, but there was no other corroborating evidence other than the defendant's character.¹¹⁸ He had previously been charged with and convicted of several offenses involving violence and theft.¹¹⁹ Nevertheless, he may well have fallen into Brown's category as deserving special resource allocation because his was an eyewitness case, albeit one that involved multiple eyewitnesses.

Based on my initial investigation, the client had no proof of his innocence. Indeed, his initial defense was not corroborated by my investigative efforts.¹²⁰ As a result of my unsuccessful efforts to confirm his defense and his prior record, there was little to suggest he was likely innocent other than the fact that his case depended critically on eyewitness identification testimony. If the defense attorney's subjective evaluation of innocence were at all a part of the defense counsel's calculation, this case would not have gotten special effort under Brown's system.

However, the client was shown to be innocent through the fortuity that the real perpetrator happened to be in the grand jury section waiting room for witnesses and victims on the day each of the eyewitness-victims were scheduled for their interviews with the Assistant U.S. Attorney before my client's case was presented to the grand jury for indictment.¹²¹ Each eyewitness-victim immediately recognized this man, who must have been either a victim or a witness in another case, as the person who actually robbed them.¹²² They each told the prosecutor this fact, and he notified me shortly thereafter that he was dismissing the charges against my client.¹²³

Because the case was dismissed relatively early in the process, I did not have time to re-interview the client. If I had, I might have found solid evidence of a defense, but it is equally likely I would have simply received a different version of his story that fared no better when I investigated it. If so, a rational assessment of likely innocence would probably have been further reduced. I now know that my client was in fact innocent, and my best guess as to why he was identified and charged is that he looked like the real robber and had a prior record that made him a plausible suspect. Although there was no other corroborating evidence of guilt, three witnesses had identified him, which made it less obviously problematic than the classic one-witness identification.

118. See Mosteller, *supra* note 1, at 23-30. This is the case described there of Innocent Client #2.

119. See *id.* at 23.

120. See *id.* at 24 (describing the first unsuccessful effort to corroborate the alibi the client gave to the police).

121. See *id.* at 26.

122. See *id.*

123. See *id.*

Giving this innocent client's case the resources it deserves requires the operation of two very different principles that I fear Brown's system undercuts. First, a proper indigent defense system requires adequate funding for all cases because likely innocence is not something that can be accurately assessed in many cases, despite a careful examination by the defense attorney.¹²⁴ Second, such a system depends on the defense attorney not restricting his or her best efforts to those defendants believed to be likely innocent. It also demands a commitment to defend even those that are guilty, because otherwise the defense attorney will be justified in cutting back on efforts in cases where initial results are negative. By contrast, limiting or abandoning zealous defense of such cases would seem justified if a rationing system were adopted that was designed to maximize defense efforts for those likely to be innocent.

I have strongly criticized Brown's effort to rationally prioritize defense efforts, a system that is likely as logically oriented as any realistic effort to focus the defense effort before trial on cases of likely innocent defendants. In the next section, I endorse an approach that is not new but is practical and promises real improvement: to bring both a more national perspective and federal funding to state defender programs, which are currently underfunded and will not likely be changed if left to individual states' political processes. In looking at this proposal, I critique another well-motivated but misguided proposal for targeted reform that recognizes the importance of innocence.

124. Brown is not insensitive to the difficulty of a defense attorney knowing which clients are innocent ones, recognizing that "[a]ttorneys rarely know, especially early in representation, who is wrongly accused," and more frequently can quickly identify those who are guilty. See Brown, *Rationing Criminal Defense Entitlements*, *supra* note 12, at 822. He also recognizes that more than a minimal case-file review would ordinarily be required to make the assessment needed of the likely innocent clients. *Id.* In my judgment, his recognition of the difficulty of the assessment process is admirable, but it is still far too optimistic and unrealistic. He assumes substantially greater capacity for professional evaluation, excessive clarity in the conclusions that can be reached from the facts that are typically available, and less dangerous stereotyping of case analysis by even seasoned and sophisticated counsel than I believe can be safely assumed. These limitations are especially important if one wants to do more than simply marginally reduce unjust convictions but rather adequately invest to eliminate most of those where avoidance is reasonably possible.

IV. THE ROLE OF INNOCENCE IN SUPPORTING INCREASED FEDERAL SUPPORT AND FUNDING FOR STATE INDIGENT DEFENSE SYSTEMS

When looking at the chronic underfunding of public defenders, which seems to be a constant condition,¹²⁵ realistic plans for remedy are not easy to generate.¹²⁶ One part of the problem is political and obvious. As Robert Kennedy accurately and perceptively noted, “‘The poor man charged with crime has no lobby.’”¹²⁷ Professor Brown, in a different article than that discussed above, asserts that the chronic underfunding of indigent defense is the result of legislative determination to limit the effectiveness of defense counsel because of defenders’ lack of focus on accuracy.¹²⁸ As noted earlier, accuracy protection and innocence protection are not the same, although I believe

125. See Backus & Marcus, *supra* note 1, at 1039 (noting that “indigent defense in the United States . . . is in a chronic state of crisis”). A series of ABA reports over more than two decades document the chronic and extensive inadequacies of state indigent defense services. See generally NORMAN LEFSTEIN, AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 1-2 (1982); AM. BAR ASS’N SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC’Y, CRIMINAL JUSTICE IN CRISIS 37 (1988); AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE 7 (2004).

126. In addition to the ideas I develop in this Article, two quite plausible but very different approaches are to link public defender funding to the funding levels of the prosecution either through legislative action, see Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 222 (2004), or litigation, see Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 117-19 (2007). See also Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 431-32 (1993) (arguing for a litigation strategy not based on rights of individual defendants but on securing systemic change).

127. See LEWIS, *supra* note 53, at 211.

128. Professor Brown makes the following assertion:

Right-to-counsel (and later, effective-assistance) cases repeatedly described defense lawyers as improving the accuracy of adjudication. But defense counsel’s commitment is not to accuracy; it is to his or her clients, many of whom want inaccuracy to mask their guilt. Legislatures recognize this difference, and they have responded to Court mandates for defense counsel by consistently underfunding defenders in order to constrain their effectiveness. Forty years after *Gideon v. Wainwright*, this political limit on defense counsel is a fixed component of criminal justice; underfunding of defense counsel will not change except at the margins. As a result, adversarial advocacy is a weak means to achieve accuracy.

Brown, *Rise of Accuracy*, *supra* note 91, at 1590.

that society currently accepts innocence protection as the first priority in the search for accurate results in criminal trials.¹²⁹ My suggestion is not to ignore that claimed limitation on accuracy, which in part is true but misses the critical role that defense attorneys play in protecting those whose innocence is not readily apparent; instead, it should be addressed directly. I suggest employing the politically popular concept of innocence, which defense counsel does protect, to help create the currently missing lobby to which Robert Kennedy referred.¹³⁰

*A. The Promising Proposal of National Public Defender Standards
Encouraged by Federally Funded Incentive Grants*

In 2004, Congress enacted the Innocence Protection Act, which provided both a right of defendants to secure DNA testing¹³¹ and funding for defense services in state capital cases.¹³² One of the major justifications for enacting this legislation was congressional and public concern with the numerous convictions and death sentences imposed on defendants later shown to be innocent by new DNA technology.¹³³ This legislation and the funding it has provided in subsequent years is a testament to the power of innocence in

129. See *supra* notes 4-6 and accompanying text.

130. Professor Ronald Wright has argued that publicity regarding wrongful convictions revealed by DNA testing could provide a popular basis for public defender funding “framed as an investment in accuracy.” See Wright, *supra* note 126, at 261; see also *supra* note 1 and accompanying text. Professor Wright is apparently treating innocence protection and accuracy as roughly synonymous, which is not far off the mark given society’s strong commitment to avoiding erroneous convictions. See Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 CAL. L. REV. 323, 380 (2008) (“Incorporating a deontological constraint against (risking) false convictions may thus yield a more satisfactory analysis.”). But see Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65, 68 (2008) (arguing that reformers tend to overly value the danger of unjust convictions and arguing that accuracy and preventing unjust convictions should be given greater prominence).

131. See Innocence Protection Act of 2004, 18 U.S.C. §§ 3600-3600A (2006) (provisions covering the testing and retention of DNA evidence for those convicted and sentenced to imprisonment under federal law).

132. See Innocence Protection Act of 2004, 42 U.S.C. § 14163 (2006) (containing provisions for increased defense and prosecution funding under “capital representation improvement grants” and establishing basic standards for representation).

133. See 150 CONG. REC., S10, 910-01 (daily ed. Oct. 9, 2004) (statement of Senator Patrick Leahy regarding H.R. 5107, the Justice for All Act of 2004, describing the purpose of the reforms as intended to “create a fairer system of justice, where the problems that have sent innocent people to death row are less likely to occur, where the American people can be more certain that violent criminals are caught and convicted instead of innocent people who have been wrongly put behind bars for their crimes, and where victims and their families can be more certain of the accuracy, and finality, of the results”).

improving defense representation. It is also a testament to the power of politics in the decision to fund basic indigent defense for capital cases.¹³⁴ The limitations placed on funding under this Act, which was linked to innocence protection of death penalty defendants, demonstrates the importance of developing supportive public attention for indigent defense work to offset the even more difficult political context of defense work outside the sensitive area of death penalty cases.

Professor Norman Lefstein has argued that the best hope for significant improvement in financial support for indigent defense services throughout the nation is federal funding, and the best hope for enhanced quality of representation is the creation of a federal Center for Defense Services.¹³⁵ The creation of such a center was supported by the ABA House of Delegates, and federal legislation was proposed that would create a private corporation whose board of directors would be appointed by the President and confirmed by the United States Senate.¹³⁶

B. A Supporting Proposal with Critical Flaws Based on Linking Increased Defender Funding to Selective Innocence Protection

In an article published in 2009, Professors Joseph Hoffmann and Nancy King argued for the establishment of a new federal initiative to improve state defense representation systems.¹³⁷ Although I believe their proposal suffers from several key flaws that may reflect both a misunderstanding of innocence cases and the danger of separating concern for innocence from that of procedural rights of all defendants, I first concentrate on the important point they make: focusing federal scrutiny and aid on providing adequate counsel for defendants at trial avoids errors in the first instance. To that end, better repre-

134. Under the legislation, Congress appropriated \$375 million over five years to grants for states that adopt and implement minimal standards for the appointment of defense counsel and prosecutors in capital cases. See The Justice Project, The Innocence Protection Act, www.thejusticeproject.org/national/ipa (last visited June 19, 2010). As indicated in the preceding sentence, the legislation providing support to indigent capital defense contained a provision requiring that any state that accepts funds to improve their defense systems in capital representation also receives equal funding to support the prosecution. See Ronald Weich, *The Innocence Protection Act of 2004: A Small Step Forward and a Framework for Larger Reforms*, 29 CHAMPION 28, 31 (2005); Innocence Protection Act of 2004, 42 U.S.C. § 14163a (2004) (titled "Capital Prosecutor Improvement Grants" that, with restrictions on use of funds, links funding to states receiving defender funding for capital defense to equal funding for prosecutors).

135. See Lefstein, *supra* note 2, at 928-29.

136. The legislation was introduced in the Senate in 1979, sponsored by Senator Edward Kennedy from Massachusetts and Dennis DeConcini from Arizona. See *id.* at 926-27.

137. See Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791 (2009).

sensation for all those accused of crime, federal grants, and encouragement of the development of effective models for providing representation are worthy of careful attention.

Their proposal as to the new federal effort follows the ideas that Professor Lefstein developed, which they term "a comprehensive national plan to encourage state and local legislative bodies to provide adequate funding for representation services."¹³⁸ The measures include creation of a federal center for defense services and incentive grants conditioned on legislative and regulatory change, both of which would improve the provision of defense services.¹³⁹

Hoffmann and King recommended shifting the federal role in state criminal prosecutions from what they consider an inefficient expenditure in post-conviction review to encouraging states to avoid constitutional error.¹⁴⁰ They would make this change by redirecting federal resources and attention from the end of the criminal process to the beginning by investing federal money and attention to the support and reform of state criminal defense systems.¹⁴¹ While redirecting attention from post-conviction review, they would limit federal habeas jurisdiction for prisoners in custody as a consequence of a state criminal conviction to only three classes of cases where they believe the benefits of the writ justify the costs.¹⁴² These classes include: (1) cases of innocence, (2) cases where a new rule of criminal procedure has been made retroactive by the U.S. Supreme Court, and (3) death penalty cases.¹⁴³

Despite supporting the call for increased attention to and support for state indigent defense systems, I find several problems with connecting increased federal assistance of the state defense system to restricting habeas rights for important classes of error that potentially involve innocent defendants. While the authors explicitly recognize the importance of innocence

138. *Id.* at 828.

139. *See id.* at 828-30. Hoffmann and King note, as I have, that the Innocence Protection Act's funding follows the latter part of this model. *See id.* at 830.

140. *See id.* at 818.

141. *Id.* They define the proposed reviewable classes of cases as follows:

(1) the petitioner is in custody in violation of the Constitution or laws or treaties of the United States and has established by clear and convincing new evidence, not previously discoverable through the exercise of due diligence, that no reasonable factfinder would have found him guilty of the underlying offense in light of the evidence as a whole; (2) the petitioner is in custody in violation of a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court; or (3) the petitioner is under a sentence of death, and either (a) his death sentence was imposed in violation of the Constitution or laws or treaties of the United States or (b) he is legally ineligible to be executed.

Id. at 819.

142. *Id.* at 819.

143. *Id.* at 820-21.

protection by excluding clear cases of innocence from restrictions on habeas review and relief, the negative impact on innocence protection still occurs.

The reason for a linkage between more assistance for indigent defense and less protection for defendants on federal habeas is not clear, and it is unjustified. The authors suggest a political quid pro quo, but any link is not logically required or guaranteed to achieve a beneficial result. The implicit justification is that the funds for trial-level defense of state cases would be freed up by limiting federal habeas review. The article recounts the gross number of cases handled by the federal courts on habeas and claims "a significant expenditure of state dollars to defend them."¹⁴⁴ However, the authors provide no real information about the magnitude of those state expenditures,¹⁴⁵ and nothing about the federal courts' expenses in handling the litigation, which would be the offsetting federal savings that might justify the tradeoff. The budget expenditure by the federal courts, which treat many of these petitions in the most summary fashion, is likely not at all commensurate with funds required to meaningfully impact state indigent defense. Likewise, the savings to the states in post-conviction counsel costs that are presently incurred but would be avoided by their proposal is minor when compared with the cost of providing effective counsel for all. As a result, anyone leery of further outlays by either the federal or state justice system on indigent defense at the trial level would not be mollified. In sum, the cost savings justification that apparently would link elimination of post-conviction review with a new willingness of the states to fund indigent defense adequately is illusory and would likely result in denial of protection at the end of the process for many innocent defendants without any off-setting increase in protection through provision of effective counsel early in the prosecution.

*C. The Fundamental Link Between a Reasonable Possibility of
Acquittal Based on Reasonable Doubt and
Effective Innocence Protection*

Hoffmann and King argue that the most dramatic effect of their proposal would be upon federal habeas review of ineffective assistance of counsel claims.¹⁴⁶ Even with the promise of better counsel in the future, the loss of habeas protection is very significant. Even with improved funding, serious failings by counsel would continue, as occurs today even with retained counsel and in jurisdictions where adequate funding is provided. Moreover, these deficiencies, if they deny the defendant a fair trial, are not excusable even if

144. *Id.* at 816.

145. The only citation supporting the assertion of significant federal expenditure is the testimony of a deputy district attorney that in the last decade the number of lawyers employed on habeas litigation has increased 400%. *See id.* at 849 n.93.

146. *See id.* at 823.

they are less frequently encountered with the new resources than they currently are with an inadequately funded defense service.

Moreover, I find no reference to another critical category of cases that would not receive review – prosecutorial violations of due process obligations under *Brady v. Maryland*¹⁴⁷ and related cases¹⁴⁸ to provide potentially exculpatory evidence to the defense. Loss of any federal habeas review is particularly significant because claims both involving ineffective assistance of counsel and *Brady* can usually be litigated only after the conclusion of the trial and therefore are not subject to the full review afforded to direct appeals. Finally, although these claims can be litigated on direct appeal, cases involving compelled confessions, where habeas review is currently permitted, strongly relate to prosecutorial abuse and potentially to innocence, and their loss is significant.

The majority of innocent defendants who have been convicted can never demonstrate their innocence to the extent required by most current judicial standards or by the standard of “clear and convincing evidence” used by Hoffmann and King. Most innocent defendants can only show the plausibility of their innocence or substantial doubt of their guilt. Without dispositive DNA or other similarly unquestionable evidence, which is usually not available, or extraordinary witness testimony, such as the actual perpetrator confessing under circumstances that support the confession’s validity, charged defendants cannot clearly demonstrate innocence.

1. Innocence Likely Located Among Successful *Brady* Claims and Ineffective Assistance of Counsel Claims

Meritorious habeas cases under ineffective assistance of counsel and *Brady* grounds neither show that the defendant is innocent nor even address the issue, but they do often suggest the possibility of innocence. This is because both ineffective assistance of counsel and *Brady* claims require a showing that the error likely affected the outcome. Ineffective assistance requires a showing that counsel’s failures likely had an impact on the outcome of the litigation and effectively denied the defendant a fair trial.¹⁴⁹ *Brady* requires

147. 373 U.S. 83 (1963). *Brady* holds that the Due Process Clause requires the prosecution to provide potentially exculpatory evidence to the defense. *Id.* at 86.

148. *United States v. Bagley*, 473 U.S. 667, 676 (1985), extended the *Brady* concept to impeachment evidence. Other cases both before and after the *Brady* decision imposed disclosure obligations under the Due Process Clause to prosecutors. *See Napue v. Illinois*, 360 U.S. 264 (1959) (applying due process to perjured testimony knowingly presented or allowed to stand uncorrected by the prosecution); *Giglio v. United States*, 405 U.S. 150 (1972) (requiring under due process the revelation of offers of leniency provided to government witnesses).

149. In *Strickland v. Washington*, 466 U.S. 668, 694 (1984), the Court held that a new trial must be granted only when evidence is not introduced or actions are taken because of the incompetence of counsel creates “a reasonable probability that, but for

materiality, which uses much the same legal standard and has the same effect.¹⁵⁰ Giving a high priority to innocence provides no justification for restricting either of these categories of claims.

However, a claim that should prevail under these two legal theories will generally not establish clear and convincing evidence of innocence. I noted earlier that Gideon did not show he was innocent at his retrial. Had he had a lawyer and that lawyer performed as woefully as did Gideon in conducting his own defense at his initial trial,¹⁵¹ he would have no recourse under Hoffmann and King's proposal, and his five year sentence would not be made more tolerable by knowledge that most defendants in the jurisdiction had a competent lawyer.

Similarly, my colleague Richard Rosen prevailed in litigating a *Brady* claim that appears meritorious from even a thumbnail account.¹⁵² The prosecution failed to provide the defense with an initial description of the perpetrator, despite one being provided by the surviving victim of a murderous attack on the victim's sister.¹⁵³ That first statement by the surviving victim de-

counsel's unprofessional errors, the result of the proceeding would have been different." The *Strickland* Court stated:

The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases – that is, those presenting claims of 'actual ineffectiveness.' In giving meaning to the requirement, however, we must take its purpose – to ensure a fair trial – as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Id. at 686.

150. See *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Augurs*, 427 U.S. 97 (1976); *Kyles v. Whitley*, 514 U.S. 419 (1995). *Bagley* essentially adopts the *Strickland* formulation and states: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682.

Outside of death penalty cases, Hoffmann and King would preserve review of such errors only if the evidence constituted clear and convincing evidence of innocence. The indirect effect is to impose, for federal habeas review only, "super" material breaches of the disclosure obligation. Their proposal would not alter the trial-level constitutional obligation directly imposed by state court judges, but I fear it would erode the standard because violations would lack even a theoretical review by life-tenured federal judges unless they rose to the level of clear evidence of actual innocence.

151. See LEWIS, *supra* note 53, at 57-62 (summarizing the transcript of Gideon's first trial where he was forced to represent himself).

152. See *Dixon v. McDowell*, 858 F.2d 945 (4th Cir. 1988).

153. *Id.* at 946-47.

scribed the attacker as a white man whom the witness did not know.¹⁵⁴ The defendant was a black man well known to the victim.¹⁵⁵ The prosecutor did not turn over the evidence because he believed the witness to have been confused in her first statement to the police.¹⁵⁶ There was no exculpatory DNA evidence and no confessing perpetrator, and, in the end, the defendant, who had consistently denied his guilt, entered a guilty plea that avoided a potential death penalty.

In the more recent case of Alan Gell, a North Carolina trial judge reversed the defendant's conviction for murder because the prosecution failed to disclose that a number of witnesses saw the murder victim alive at a time when he would necessarily have been dead, had Gell committed the murder.¹⁵⁷ Despite this evidence, the same prosecutor, who later decided that the defendants in the Duke Lacrosse case were innocent, reached the opposite conclusion in the Gell case and prosecuted it on retrial.¹⁵⁸ Gell was acquitted,¹⁵⁹ but whether he was innocent was not clear to that knowledgeable and respected prosecutor, and whether there is clear and convincing evidence of that conclusion is not clear to me.

2. The Important Prospect of Federal Court Review

The above examples are admittedly both death penalty cases, which would be excluded from Hoffmann and King's restricted federal habeas review. However, other prominent North Carolina cases show that issues of exculpatory evidence, innocence, and the denial of justice are not limited to death penalty cases. In the Duke Lacrosse case, the prosecutor failed to disclose exculpatory evidence.¹⁶⁰ Because of reforms North Carolina had instituted in pretrial discovery, which were generated because of abuses revealed by the opening of discovery for death penalty cases, relief was available during the trial.¹⁶¹ However, North Carolina's pretrial criminal discovery is far

154. *Id.* at 947.

155. *Id.* at 949-50.

156. *See id.* at 950; *see also* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 317 n.326 (2008) (citing additional sources that describe the prosecutor's justifications for non-disclosure).

157. *See* Mosteller, *supra* note 156, at 264 (noting this evidence and explaining that, after that date, conclusive evidence placed Gell outside the state or in jail). In addition, other undisclosed exculpatory evidence consisted of a tape recorded statement by a key government witness that she had to "make up a story" to tell the police regarding the murder. *Id.* at 264-65.

158. *See id.* at 265 n.31 (identifying Jim Coman as that prosecutor).

159. *Id.* at 265.

160. *See id.* at 285-306 (describing course of events that led to state bar's disciplinary ruling that found, *inter alia*, a violation of the requirement of providing exculpatory DNA evidence).

161. *See generally id.*

more extensive than that in the federal system and in virtually any state other than Florida.¹⁶² In most jurisdictions, scrutiny through post-conviction review may be necessary to unearth and remedy errors caused by inadequate disclosure of prosecution-controlled evidence.

King and Hoffmann attempt to address the inadequacy of defense efforts, which their reforms would no longer allow to be addressed as ineffective assistance of counsel claims in habeas, by increasing defense funding at the trial level. At a minimum, they should revise their proposal to require full, open-file discovery¹⁶³ for the defense before eliminating habeas review of *Brady* claims. Certainly, such discovery is broader than *Brady* requires, but experience has shown that targeted demands to produce exculpatory evidence, either in the form of constitutional imperatives or commands of ethics rules applicable to the prosecutor, are inadequate. Only an all-encompassing command to produce all evidence possessed by both the prosecutor and investigative personnel will produce the evidence that, in the hands of the defense, shows both reasons to doubt the case and indications of innocence.¹⁶⁴

I have discussed the tremendous injustice to Lee Wayne Hunt, who was sentenced to life imprisonment rather than death for his alleged role in two drug-related murders.¹⁶⁵ Hunt was denied relief, despite the fact that another person charged with the crime confessed to his counsel at the beginning of the prosecution that he alone committed the murder.¹⁶⁶ The trial judge who denied relief brazenly rejected the admission of this confession recounted by the confessor's own attorney, who testified only after his client's death. The judge even threatened the attorney with disciplinary action for breaching

162. See 5 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 20.1(c), at 355 & n.48, § 20.2(b), at 365-67 & nn.34, 41 (3d ed. 2007) (placing North Carolina's criminal discovery statute among the five that are the most expansive and are in line with the scope of the third edition of the ABA Standards, and noting that North Carolina goes further than any other jurisdiction in authorizing defense discovery from the prosecution, but that, in other areas, Florida's provisions provide broader discovery).

163. See Mosteller, *supra* note 156, at 306-16 & n.303 (describing the importance of full open-file discovery to finding serious violations of fairness and emphasizing that not only the prosecutor's files need to be available but also others who may have information helpful to the defense, which either purposefully or inadvertently have not been provided to the prosecutor).

164. See *id.* at 260-76, 285-316 (detailing that after North Carolina prosecutors' files were opened by a broad open-file discovery statute for death penalty cases, the information demonstrated that neither *Brady* nor ethics rules had produced the required information and that the injustice in the Duke Lacrosse Case was only brought to light by the operation of the new broad open-file discovery law made applicable to felony cases generally in North Carolina, and that only specific objective rules that mandate disclosure of broad classes of evidence possessed by the prosecution can assure that injustice to the innocent will not occur).

165. See Mosteller, *supra* note 110, at 520.

166. See *id.* at 538-40 (detailing the incriminating revelation by the codefendant's attorney).

client confidence when the attorney began to reveal his client's previously confidential confession.¹⁶⁷ Whether the state trial judge would have refused even to consider the evidence or would have rejected the claim at all, had there been a real prospect of federal habeas review of this claim, cannot be known. The case involved claims of innocence but no clear cognizable federal constitutional issue. I suspect that, at the least, the evidence would have been treated differently, and perhaps a different result reached, had the local, elected state trial judge who heard the case faced the prospect of review, even under the current restrictive habeas standard. The possibility of review by a more geographically distant federal judge who enjoys the freedom of action because of life tenure may be important even to fair initial reviews of the case by differently situated state court judges.

Hoffmann and King argue that, as a matter of logic, federal habeas review in its present restricted form provides little deterrence to state constitutional violations.¹⁶⁸ That may be true, but removing the possibility of review probably would not affect state prosecutors or judges in giving a truly fair hearing to allegations of ineffective assistance of counsel and *Brady* violations. I cannot provide broad empirical proof, but the North Carolina experience suggests federal habeas is an important instrument in rectifying significant procedural injustice in cases that may involve innocent defendants. Federal district judges in North Carolina seem to pay special attention to these two categories of claims and have granted relief.¹⁶⁹ State court judges also frequently take these claims quite seriously and grant relief on their own. I suspect there is a relationship between the judges' actions in the different systems, and find nothing in Hoffmann and King's data that suggests otherwise.¹⁷⁰ A legal regime in which oversight is totally eliminated is fundamen-

167. The judge followed through on his threat and filed a disciplinary complaint with the bar. See *id.* at 541-42. Without holding a hearing, the North Carolina State Bar dismissed the complaint against the attorney. See *id.* at 544.

168. See Hoffmann & King, *supra* note 137, at 810-14.

169. I list here three recent reversals in federal court in the Eastern District of North Carolina. The first, *Sharpe v. Bell*, 595 F. Supp. 2d 636, 644-45 (E.D. N.C. 2009), *rev'd*, 593 F.3d 372 (4th Cir. 2010), reversed a non-capital murder case on grounds of ineffective assistance of counsel, the second, *McNeill v. Branker*, 601 F. Supp. 2d 694, 728 (E.D. N.C. 2009), reversed a death penalty sentence on the basis of ineffective assistance of counsel grounds, and the third, *Cheek v. Branker*, No. 5:04-HC-783-H (E.D. N.C. Mar. 4, 2010) (on file with author), reversed a death sentence on *Brady* grounds.

170. I am not troubled, as the authors are, but rather encouraged by their data that a disproportionate percentage of habeas petitions are filed by prisoners serving life sentences. See Hoffmann & King, *supra* note 137, at 808-09 (noting that almost 30% of habeas petitions are filed by those sentenced to life imprisonment even though less than 1% of prisoners receive such sentences and that by contrast only 12% of habeas petitions are filed by those who receive five years or less imprisonment even though they constitute the majority of felons sentenced to prison). My experience is that such

tally different from one in which there is a prospect of correction and a right to review. Arguments in favor of better indigent defense funding, even with

serious cases are often more complicated, have more questionable evidence, and are more likely to involve political pressure to convict than ordinary felonies.

Moreover, defendants serving life sentences, including many who are sentenced to die in prison with “life without parole” sentences, would suffer the greatest harm from unjust convictions among those not sentenced to death if erroneously convicted. From my perspective, and for multiple reasons, the fact that most petitions are filed by those serving the longest sentences is appropriate rather than a basis for restricting habeas review. Lee Wayne Hunt’s case described earlier involves a defendant whom I believe is innocent of a murder but has spent over twenty-five years in prison where he remains under a life sentence. *See supra* notes 111-113 and accompanying text. Hunt, if in fact innocent, obviously merits justice from the courts almost as much as if he had been sentenced by his jury to death. In a ten-year period beginning in 1998, in large part due to a new discovery law applicable to death penalty cases on post-conviction review in state courts, ten death penalty cases were reversed because of the failure of the prosecution to provide evidence required by the Due Process Clause because it was exculpatory or bearing on credibility of the prosecution’s witnesses. *See Mosteller, supra* note 156, at 261 n.11.

There may be reasons why fundamental errors are more prevalent in death penalty cases. *See* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2090-93 (2010) (arguing that racial issues involving either the race of the victim or the defendant may cause the decision in death penalty cases to be particularly prone to serious legal error); *cf.* Heather T. Keenan et al., *Race Matters in the Prosecution of Inflicting Traumatic Brain Injury*, 121 PEDIATRICS 1174, 1178-79 (2008), available at <http://www.pediatrics.org/cgi/content/full/121/6/1174> (reporting that an empirical study showed that in North Carolina when children died as a result of traumatic brain injury the initial charges and the final charges were principally related to the death of the child but that the sentencing decision, even after controlling aggravating and mitigating factors, was best predicted by the defendant’s minority status). I believe, however, the most important reason that few non-death cases, including those that involve life imprisonment, have received federal habeas corpus relief is that there is no general system of indigent representation provided for these cases and little careful litigation is undertaken. Where lawyers have litigated the issues in death penalty cases, many errors in ineffective assistance and *Brady* have been found. *See* James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850, 1852 (2000) (reporting that in state post-conviction review, where the data is most complete, ten percent of the cases were reversed at this level of review, and in that group, over half of the reversals were based on ineffective assistance of counsel (37%) and suppression of exculpatory evidence (16%-19%)). Of course, some of the errors in death penalty cases affect only sentences. However, the magnitude of the errors that may relate to innocence suggest that eliminating the potential of federal oversight, which may affect the willingness of the state courts to continue serious post-conviction review and where over three times more cases were reversed, *see id.* at 1852, suggests to me that a serious and unnecessary blow to potential innocence protection would occur from the proposal and its excessively narrow view of what types of cases manifest the prospect of innocence.

exceptions for cases where the defendant can clearly demonstrate innocence, do not justify restricting federal habeas review of, and important protection for, enforcement of the basic obligation that representation be minimally effective, that prosecutors meet the fundamental requirement of providing the defense with exculpatory evidence, and that courts correct such *Brady* errors and related situations where government witnesses give false or unfounded testimony.¹⁷¹

D. Moving Forward

The criminal justice system cannot reasonably be expected to avoid convicting the innocent in all situations. The system can and should guarantee fair procedure – a fundamentally fair trial. When flaws are unearthed in the basic protections afforded all defendants through claims of ineffective assistance of counsel and the failures by the prosecutor to provide potentially exculpatory evidence under *Brady* that likely had an effect on the outcome of the trial, a minimum guarantee of fairness has been denied. These fundamental defects in the trial process may also be reflected in the conviction of innocent defendants. No justification has been provided for eliminating such review of non-capital cases except where the defendant can demonstrate innocence. No substantial link has been demonstrated between the elimination of habeas review of such errors, be it political, fiscal, or moral, and improving indigent defense services. I fear that an implicit misuse of our special concern for the innocent, or at least the license not to be concerned because of the proposal to allow review for demonstrably innocent defendants, is part of the false trade-off between providing resources at the beginning or the end of the criminal process upon which this proposal is built.

Although the current recession and the prospect of large future deficits will no doubt restrict the federal government's ability to fund worthy public needs, Lefstein's basic idea of nationally developed standards for indigent defense supported by federal funding is among the most promising and realis-

171. In December 2009, Donald Eugene Gates, a resident of Washington, D.C., who was convicted in 1981 of rape and murder but not sentenced to death, was released when DNA evidence showed he did not commit the rape that preceded the murder. See Keith A. Alexander, *DNA Sets Free D.C. Man Imprisoned in 1981 Student Slaying*, WASH. POST, Dec. 16, 2009, available at <http://www.washingtonpost.com/wpdyn/content/article/2009/12/15/AR2009121502360.html>. Gates' conviction was supported by what was clearly erroneous hair examination evidence from a discredited FBI analyst, Michael A. Malone. *Id.* Malone testified in a number of other cases. *Id.* The Superior Court judge who ordered the release of Gates also ordered examination of the other cases in which Malone provided testimony. *Id.* Because the District had no death penalty, these other cases could not be examined in federal habeas under King and Hoffmann's proposal in the absence of clear proof of innocence, which is often far different from the required showing under existing law of a likely impact upon the outcome of the case.

tic proposals for meaningful improvement in woefully inadequate representation. This is needed reform that the innocence movement could vitally assist if it can be harnessed to move public opinion to support better defense for all in order to avoid convicting defendants who are innocent, but whose innocence is effectively concealed. Innocent defendants need competent counsel with adequate resources in order to win their acquittal.

V. INNOCENCE STORIES

In *Caring About Innocence* and this Article, I have discussed cases from my practice that I believe provide valuable illustrations of the difficulty of knowing before trial that a defendant is innocent. Generally, the most defense counsel ever knows regarding innocence is that the evidence does not establish guilt clearly and that the client might be innocent. My case discussions, which may be characterized as innocence stories, lack the power of DNA exonerations of defendants who face execution but are human stories of potential injustice that was avoided or the necessity of a fair trial for defendants who may be innocent, giving the jury an opportunity to dispense the best form of justice our system can provide: an accurate acquittal at trial rather than an exoneration after years of erroneous incarceration.

Others have suggested that stories should be told of injustice that has befallen the innocent as a result of inadequate representation and assembly line justice,¹⁷² and many of these powerful accounts have been published.¹⁷³ I suggest that defenders develop stories of other cases with somewhat different outcomes. These cases are accounts of injustices avoided by sheer luck and particularly by excellent representation of defendants not obviously innocent.¹⁷⁴

Although these stories may be more difficult to collect, I strongly suspect that, in the collective experience of those who defend the indigent, there are powerful stories of typical defendants who turned out to be certainly or likely innocent. These stories could highlight the critical importance of an

172. See Backus & Marcus, *supra* note 1, at 1128.

173. See, e.g., JENNIFER THOMPSON-CANNINO ET AL., *PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION* (2009) (describing the erroneous conviction of Ronald Cotton for multiple rapes and his exculpation and the identification of the true perpetrator after years of Cotton's incarceration through DNA testing); TIM JUNKIN, *BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA* (2004) (describing the case of the first death row inmate exonerated by DNA evidence).

174. As noted earlier, the documentary film, *MURDER ON A SUNDAY MORNING* (2001), provides an excellent example of a powerful story of innocence vindicated by sound defense work. See *supra* note 16. It is supportive of the fundamental message of this Article in that the defendant was properly acquitted because of the extensive and highly competent work of his public defenders, but it was only after the acquittal that conclusive evidence of innocence was documented. See *supra* note 16.

aggressive and adequately funded defense to protect the innocent. In *Caring About Innocence*,¹⁷⁵ I recounted several cases where luck and good representation resulted in dismissal. Some of these are stories of defense successes and some are of fortuities that likely avoided erroneous convictions.

No doubt some defendants have won cases that were vigorously prosecuted, and later evidence disclosed the true perpetrator. Other defenders likely could provide stories of defendants who initially appeared to be almost certainly guilty, but later discoveries showed they were innocent. Those stories highlight the predomination of defense failures to uncover innocence and provide an adequate defense because of inadequate funding. I suspect there are many such stories within the defense community. I believe there are also stories that reveal successes that can also be helpful to the effort to support adequate funding for excellent defense efforts. The defense community should develop a strategy for gathering and presenting them.¹⁷⁶

A senior attorney at PDS recently recounted that a well-regarded member of the District of Columbia Superior Court bench remarked that the justice system in the District of Columbia had avoided the types of problems related to convicting the innocent that occurred in Chicago.¹⁷⁷ Perhaps this was true, but the PDS attorney suspected that the major difference between justice in the District and Chicago was only that Chicago's failures had become known to the public.¹⁷⁸ He believed the real difference was that Washington, D.C. had not had such notorious or widely publicized revelations,¹⁷⁹ not that serious failures had been avoided, although he hoped and suspected that Chicago's situation was worse.¹⁸⁰

The purpose of good defense work for all is to avoid convicting the innocent. Conveying that fact can be one part of the solution to the consistent underfunding of defender programs. A very intriguing account of the decline

175. See Mosteller, *supra* note 1.

176. Using the model of PDS and its large group of interested "alums," a concerted effort to solicit innocence stories cumulated from all present and former defenders should, as a whole, present an impressive set of examples. Compiled into a publication and arranged by types of cases, it could merit attention and would make more difficult the argument of detractors that defenders do not protect the innocent.

177. The conversation was with Ed Ungvarsky, then Director of the Trial Division at PDS. See Telephone Interview with Ed Ungvarsky, Director of the Trial Division, Public Defender Service, in Washington, D.C. (Sept. 16, 2008) (notes on file with author).

178. *Id.*

179. The absence of a highly publicized case of clearly wrongful conviction that had serious consequences may recently have changed with the release of Donald Eugene Gates through DNA evidence. Gates was wrongfully incarcerated for twenty-eight years based, *inter alia*, on bogus hair comparison evidence prepared by an FBI analyst. See Alexander, *supra* note 171. The case has wider implications since the analyst presented testimony in numerous other cases, which are now being further examined. *Id.*

180. See Telephone Interview with Ed Ungvarsky, *supra* note 177.

of the death penalty's imposition in America, *The Decline of the Death Penalty and the Discovery of Innocence*, emphasizes "both the dramatic rise in the innocence frame and the complex and self-reinforcing interactions that pushed it forward so dramatically."¹⁸¹ No single event or argument can transform the debate on defender funding to one that enjoys major public support, but it may be that only transformation of that debate will give this just cause a chance to succeed. *Gideon* is indeed a landmark decision of the U.S. Supreme Court, and its proclamation that justice does not depend on economic means resonates with the American character. Time has proven that *Gideon's* promise of defense counsel to indigent defendants is not easily fulfilled. Perhaps that promise can become more of an actual commitment if society comes to understand that adequately funded and supported defenders, who are critical to procedural justice, are similarly vital in reducing unjust convictions, and that they are the best mechanism to achieve that end for many innocent defendants who have no realistic hope of compelling objective proof of their innocence.

VI. CONCLUSION

Because concern for innocence has the power to motivate reform, it should be harnessed to support the adequate provision of indigent defense services for all those accused of crime. Even if not embraced by indigent defenders as a matter of choice, the significance of innocence to the justice debate cannot be ignored. Interesting and potentially damaging proposals have been advanced that advocate the intuitively attractive point that protecting the innocent should be of paramount importance in criminal justice reform. The dangers posed by these proposals to innocent defendants, those who they ostensibly seek to advantage, should be identified so that the harm can be avoided.

Incorporating innocence protection into the fabric of arguments for increased indigent defense funding admittedly has potential pitfalls, including that it may be turned against defending the great mass of defendants who are presumably guilty, and in particular those who appear likely guilty. However, the issue needs to be part of the strategy because, without it, the effort loses too much of the power of public concern for reform centered in the public's deeply felt need to avoid unjust convictions.

Several schools in my area of the country – Duke and the University of North Carolina, in particular – have teams that typically play good basketball. From time to time, one of the taunts to the opponent is roughly that "they can talk the talk, but can they walk the walk?" In their daily practice, defenders who provide excellent representation to their clients already "walk the walk" as innocence protectors. Innocence protection is part of their fundamental job description of providing an excellent defense, and such protection can only be

181. See BAUMGARTNER ET AL., *supra* note 6, at 221.

achieved if quality defense is provided without first demanding the often unavailable proof of that innocence. The average trial-level defender will have difficulty “talking the talk” and still surviving in a job that depends on the central link between attorney and client in the protection of an individual client’s interests, regardless of indicators that some particular clients are more likely guilty or innocent than others. However, at least the leadership of defender offices must learn to speak of innocence protection effectively, which should be possible because it is absolutely true and likely important to prospects of successful efforts to increase essential funding.

Adequately funded defenders serving all indigent clients provide the best protection for the innocent. But, in the end, the system will sometimes fail and unjustly convict some innocent defendants because juries comprised of ordinary humans cannot avoid error. However, the criminal justice system will have done what it is always capable of doing and what procedural justice can fairly demand. It will have provided the innocent defendant with a fair trial and therefore an opportunity for an accurate result – an acquittal. The criminal justice system cannot expect to always reach a correct result, but it can always guarantee a fair trial, which necessarily includes an adequately funded defense.