

WHY OUR JUSTICE SYSTEM CONVICTS INNOCENT PEOPLE, AND THE CHALLENGES FACED BY INNOCENCE PROJECTS TRYING TO EXONERATE THEM

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Despite the prominence and success of the over sixty innocence projects in the United States, there is almost no empirical literature discussing how these organizations operate, what resources or factors contribute to their success, and what challenges they must overcome. This article is a foundational step to fill this void. Following a brief introduction, Part I of the article surveys the reasons why innocent individuals get convicted, including: inaccuracy of eyewitnesses, perjured testimony, availability of DNA testing, accuracy of DNA testing and scientific evidence, prosecutorial misconduct, ineffective defense representation, ineffective capital representation, police misconduct: false confessions, and pretrial criminal procedure processes. Part II reviews the institutional development of innocence projects. Part III, based on unprecedented empirical research, analyzes the resources and factors that contribute to an innocence project's success to determine if a relationship exists between particular factors and an increase in exonerations when compared to other innocence projects. The factors discussed are: finances, staff and volunteers,

*The author, J.D., UCLA School of Law (2011), wishes to express a tremendous amount of gratitude and appreciation to the following individuals: Professor Scott L. Cumming, UCLA School of Law for his wisdom, guidance, and encouragement while overseeing this project, which would not have been possible without his expertise and willingness to participate; Amber Phillips for her assistance in operating the UCLA Chapter of the California Innocence Project and recommending that innocence projects clearly articulate the difference between factual and legal innocence to requestors; Sylvie Levine for her thoughtful insights into capital punishment; the anonymous reviewers; and the following individuals from the *New Criminal Law Review* who were instrumental in helping to improve the objectives and clarity of this article: Mark Penrose and Cher Paul.

New Criminal Law Review, Vol. 14, Number 3, pps 333–402. ISSN 1933-4192, electronic ISSN 1933-4206. © 2011 by the Regents of the University of California. All rights reserved. Please direct all requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website, <http://www.ucpressjournals.com/reprintInfo.asp>. DOI: 10.1525/nclr.2011.14.3.333.

time distribution per task, age of the innocence project, number of cases seriously reviewed, and state characteristics. The results found a “sweet spot” for each characteristic or resource evaluated, which demonstrated two conclusions: (1) a medium level of resources can achieve success equal to or greater than the success of projects with more resources; and (2) increasing the resources beyond the sweet spot did not necessarily correlate to greater success for the particular innocence project. This part also discusses the issues that innocence projects must overcome to free their clients. Part IV provides modest recommendations for improvements—even though the innocence projects have been exceedingly successful despite their lack of resources.

PREFACE

Nonprofits fill a void ignored by the private sector and rejected by the government.¹ The private sector ignores particular projects for lack of potential profit, whereas the government rejects particular projects for reasons of politics and access to resources. Fortunately, “[n]onprofits can be considered . . . the safety net for worthy projects rejected by the government” and ignored by the private sector.² However, nonprofit organizations, including federally funded legal aid organizations, “can respond to only a small fraction of collective societal needs for representation in areas such as civil rights, civil liberties, environmental justice, educational equity, and consumer health and safety.”³ The proliferation and success of nonprofit legal service organizations depends on the organizations’ access to the resources necessary to achieve the organizations’ goals.⁴

1. See James Douglas, *Why Charity: The Case for a Third Sector* 160 (1983) (this void was named the twin failure theory to recognize the failures of the private sector and government). See also Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. Rev. 501, 505 (1990) (discussing that the twin failure theory is incomplete because it fails to incorporate altruism).

2. Barbara K. Bucholtz, *Doing Well by Doing Good and Vice Versa: Self-Sustaining NGO/Nonprofit Organizations*, 17 J.L. & Pol’y 403, 407 (2009).

3. Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well By Doing Better*, 78 Fordham L.R. 103, 111–12 (2010).

4. See generally Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 Stan. L. Rev. 2027 (2008) (the number of organizations, staff size, and budgets has increased

There is much empirical literature analyzing “cause lawyering”—how nonprofit (and for-profit) legal service organizations advance particular causes.⁵ For example, studies have evaluated (1) the benefits and challenges faced by particular organizations engaged in cause lawyering by analyzing the type of organization,⁶ clients served,⁷ and funding sources⁸; and (2) how the law and litigation can be used as a catalyst for social change in the United States⁹ and abroad.¹⁰

among nonprofit, public interest organizations, but the overall quantity of resources is inadequate to properly address society's current needs).

5. See generally *Cause Lawyering: Political Commitments and Professional Responsibilities* (Austin Sarat & Stuart Scheingold eds., 1998); *Cause Lawyers and Social Movements* (Austin Sarat & Stuart Scheingold eds., 2006) (case studies of cause lawyers involvements with larger social movements instead of specific issues).

6. See Aaron Porter, Norris, Schmidt, Green, Harris, Higginbotham & Associates: The Sociological Import of Philadelphia Cause Lawyers, in *Cause Lawyering*, supra note 5, at 151–80 (discussing how lawyers at a Philadelphia firm promoted racial justice in the United States).

7. See John Kilwein, Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania, in *Cause Lawyering*, supra note 5, at 181–200 (discussing how poverty lawyers in Pittsburgh who focused on individual clients differ from those who focused on high-impact litigation).

8. See Louise Trubeck & M. Elizabeth Kransberger, Critical Lawyers: Social Justice and the Structures of Private Practice, in *Cause Lawyering*, supra note 5, at 201–26 (discussing the differences between publicly funded organizations in the sixties and seventies and the rise of fee-for-service organizations later in the century); Ronen Shamir & Sara Chinski, Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in the Israeli Courts, in *Cause Lawyering*, supra note 5, at 227–60 (discussing the differences between the private, fee-for-service lawyers and the Association for the Support and Defense of Bedouin Rights lawyers who represented the Bedouins in illegal housing matters before the Israeli courts).

9. See Michael McCann & Helena Silverstein, Rethinking Law's “Allurements”: A Relational Analysis of Social Movement Lawyers in the United States, in *Cause Lawyering*, supra note 5, at 261–92 (analyzing the pay equity and animal rights movements to challenge the critiques of cause lawyering); Austin Sarat, Between (the Presence of) Violence and (the Possibility of) Justice: Lawyering Against Capital Punishment, in *Cause Lawyering*, supra note 5, at 317–48 (evaluating the strategies of lawyers engaged in a losing battle by analyzing the capital punishment movement).

10. See Susan Sterett, Caring about Individual Cases: Immigration Lawyering in Britain, in *Cause Lawyering*, supra note 5, at 293–316 (arguing that litigation was an effective tool for immigration lawyers in Great Britain); Stephen Ellmann, Cause Lawyering in the Third World, in *Cause Lawyering*, supra note 5, at 349–430 (surveying twenty-two public interest law organizations from eighteen Third World countries to explain how cause lawyers differ

Further, much empirical literature discusses the challenges and opportunities faced by the cause lawyers,¹¹ including studies on particular issues,¹² ideologies,¹³ and professional settings or atmospheres.¹⁴

Finally, there is significant empirical literature on discrete characteristics that impact cause lawyers. Although funding is critical, organizations also face other discrete macro and micro challenges.¹⁵ Professors

among developing countries); Daniel Lev, *Lawyers' Causes in Indonesia and Malaysia*, in *Cause Lawyering*, supra note 5, at 431–52 (analyzing the similarities and differences between cause lawyers in Indonesia and Malaysia).

11. See generally *The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice* (Austin Sarat & Stuart Scheingold eds., 2005).

12. See Ronen Shamir, *Corporate Responsibility and the South African Drug Wars: Outline of a New Frontier for Cause Lawyers*, in *The Worlds Cause Lawyers Make*, id. at 37–62 (explaining how NGOs fought pharmaceutical companies for access to low-cost or generic AIDS drugs in South African courts by attempting to redefine corporate social responsibility as a legal duty); Laurent Willemez, *A Political-Professional Commitment?: French Workers' and Unions' Lawyers as Cause Lawyers*, in *The Worlds Cause Lawyers Make*, id. at 63–82 (discussing the challenges of cause lawyering in France by examining French labor lawyers).

13. See Ann Southworth, *Professional Identity and Political Commitment among Lawyers for Conservative Causes*, in *The Worlds Cause Lawyers Make*, supra note 11, at 83–111 (analyzing the challenges of ideological commitment and professional identity faced by lawyers working for conservative and libertarian causes in the United States); Laura Hatcher, *Economic Libertarians, Property, and Institutions: Linking Activism, Ideas, and Identities Among Property Rights Advocates*, in *The Worlds Cause Lawyers Make*, supra note 11, at 112–46 (discussing the conservative ideology behind the property rights movement).

14. See Lynn C. Jones, *Exploring the Sources of Cause and Career Correspondence among Cause Lawyers*, in *The Worlds Cause Lawyers Make*, supra note 11, at 203–38 (arguing that the conditions or professional settings under which cause lawyers work influences their professional and activist identities); Corey S. Shdaimah, *Dilemmas of "Progressive" Lawyering: Empowerment and Hierarchy*, in *The Worlds Cause Lawyers Make*, supra note 11, at 239–73 (analyzing how the relationships between lawyers and their clients impact strategic litigation choices); Douglas Thomson, *Negotiating Cause Lawyering Potential in the Early Years of Corporate Practice*, in *The Worlds Cause Lawyers Make*, supra note 11, at 274–306 (comparing the professional satisfaction of "public interest law persisters" who accepted postgraduate positions in corporate firms with those who practiced public interest law right away).

15. See Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. Rev.* 1, 130 (2004) (federal legal services programs are the most vulnerable to funding restrictions); Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 *Loy. L.A. L. Rev.* 869, 908 (2009) (nonprofits are increasingly relying on multiple revenue sources).

Cummings and Rhode cite numerous examples of macro and micro challenges, explaining that civil rights and women's rights groups face a type of "cultural complacency" from people who believe that these issues have already been solved, technology groups must overcome framing problems to maintain the public's interest in their issue, and groups representing criminals or undocumented workers are easy for the public to "demonize."¹⁶ Further, they explain that virtually all leading public interest organizations report being understaffed and overworked, but only a quarter of the organizations believe they could benefit from an increase in volunteers.¹⁷

The advent of innocence projects has been a crucial development within the capital punishment field. In 1992, Barry Scheck and Peter Neufeld founded the nonprofit Innocence Project at Yeshiva University, Cardozo School of Law to help free innocent people who have been wrongly convicted in the United States.¹⁸ Currently, approximately sixty innocence projects are operating in the United States, but most focus on specific geographic jurisdictions. Like other nonprofit organizations, innocence projects severely lack the necessary resources to help individuals who have been failed by our criminal justice system. Despite the prominence and success of innocence projects, there is almost no empirical literature discussing how these organizations operate, what resources or factors contribute to their success, and what challenges they must overcome. This article is a foundational step to fill this void.

Following a brief introduction, Part I of this article will survey the reasons why innocent individuals get convicted. Part II will review the institutional development of innocence projects. Part III, based on unprecedented empirical research, will analyze the resources and factors that contribute to the successes of innocence projects and the issues that innocence projects must overcome to free their clients. Part IV will provide some modest recommendations for improvements—even though the innocence projects have been exceedingly successful despite their lack of resources.

16. Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 *Fordham Urb. L.J.* 603, 650 (2009).

17. *Id.* at 651.

18. Innocence Project, *About, The Innocence Project—About Us*, <http://www.innocenceproject.org/about/>.

INTRODUCTION

“It is better that ten guilty persons escape, than that one innocent suffer.”¹⁹ Professional estimates suggest that 90–99 percent of defendants are guilty.²⁰ In life, a score of 90–99 percent is usually considered remarkable. However, if that means at least 23,000 innocent people are wrongly convicted, the results are strikingly inadequate.²¹ “No one knows how many people who plead guilty or who are convicted by a jury are factually innocent. But the number of exonerations in the comparatively few old cases in which DNA testing can be conducted suggests that the numbers are meaningful.”²² At the time of this writing, there have been 272 DNA postconviction exonerations in the United States²³ and hundreds of exonerations based on non-DNA evidence.²⁴ Furthermore, “because innocence is so very difficult to prove postconviction without

19. Larry Cunningham, *The Innocent Prisoner and the Appellate Prosecutor: Some Thoughts on Post-Conviction Prosecutorial Ethics after Dretke v. Haley*, 24 *Crim. Just. Ethics* 12, 15 (2005), citing William Blackstone, *Commentaries on the Laws of England*, bk. IV, ch. 27, 420 (Beacon Press, 1962) (1769).

20. Sheila Martin Berry, *Bad Lawyering—How Defense Attorneys Help to Convict the Innocent*, 30 *N. Ky. L. Rev.* 487, 489 (2003).

21. U.S. Department of Justice, Office of Justice Programs, Bureau of Prison Statistics, <http://www.ojp.usdoj.gov/bjs/prisons.htm> (as of June 30, 2008, “2,310,984 prisoners were held in federal or state prisons or in local jails”). See also Paul G. Cassel, *Protecting the Innocent from False Confessions and Lost Confession—And from Miranda*, 88 *J. Crim. L. & Criminology* 497, 518 (1998) (estimates suggest that 330 innocent people are convicted in the United States each year).

22. Bruce A. Green & Ellen Yaroshfsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 *Ohio St. J. Crim. L.* 467, 471–72 (2008–2009) (finding that from 1989 through 2003, there were 340 exonerations in the United States and detailing the ways the defendants were exonerated (quoting Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 *J. Crim. L. & Criminology* 523 (2005)); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 *J. Crim. L. & Criminology* 761 (2007) (analyzing data from convictions in the 1980s and finding an error rate for capital convictions of about 3.3 percent during that time period).

23. Innocence Project, *News & Resources: Fact Sheets: Facts on Post-Conviction DNA Exonerations*, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php.

24. Gross et al., *supra* note 22, at 529 (finding that from 1989 through 2003, there were 340 exonerations in the United States and detailing the ways the defendants were exonerated).

DNA, these known exonerations almost surely reflect only the tip of a very large iceberg.”²⁵

I. WHY INNOCENT PEOPLE ARE WRONGLY CONVICTED

After accepting that innocent people are wrongly convicted, the next logical question is why this happens. After all, technological advances, like DNA testing, have greatly improved our justice system. Whereas DNA testing has done wonders to free innocent people,²⁶ it can also be one of many reasons why innocent people are wrongly convicted (see *infra* Part I.C–D). Including DNA issues, innocent individuals have been wrongly convicted based on at least one of the following occurrences: inaccuracy of eyewitnesses, perjured testimony, prosecutorial misconduct, inadequate defense representation, police misconduct, and the pretrial criminal procedural process.

A conviction of an innocent defendant may only require one of these explanations (discussed below), but often wrongfully convicted individuals are subjected to multiple violations.²⁷ For example, in 1982, Marvin

25. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 *Wis. L. Rev.* 291 (2006), citing Gross et al., *supra* note 22, at 529. See also Sandra Guerra Thompson, *What Price Is Justice—The Importance of Costs to Eyewitness Identification Reform*, 41 *Tex. Tech. L. Rev.* 33, 35 (2008) (the numbers of exonerated individuals by innocence projects “almost certainly underestimate the true number of wrongful convictions” (quoting Sandra Guerra Thompson, *Beyond a Reasonable Doubt?: Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 *U.C. Davis L. Rev.* 1487, 1490 n.7 (2008))).

26. See Innocence Project, *About The Innocence Project—About Us*, <http://innocenceproject.org/about/> (Barry C. Scheck and Peter Neuberg founded the Innocence Project in 1992 to assist wrongly convicted individuals who have exhausted “all legal avenues for relief” and have been tremendously successful in using DNA evidence to secure exonerations).

27. See generally Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011) (evaluating the causes of wrongful conviction in the first 250 people to be exonerated by DNA testing in the United States). See also Findley & Scott, *supra* note 25, at 292 (citing Dianne L. Martin, *Lessons About Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 *UMKC L. Rev.* 847, 848 (2002) (explaining that tunnel vision is a theme running through almost every postconviction exoneration because as a “compendium of common

Anderson was wrongfully convicted of robbery, forcible sodomy, abduction, and two counts of rape of a twenty-four-year-old woman in Virginia.²⁸ The police focused on Anderson because he was the only man they knew who matched the victim's description: a black rapist who told her that he had a white girlfriend (see *infra* Part I.A).²⁹ The victim was asked to select the rapist's picture from a photo spread where Anderson's picture was the only color photograph and the only photograph with a social security number on it (see *infra* Part I.A).³⁰ Then, the victim was asked to select the rapist from a live lineup, and Anderson was the only person included in both the pictures and the lineup (see *infra* Part I.A).³¹ The Virginia Innocence Commission explained that "once the victim identified Anderson, . . . the police did not pursue additional leads."³² At trial, Anderson was saddled with ineffective assistance of counsel in that his attorney had a conflict of interest: he previously represented the actual rapist, knew there was evidence against the actual rapist, suspected the actual rapist, but failed to disclose any of this to Anderson (see *infra* Part I.F).³³ Furthermore, the attorney failed to call witnesses despite pleas from Anderson's mother and failed to request fingerprinting of the evidence in police custody (see *infra* Part I.C–D).³⁴ At Anderson's habeas hearing, the actual rapist admitted to the crime and provided details of the incident under oath in court; however the judge did not find that testimony truthful (see *infra* Part I.G).³⁵ In 2002, Anderson was finally exonerated using DNA evidence (see *infra* Part I.C–D).³⁶

heuristics and logical fallacies," tunnel vision affects all humans and leads individuals "in the criminal justice system to 'focus on a suspect, select and filter the evidence that will build a case for conviction, while ignoring or suppressing evidence that points away from guilt'" in a variety of different ways).

28. *Id.* at 296.

29. *Id.*

30. *Id.*

31. *Id.* at 296–97.

32. *Id.* at 298.

33. *Id.* at 299.

34. *Id.*

35. *Id.* at 298–99.

36. *Id.* at 299. See also *id.* at 299–304 (discussing the wrongful rape conviction of Steven Avery, despite his sixteen alibi witnesses, caused by poor police practices including a prejudicial line-up and photo spread and failing to investigate a known sex offender who was under regular police supervision despite pleas from the district attorney. Avery was subsequently exonerated by DNA evidence; the DNA matched the known sex offender).

A. Inaccuracy of Eyewitnesses

The most common cause of wrongful convictions is erroneous eyewitness identification testimony.³⁷ “Eyewitness misidentifications contributed to the initial convictions in over 80 percent of documented DNA exonerations.”³⁸ Inaccurate eyewitness identifications are often caused by “the imperfect manner in which human beings process visual information at the time of an event, and the design of most police identification procedures, which can serve to reinforce, or exacerbate, any potential flaws in the original observation.”³⁹ These inaccuracies often take the form of live lineups, photo spreads, or show-ups (where a suspect is identified at the crime scene). A consortium—including the U.S. Department of Justice’s National Institute on Justice, the American Bar Association’s Criminal Justice Section, the Justice Project, and Cardozo School of Law Innocence Project—has proposed five reforms to correct the most serious eyewitnesses errors.⁴⁰

- Administering blind or double-blind⁴¹ lineups and photo spreads to eliminate any possibility of suggestive practices or the interpretation of

37. Sandra Guerra Thompson, *Why Do We Convict as Many Innocent People as We Do*, 41 *Tex. Tech. L. Rev.* 33, 40 (2008–2009). See also Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 *Vill. L. Rev.* 337, 358 (2006) (“Virtually all of the pertinent studies since 1932 have pinpointed eyewitness misidentification as the single most pervasive factor in the conviction of the innocent.”); see also Barry C. Scheck, *Barry Scheck Lectures on Wrongful Conviction*, 54 *Drake L. Rev.* 597, 604 (2005–2006) (“mistaken eyewitness identification is the single greatest cause of conviction of the innocent, even greater than false confessions or admissions”).

38. Medwed, *supra* note 37, at 339 (quoting Barry C. Scheck, Peter Neufeld, & Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make It Right* 361 (NAL Trade 2000)). See also *id.* at 360 (“one empirical study of mock trials revealed that positive eyewitness testimony was more likely to produce a conviction than positive testimony by experts about fingerprint, polygraph or handwriting evidence”). See also Innocence Project, *News and Information: Fact Sheets, Facts on Post-Conviction DNA Exonerations*, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (“eyewitness misidentifications contributed to over 75% of the more than 220 wrongful convictions in the United States overturned by post-conviction DNA evidence”).

39. Medwed, *supra* note 37, at 358.

40. See generally Gary L. Wells, *Eyewitness Identification: Systematic Reforms*, 2001 *Wis. L. Rev.* 615 (2006).

41. Blind testing is where the administering police officer is unaware of the suspect’s identity. Double-blind testing includes blind testing, but also informs the eyewitness that the police do not know anything about the suspect’s identity.

clues to the eyewitness.⁴² This will also eliminate the possibility for police comments like “Good job picking person #1, we thought it was him too,” which bolsters the witnesses confidence during testimony at trial.⁴³

- Preserving photo spreads or audio/video recordings of live lineups, so any suggestive behavior can be evaluated by a jury.⁴⁴
- Presenting lineup suspects one at a time (the sequential method)⁴⁵ rather than all together. This precludes relative judgment by the eyewitness, selecting by a process of comparison and elimination instead of solely based on memory.⁴⁶ Although the sequential method is effective when the culprit is in the lineup, eyewitnesses seem to have “great difficulty not selecting someone when the culprit is not in the lineup,” which allows for mistaken identification.⁴⁷

42. Thompson, *supra* note 37, at 43–44. See also generally Elizabeth F. Loftus and John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 *J. Verbal Learning & Verbal Behav.* 585 (1974) (Finding that questions asked after an event can influence an individual’s memory of the event. The authors showed participants a car collision film and asked, “About how fast were the cars going when they smashed into each other?” The use of “smashed” elicited higher estimates of speed than “collided,” “bumped,” “contacted,” or “hit.” In addition, participants who were told the cars “smashed” were more likely to believe that they saw broken glass, even though no broken glass was shown in the film.)

43. Scheck, *supra* note 37, at 607.

44. Thompson, *supra* note 37, at 48. See also Innocence Project, *News & Resources: Fact Sheets: False Confessions & Recording of Custodial Interrogations*, http://www.innocenceproject.org/Content/False_Confessions__Recording_Of_Custodial_Interrogations.php (“To date, Illinois, Maine, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Oregon, Wisconsin, and the District of Columbia have enacted legislation requiring the recording of custodial interrogations. State supreme courts have taken action in Alaska, Iowa, Massachusetts, Minnesota, New Hampshire, and New Jersey. Approximately 500 jurisdictions have voluntarily adopted recording policies.”).

45. Innocence Project, *News & Resources: Fact Sheets: Eyewitness Identification Reform*, http://www.innocenceproject.org/Content/Eyewitness_Identification_Reform.php (only the following jurisdictions have implemented a sequential and double-blind process as standard procedure: New Jersey, North Carolina, Boston (Mass.), Northampton (Mass.), Madison (Wisc.), Winston-Salem (N.C.), Hennepin County (Minn. Minneapolis), Ramsey County (Minn. St. Paul), Santa Clara County (Cal.), Virginia Beach (Vir.)).

46. Thompson, *supra* note 37, at 45. See also Medwed, *supra* note 37, at 359 (“[W]itnesses may undertake a ‘relative judgment’ approach in which they compare and contrast the suspects to one another, choosing the person who most closely resembles the perpetrator as opposed to making an absolute judgment about whether the person they saw at the crime scene is actually present.”).

47. Thompson, *supra* note 37, at 45.

- Increasing the number of individuals (foils) in the lineup.⁴⁸ Research indicates that six people in a line will result in a false positive 10 percent of the time; and the greater number of people in the lineup, the lower the chance of a false positive.⁴⁹
- Minimizing the amount of time between when the witness reports the crime and when identification of the suspect takes place.⁵⁰

For example, James Lee Woodward served twenty-seven years in a Texas prison for a rape and murder based on two (inaccurate) eyewitnesses. One witness recanted, and the accuracy of the other was called into question. At Woodward's exoneration hearing, District Court Judge Mark Stoltz sympathized, "No words can express what a tragic story yours is."⁵¹ Additionally, Walter D. Smith was convicted in 1986 of committing three rapes based on three (inaccurate) eyewitnesses.⁵² Smith maintained his innocence and began requesting DNA testing in 1987, which eventually affirmed his innocence in 1996.⁵³

There are likely hundreds more "equally tragic cases" and "thousands more that will never come to light."⁵⁴

B. Perjured Testimony

The prevalence of perjured testimony by witnesses, like jailhouse informants, who know they are not providing accurate testimony because of the "minimal accountability for both the informant and the government, and enormous incentives for the witness to falsify testimony" is related to eyewitness inaccuracy (where the witness is mistaken, but honestly believes he is accurate).⁵⁵ "[A]t least one sort of perjury is reported' in over 40 percent of

48. *Id.* at 49.

49. *Id.* at 45.

50. *Id.* at 52.

51. *Id.* at 34.

52. Innocence Project, Know the Cases: Browse Profiles: Walter D. Smith, <http://www.innocenceproject.org/Content/263.php>.

53. *Id.*

54. Thompson, *What Price Is Justice?*, *supra* note 25, at 34 (quoting Thompson, *Beyond a Reasonable Doubt?*, *supra* note 25, at 1490 n.7).

55. Medwed, *supra* note 37, at 369.

all exonerations,”⁵⁶ and informant perjury is the leading cause of wrongful convictions in capital cases.⁵⁷

For example, Kin-Jin “David” Wong was indicted for a 1986 murder within a maximum security prison largely based on the testimony of corrections officer, Richard LaPierre, who saw the murder from his 80-foot tower above the prison yard, approximately 120 to 130 yards away from the crime scene,⁵⁸ and testified that it was “hard to tell” the attacker’s race.⁵⁹ LaPierre’s story was corroborated by Peter Dellfava, who explained that he was 15 feet away⁶⁰ when the incident took place, and identified Wong because he had seen him many times and spoken with him frequently.⁶¹ At the 1987 trial, Dellfava, who had previously attempted to escape prison, was out on parole after his first parole hearing, after the District Attorney wrote a letter to the parole board on Dellfava’s behalf recommending his release.⁶² The jury placed heavy emphasis on the testimony from LaPierre and Dellfava, convicted Wong of second-degree murder, and sentenced him to 25 years to life.⁶³ In December 2000, Dellfava recanted his testimony and swore in an affidavit that “the first time I ever saw David Wong in person was in court.”⁶⁴ When a correctional officer had approached Dellfava and suggested that “it was an Oriental guy, wasn’t it?,” Dellfava took that opportunity to improve his situation by agreeing to help and requesting transfer to a facility closer to his family and a letter to the parole board.⁶⁵

56. *Id.* (quoting Gross et al., *supra* note 22, at 544).

57. Center on Wrongful Convictions, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row 3* (2004–2005), <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf> (fifty-one death penalty exonerations have been based wholly or partly on the testimony of jailhouse witnesses). See also generally Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* (NYU Press 2009) (discussing how snitching negatively impacts the American criminal justice system by making the justice system more secretive and less fair).

58. Medwed, *supra* note 37, at 340–41.

59. *Id.* at 342.

60. *Id.*

61. *Id.* at 343.

62. *Id.*

63. *Id.* at 344–45.

64. *Id.* at 347.

65. *Id.*

Despite Dellfava's desire to "do the right thing," recantations are typically viewed with enormous skepticism by the courts and rarely supply the basis for overturning a conviction collaterally.⁶⁶ Affidavits from six cross-racial prison inmates, the victim's wife, and the private investigator who secured Dellfava recantment swore that Wong was not responsible. The affidavits were not enough for Judge Lawliss, who held that Wong's testimony was "preposterous" and "unreliable," while claiming that the testimony from "Mr. LaPierre was anything other than a disinterested, unbiased, and credible witness."⁶⁷ In October 2004, the New York Appellate Division, Third Department overruled Judge Lawliss and remanded the case back to him.⁶⁸ He recused himself, and the new judge dismissed the charges in December 2004.⁶⁹

C. Availability of DNA Testing

Since the first DNA exoneration in 1989, there have been a total of 272 exonerations in the United States as a result of DNA testing⁷⁰ as of this writing.⁷¹ Yet in *District Attorney's Office v. Osborne*, the U.S. Supreme Court ruled that there is no Constitutional right to postconviction DNA testing.⁷² Currently, forty-eight states have some type of law permitting postconviction DNA testing, though they vary in scope and substance.⁷³

66. Id.

67. Id. at 353–54.

68. Id. at 355.

69. Id. at 356.

70. See also Scheck, *supra* note 37, at 601; Innocence Project, News & Resources: Fact Sheets: Facts on Post-Conviction DNA Exonerations, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (since 1989, there have been tens of thousands of cases where prime suspects were identified and pursued—until DNA testing (prior to conviction) proved that they were wrongly accused).

71. Id.

72. *District Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2312 (2009) (reversing the 9th Circuit decision to grant a constitutional right to DNA testing because it would improperly "take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause").

73. Innocence Project, News & Resources: Fact Sheets: Access to Post-Conviction DNA Testing, http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (the two states without postconviction DNA statutes are Massachusetts and Oklahoma).

Thus, convicted individuals are subject to the state laws where they are incarcerated⁷⁴—assuming DNA testing is possible, since DNA evidence exists only for a small number of cases and is “preserved and available for postconviction testing in an even smaller proportion of cases.”⁷⁵

For example, in 1986, Bruce Godschalk was convicted of raping two women living in the same housing complex when his sister informed police that her brother looked like a sketch of the suspect she had seen.⁷⁶ One victim selected a picture of Godschalk from a photo spread.⁷⁷ The police claimed that Godschalk provided details of the crime, confessed, and matched his blood type to the man who committed the rapes through semen.⁷⁸ In 1995, Pennsylvania case law began to establish a qualified right to postconviction DNA testing,⁷⁹ and Godschalk filed a petition seeking DNA testing, but was denied based on the overwhelming evidence against him.⁸⁰ Eventually, the parties agreed to divide the DNA evidence and perform the testing separately at their respective laboratories, which resulted in a categorical exclusion of Godschalk, who was freed fifteen years into his twenty-year sentence.⁸¹

But even in states with DNA testing, sometimes justice is too slow for any relief. For example, in 2000, Frank Lee Smith died of cancer on death row. In 1985, he was convicted of the rape and murder of an eight-year-old girl based on a single eyewitness.⁸² In 1989, the witness recanted, explained that the police told her that “Smith was dangerous,” and named Eddie Lee Mosely as the killer.⁸³ Subsequent evidence corroborated her story, and ten

74. See also Scheck, *supra* note 37, at 601 (in 75 percent of the cases his Innocence Project deems worthy of testing, the DNA evidence eventually is reported lost or destroyed, but 40 percent of the cases with available DNA ultimately exclude his client).

75. Findley & Scott, *supra* note 25, at 291 (citing Gross et al., *supra* note 22, at 523–24, 529).

76. Seth F. Kreimer & David Rudovsky, *Double Helix, Double Blind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547 (2002–2003).

77. *Id.*

78. *Id.* at 548.

79. See *Commonwealth v. Reese*, 663 A.2d 206, 210 (Pa. Super. Ct. 1995); *Commonwealth v. Brison*, 618 A.2d 420, 425 (Pa. Super. Ct. 1992).

80. Kreimer & Rudovsky, *supra* note 76, at 549; see *Commonwealth v. Godschalk*, 679 A.2d 1295, 1296 (Pa. Super. Ct. 1996); *Godschalk v. Montgomery County Dist. Attorney’s Office*, 177 F. Supp. 2d 366, 368–70 (E.D. Pa. 2001).

81. Kreimer & Rudovsky, *supra* note 76, at 550–51.

82. *Id.* at 551.

83. *Id.*

months after Smith's death, DNA testing cleared him of any involvement with the crime.⁸⁴

Finally, obtaining DNA testing is often a matter of prioritizing limited resources and using discretion. Thus, prosecutors triage DNA requests in postconviction situations to determine if the expense for DNA testing is worthwhile. If the case's additional evidence is considered overwhelming—like if the individual confessed or if the attacker was someone the victim knew well—a prosecutor is less likely to consent to a postconviction DNA test. For example, in 1989, Chris Ochoa and Richard Danziger, Pizza Hut employees, were accused of raping, robbing, and murdering the manager of a different Pizza Hut location in Texas.⁸⁵ A few days later, both were watching the police investigate the crime scene, and when an employee told the detective that he had suspicions about the two men, the detective sought them out.⁸⁶ After hours of interrogation, the men agreed to a guilty plea to avoid the death penalty.⁸⁷ Twelve years later, a man in the Texas prison system named Marino confessed to the crime to clear his conscious and sent a letter to the Austin police explaining where to find evidence.⁸⁸ After two more years, when nothing had been done, Marino wrote to then Governor Bush explaining that two innocent men should not be executed.⁸⁹ Finally, with the help of the Wisconsin Innocence Project, the men were able to obtain DNA testing; Ochoa was freed in the fall of 2000 and Danziger in the spring of 2001.⁹⁰ Peter Neuberg, founder of the Innocence Project in New York, explained that “if Chris Ochoa came to our Innocence Project and requested to have DNA testing, we probably would have turned him down. . . . After all, the man confessed, gave a full elocution, pled guilty, and testified against his cohort in a separate trial under oath. . . . What is extraordinary about this case is that it blew the roof off many assumptions and presumptions about which cases warrant DNA testing and which ones do not.”⁹¹

84. *Id.* at 552. See also Sydney Freedberg, *DNA Clears Inmate Too Late*, *St. Petersburg Times*, Dec. 15, 2000, at A1.

85. Peter J. Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 *New Eng. L. Rev.* 639 (2000–2001).

86. *Id.*

87. *Id.* at 639–40.

88. *Id.* at 640.

89. *Id.*

90. *Id.*

91. *Id.*

D. Accuracy of DNA Testing and Scientific Evidence

Requests for pretrial DNA tests by the prosecution are sent to the local lab. However, as Craig Cooley thoroughly explains, there are critical problems of deficiency amongst the crime labs performing the DNA testing in this country.⁹² This can largely be explained by (1) a lack of training of forensic examiners; (2) a lack of science in forensic “science” (i.e., certain techniques such as fingerprinting⁹³ are not based on legitimate scientific principles⁹⁴); (3) a lack of preventative measures in forensic science that account for and minimize observer effects (i.e., subconscious effects on the examiner); (4) a lack of clear standards to counter the highly subjective nature of forensic examinations that renders them very susceptible to an assortment of errors, particularly those caused by subconscious observer effects; (5) a lack of funding for the forensic science community, which has led to highly questionable crime lab practices, unfit examiners, and miscarriages of justice, in that relatively low salaries lead to smaller applicant pools, higher turnover rates, and understaffing as many forensic scientists leave public crime labs for private labs.⁹⁵

Of course, accuracy is moot if DNA evidence does not exist; not only are stored samples being destroyed (another result of funding shortages), but DNA evidence was collected in only 5–10 percent of serious felony convictions.⁹⁶ Additionally, as technology continues to improve, methods of analyzing scientific evidence that were formally acceptable are now considered inconclusive, inaccurate, or downright lacking in scientific basis.

92. See Craig M. Cooley, *Forensic Science and Capital Punishment Reform: An Intellectually Honest Assessment*, 17 *Geo. Mason U. Civ. Rts. L.J.* 299 (2006–2007).

93. See also Scheck, *supra* note 37, at 617 (for over a century people have believed that fingerprinting was a unique identifier because the prints are formed by friction generated by an unborn child in the amniotic sac; however, incomplete prints are used as forensic evidence, so the question becomes, how many points of dissimilarity or identity are needed to declare the print a match?).

94. See also Simon A. Cole, *More than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 *Crim. L. & Criminology* 985, 985–88 (2004–2005) (despite fingerprint misidentifications in highly publicized cases like Brandon Mayfield, who was wrongly held for two weeks as a material witness in the Madrid terrorist bombing, and Stephan Cowans, who was wrongly imprisoned for over six years for shooting and wounding a police officer, the myth of finger print infallibility continues to exist in the public and by latent print examiners).

95. Cooley, *supra* note 92, at 304.

96. Scheck, *supra* note 37, at 603.

For example, Cameron Todd Willingham was executed on February 17, 2004, for intentionally setting a fire that killed his three young children.⁹⁷ Fire investigators indicated that the deep charring at the base of the walls and patterns of soot in the house suggested arson rather than accident.⁹⁸ Weeks before the execution, the arson “evidence” was refuted by Gerald Hurst, a widely respected chemist and arson investigator, who found no evidence of arson.⁹⁹ The state of Texas Special Commission to investigate errors and misconduct hired another well-known scientist named Craig Beyler, who also found “absolutely no scientific basis for determining that the fire was arson,” and concluded that the fire marshal who testified against Willingham “seems to be wholly without any realistic understanding of fires” and the testimony lacked “rational reasoning,” which made the testimony more like “mystics or psychics” instead of rigorous scientific analysis.¹⁰⁰

E. Prosecutorial Misconduct

“As prosecutors, we have an ethical duty to seek the truth and ensure that justice is done in every case. . . . We don’t want an innocent person behind bars any more than defense attorneys do. If a mistake has been made, DNA technology can help to establish the truth.”¹⁰¹ Although there is very little law to guide prosecutors in postconviction situations, as the American Bar Association’s Standards for Criminal Procedures addresses prosecutorial conduct only through sentencing,¹⁰² in every postconviction innocence case, prosecutorial cooperation would greatly benefit the convicted who seeks relief for actual or legal innocence as “prosecutors have a duty to seek justice that includes a duty to seek a fair result.”¹⁰³ Not

97. David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, *New Yorker*, Sept. 7, 2009.

98. Bob Herbert, *Innocent But Dead*, *New York Times*, Sept. 1, 2009, at A29.

99. *Id.*

100. *Id.*

101. Kreimer & Rudovsky, *supra* note 76, at 558 (quoting Paul Gustafson, *DNA Tests May Help Inmates Prove Innocence: Ramsey County Is Reviewing Old Convictions to See if New Tests Might Change Outcomes*, *Minn. Star Tribune*, Mar. 2, 2001, at 1B (quoting prosecutor Susan Gaertner)).

102. Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 *Vand. L. Rev.* 171, 174 (2005).

103. Cunningham, *supra* note 19, at 15.

surprisingly, prosecutors may be less than willing to assist in postconviction reviews of innocence for a variety of reasons, not least of which is whether the claim has merit.¹⁰⁴ As previously stated, 90–99 percent of convictions are correct.¹⁰⁵

However, a variety of personal, institutional, and political pressures upon prosecutors can promote misconduct.¹⁰⁶ Personally, the current prosecutor may be the same individual who “successfully” convicted the defendant initially. We cannot expect the prosecutors to instantly change their minds, as this would require some degree of admission of fault pertaining to the original prosecution,¹⁰⁷ and no one is particularly good at admitting mistakes.¹⁰⁸

The institutional culture of prosecutor’s offices, where the “professional incentives to obtain and maintain convictions” and the emphasis on conviction rates as a barometer for professional advancement, will eventually conflict with prosecutors’ role as “ministers of justice.”¹⁰⁹ Resistance to post-conviction claims is consistent with a desire to maintain high conviction rates and the perceived integrity of the attorney, office, and judicial system.¹¹⁰

104. See Ronald F. Wright, *Dead Wrong*, 2008 Utah L. Rev. 89, 93 (2008) (Dallas County had thirteen DNA exonerations from 2001 to 2007, more than any other county in the country, but within weeks of becoming the district attorney in 2007, Craig Watkins formed a partnership with the Texas Innocence Project to attempt to correct the wrongs perpetrated by his predecessor, Bill Hill, whose office was known for explicitly relying on racial stereotypes when selecting jurors and who was recently overturned by the U.S. Supreme Court in two cases: 545 U.S. 231, 234–37 and 537 U.S. 322, 326–31).

105. Berry, *supra* note 20, at 489.

106. See also Peter Joy, *Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, Wis. L. Rev. 399, 400 (2006) (arguing that “prosecutorial misconduct is largely the result of three institutional conditions: vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct, which create perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct”).

107. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 149 n.107 (2004) (because prosecutors have a high turnover rate, it is possible that the original trial attorney is no longer at the same office, so although the new attorney assigned the case may not have the same issue of admitting guilt, he has a different burden of familiarizing himself with the case).

108. *Id.* at 138.

109. *Id.* at 134–35.

110. *Id.* at 136.

Some offices have been known to post prosecutor's "batting averages" of conviction rates, putting green and red stickers next to prosecutors' names based on "wins and losses."¹¹¹

Further institutional pressure results from prosecutors having to wade through an overwhelming number of frivolous postconviction motions¹¹² from former defendants claiming wrongful conviction to find the needle in the haystack.¹¹³ Prosecutors have scarce resources, and reviewing frivolous postconviction claims wastes their limited resources and detracts from their regular caseload.¹¹⁴

A final institutional pressure arises when there is disagreement between the trial prosecutor and his superiors about the guilt of a defendant—especially postconviction. For example, in 1990, David Lemus and Olmedo Hidalgo were convicted for murdering a bouncer outside the Palladium nightclub in New York City. Years later, a federal informant admitted that he and another gang member were responsible for the murder.¹¹⁵ Eventually, the Manhattan District Attorney's office appointed prosecutor Daniel Bibb to investigate. After extensive investigations, "[h]e believed that the two imprisoned men were not guilty, and that their convictions should be dropped."¹¹⁶ Unfortunately, "top officials told him . . . to go into a court hearing and defend the case anyway."¹¹⁷ Eventually, Bibb was successful in convincing his supervisors to overturn the conviction of one man, but the district attorney's office insisted on retrying the second man, which resulted in an acquittal in 2007.¹¹⁸

Political pressures also provide a disincentive for prosecutors to evaluate postconviction claims as almost every nonfederal chief prosecutor is elected by the public, and district attorneys often serve at the will of their supervising

111. *Id.* at 137.

112. *Id.* at 148 (Jennifer Joyce, St. Louis circuit attorney, believes that defendants should pay the costs of DNA requests that fail to exonerate or add time to sentences because defendants should not be permitted to "play the lottery"; however, simply failing to exonerate is too high a standard in that the DNA test may not be conclusive and, even if it is conclusive, exoneration may be withheld for other reasons).

113. *Id.*

114. *Id.* at 149.

115. Green & Yaroshfsky, *supra* note 22, at 467–68.

116. Benjamin Weiser, *Doubting Case, City Prosecutor Aided Defense*, *New York Times*, June 23, 2008, at A1.

117. *Id.*

118. Green & Yaroshfsky, *supra* note 22, at 468.

chief prosecutor.¹¹⁹ Elections for prosecutor are often held during the same election as other more prominent political battles, so prosecutors may turn to past prosecutorial conquests, or “body counts,”¹²⁰ to promote themselves as being tough on crime.¹²¹ Further, an exoneration calls into question the qualifications of the prosecutor¹²² as voters may wonder how many other innocent people have been convicted and may focus on one or more unsolved cases within the community with the perpetrator still at large.¹²³ Finally, states with compensation statutes for exonerated individuals may indirectly impact the prosecutor’s budget as fewer funds may be directed to the prosecutors’ offices in the future.¹²⁴

A specific type of political pressure arises from the powers of the media. Since prosecutorial elections may get overshadowed by the election campaigns of other elected offices (as mentioned above), the media plays a significant role in shaping public opinion about a particular candidate. This is largely because the leadership among the approximately 2,344 separate prosecutor offices in the United States is radically fragmented and localized.¹²⁵ For example, Jeffrey Blake was convicted of murder in New York based on the testimony of Dana Garner, the single eyewitness. From the outset, the prosecutors failed to disclose evidence to the defense team questioning Garner’s credibility. After a thorough review of the evidence by the Legal Aid Society, the witness recanted, but the district attorney’s office was still hesitant to set aside the conviction until a series of scathing articles was written by a *New York Times* columnist, Bob Herbert.¹²⁶

119. Medwed, *supra* note 107, at 150–51.

120. Body counts are a record of capital convictions, and publicizing this record of past “victories” is viewed as quite controversial.

121. Medwed, *supra* note 107, at 155.

122. See Michael Pearlstein, *Jordan Drops Charges in 1975 Murder: Two Men Freed on Eve of Retrial*, *New Orleans Times-Picayune*, June 24, 2003 (Earl Truvia and Greg Bright were convicted of murder on Halloween in 1975 by testimony of an eyewitness who was battling drug addiction and mental illness; prosecutors knew this but did not share it with the defense. The conviction was overturned when a new prosecutor was elected after the former prosecutor, who uniformly opposed postconviction motions, retired.).

123. Medwed, *supra* note 107, at 156.

124. *Id.* at 157.

125. Wright, *supra* note 104, at 95.

126. See Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 *Fordham Urb. L. J.* 607, 637–42 (1999).

Dretke v. Haley, which ultimately was decided by the U.S. Supreme Court, (54 U.S. 386 (2004)) is another example of prosecutorial misconduct. Although this case concerns a matter of legal innocence instead of actual innocence, the conclusion applies to both types of cases. Haley, a repeat offender, was sentenced to over sixteen years in prison for stealing a calculator worth less than \$50, when the maximum sentence should not have exceeded two years.¹²⁷ Throughout the habeas process, the Texas Attorney General conceded that Haley's sentence was illegal, but proceeded to defend the sentence because (1) Haley's attorney failed to submit a timely objection, and (2) the State had a strong interest in finality.¹²⁸ When the federal district and appellate courts determined that this was a "a fundamental miscarriage of justice," the Texas Attorney General unsuccessfully argued before the U.S. Supreme Court that this exception was improperly applied, because this was a non-capital case and "Texas wanted to preserve the procedural default rule."¹²⁹ Justice Kennedy summarized the situation with a rhetorical question, "a man does 15 years so you can vindicate your legal point?"¹³⁰ As Dean Cunningham argues, "A prosecutor's vast discretion does not end with the imposition of a sentence."¹³¹

Although prosecutors face many difficult pressures when confronted with an innocence claim, they can have tremendous impact on postconviction innocence claims¹³² through a variety of means that may include supporting DNA testing,¹³³ quickly turning over requested biological evidence

127. Cunningham, *supra* note 19, at 12.

128. *Id.* at 13.

129. *Id.*

130. *Id.*

131. *Id.* at 16.

132. See Paul Gustafson, DNA Exonerates Man Convicted of '85 Rape, *Minn. Star Tribune*, Nov. 14, 2002 (in 2002, for the first time, prosecutors in Minnesota initiated a motion to vacate a 1985 rape conviction after a DNA test proved the defendant's innocence); Jodi Wilgoren, Prosecutors Use DNA to Clear Man Convicted of '85 Rape, *New York Times*, Nov. 14, 2002, at A22.

133. See also Judith A. Goldberg & David M. Siegel, The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence, 38 *Cal. W. L. Rev.* 389 (2001–2002) (although a majority of states have a statute allowing for postconviction DNA testing, the innocence claims are brought before the adversarial system with a "resource imbalance favoring the government over the convicted defendant," and the statutes often contain numerous issues that the prosecutors could litigate, though they should not).

to the defense, and joining or not opposing motions¹³⁴ for evidentiary hearings on new evidence.¹³⁵

F. Ineffective Defense Representation

Among the first seventy DNA exonerations, 23 percent of the wrongful convictions resulted from ineffective defense representation.¹³⁶ These practices may include “failure to communicate with the client or communicating in a dismissive, callous or hurried manner; perfunctory or no attempt at discovery; narrow, shallow or no investigation; failure to retain needed experts and/or test physical evidence; minimal preparation, weak trial advocacy and superficial or tentative cross-examination.”¹³⁷ In general, public defenders are overworked, underpaid,¹³⁸ and have far fewer resources than prosecutors; and some appointed attorneys represent indigent defendants because their skills are so inferior that this is the only way they can make a living.¹³⁹

For example, Richard Anthony Heath pled guilty to a DUI charge that injured three people. His conviction was vacated when the Georgia Court of Appeals learned that his defense attorney, in 300 cases, had never taken a case to trial. The court said that Heath’s representation “was so deficient that it effectively equaled no assistance at all.”¹⁴⁰

134. Medwed, *supra* note 107, at 129 (statistical evidence suggests that prosecutors have only consented to requests for DNA testing that resulted in exonerations in fewer than 50 percent of the cases).

135. *Id.* at 128.

136. Berry, *supra* note 20, at 489.

137. *Id.* at 489. See also Medwed, *supra* note 37, at 370 (citing studies in Phoenix where only half of defense attorneys visited the crime scene, less than a third interviewed all of the prosecutor’s witnesses, and 15 percent interviewed none; and in New York where ten of thirteen defendants whose murder convictions were vacated based on newly discovered evidence were represented by a court-appointed attorney, and two of those attorneys were disbarred for commingling client funds).

138. Berry, *supra* note 20, at 371 (citing a frugal Georgia county who hired a local lawyer to represent all defense cases for \$25,000, which was \$20,000 less than the next lowest bid; and the lawyer tried three cases, filed three motions, and entered 300 guilty pleas in four years).

139. *Id.* at 489. See also Medwed, *supra* note 37, at 370 (citing an analysis of 137 New York homicide cases where defendants were represented by court-appointed attorneys and found that one-third of the attorneys did less than one week of preparation for trial and the median was 72 hours of preparation, which is far below the adequacy benchmark of 200 hours to prepare for trial).

140. Berry, *supra* note 20, at 490.

Instead of meeting the *Strickland*¹⁴¹ test to claim ineffective assistance, Barry Scheck and Peter Neufeld believe the truth is more like the “mirror test,” where an attorney meets his responsibilities if a mirror fogs up when placed under the nose of a lawyer.¹⁴²

G. Ineffective Capital Representation

The judicial system has largely turned a blind eye to the possibility of ineffective counsel in capital punishment cases.¹⁴³ In fact, the U.S. Supreme Court has reversed only one case on the basis of ineffective counsel from 1976 (when the death penalty was reinstated) to 2002.¹⁴⁴

For example, in *Wilson v. Commonwealth*, the trial court assigned the indigent defendant to a lawyer who lacked an office, support staff, or library and provided the court with a telephone number of Kelly’s Keg when asked for his office phone number.¹⁴⁵ The Kentucky Supreme Court affirmed his conviction.¹⁴⁶ In *Paradis v. Arave*, the appointed defense lawyer had no jury trial experience and had passed the bar only six months earlier. The Ninth Circuit affirmed the conviction.¹⁴⁷ In *Frey v. Fulcomer*, the defense attorney based his entire defense in the penalty phase of the trial on a law that was declared unconstitutional three years earlier. The court then directed the jury to use the appropriate statute, and the Third Circuit affirmed the conviction.¹⁴⁸ In *Burdine v. Johnson*, the Texas court system, including the Texas Supreme Court, was willing to execute a man whose lawyer slept through large parts of the trial (including the

141. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (To make an ineffective assistance of counsel claim, the defendant first “must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”).

142. Scheck, *supra* note 37, at 605.

143. Ira Mickenburg, *Drunk, Sleeping, and Incompetent Lawyers: Is It Possible to Keep Innocent People Off Death Row?*, 35 U. Dayton L. Rev. 319, 322 (2003–2004).

144. *Id.* at 322.

145. *Id.* at 319.

146. *Id.*

147. *Id.*

148. *Id.* at 322.

questioning of witnesses¹⁴⁹).¹⁵⁰ The lawyer also made derogatory remarks about homosexuals, including his client, during the trial.¹⁵¹ The Fifth Circuit affirmed the decision and only reversed itself after the national media turned the court into a major embarrassment.¹⁵²

H. Police Misconduct: False Confessions

Police misconduct can be found throughout the stages of the justice system—from the time the victim reports the crime to decades after the suspect has been in prison—but perhaps nothing does more damage to a suspect than providing a false confession. Unless the defense attorney can get the confession excluded as evidence, it will most likely lead to a guilty verdict. Approximately 20–25 percent of DNA exonerations resulted in whole or part from false confessions induced by police,¹⁵³ and there have been hundreds of documented false confession cases.¹⁵⁴ Often these confessions result from misleading witnesses during hours and hours of interrogation.¹⁵⁵

For example, in the 1989 Central Park Jogger case, a woman was raped, beaten, and lost 80 percent of her blood before she was found.¹⁵⁶ Police focused their search on a group of teenage boys who were assaulting and attempting to rob bicyclists and joggers in the park that same night.¹⁵⁷ Without knowledge of the rape, the police apprehended fifteen-year-olds Steven Lopez and Raymond Santana, and fourteen-year-old Kevin

149. Berry, *supra* note 20, at 492.

150. Mickenburg, *supra* note 143, at 322.

151. Berry, *supra* note 20, at 492.

152. Mickenburg, *supra* note 143, at 322.

153. Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 *Wis. L. Rev.* 479, 484 (2006). See also Innocence Project, *News & Resources: Fact Sheets: False Confessions & Recording of Custodial Interrogations*, http://www.innocenceproject.org/Content/False_Confessions_Recording_Of_Custodial_Interrogations.php (“About 25 percent of the over 240 wrongful convictions overturned by DNA evidence in the U.S. have involved some form of a false confession.”).

154. See generally Steven A. Drizen & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 *N.C. L. Rev.* 891 (2004).

155. See also *supra* note 37.

156. Leo et al., *supra* note 153, at 479.

157. *Id.* at 480.

Richardson in connection with the other assaults and attempted robberies.¹⁵⁸ Prior to their release from police custody, the police learned of the rape and assumed the boys were involved.¹⁵⁹ During the interrogations, the boys named fifteen-year-olds Antron McCray and Yusef Salaam, and sixteen-year-old Kharey Wise as accomplices in the assaults and attempted robberies, and they were brought into the station.¹⁶⁰ The interrogations lasted from fourteen to thirty hours¹⁶¹ and resulted in five confessions, four of which were videotaped (Santana, Richardson, McCray, and Wise); however, none of the interrogations were videotaped.¹⁶² The boys and their parents allege that the police “slapped, yelled, and cursed at the boys, called them liars, and suggested they would be released if they confessed. Police admitted lying to the boys about fingerprint evidence, but denied any coercive tactics.”¹⁶³ Regardless, in 1993 the trial court admitted the confessions as evidence, which was upheld on appeal in 1994, and the boys who went to trial—Santana, Richardson, McCray, Salaam, and Wise (Lopez plead guilty to one assault)—were convicted and sentenced to five to fifteen years in prison.¹⁶⁴ In 2002, when the actual rapist confessed to the Central Park Jogger rape and other rapes in New York City, the prosecutors were forced to reexamine the confessions¹⁶⁵ in conjunction with DNA evidence that linked the actual rapist to the crime.¹⁶⁶ In December 2002, the six boys’ convictions were vacated.¹⁶⁷

158. *Id.*

159. *Id.*

160. *Id.* at 479.

161. Findley & Scott, *supra* note 25, at 305.

162. Leo et al., *supra* note 153, at 480.

163. Findley & Scott, *supra* note 25, at 306.

164. Leo et al., *supra* note 153, at 482.

165. *Id.* at 483–84 (There were at least three oddities with the confessions that should have tipped off police or prosecutors: (1) the “boys minimized their involvement in the crime,” because they thought they were being viewed as witnesses instead of suspects; (2) the confessions differed on almost “every major aspect of the crime—who initiated the attack, who knocked the victim down, who undressed her, who struck her, who held her, who raped her, what weapons were used in the course of the assault and when in the sequence of events the attack took place”; (3) most of the details from the confession were wrong, like where the attack on the jogger took place (four boys claimed near the reservoir and only one described the crime scene after police took him there and showed him pictures), or not supported by independent evidence.)

166. *Id.* at 482.

167. *Id.* at 484.

I. Pretrial Criminal Procedure Processes

A suspect goes through multiple steps before even reaching a trial. The goals of these processes—efficiency, community safety, witness convenience, avoiding perjury—can be at odds with the goal of accurate judgment at trial.¹⁶⁸ First, courts, legislatures, and commentators have acknowledged that a lack of pretrial release can hamper the defense by making it difficult for the defense to find witnesses, gather and review evidence, and consult about strategy.¹⁶⁹ Second, a prosecutor's ability to select a venue should be limited to ensure the location is convenient for witnesses, access the physical evidence, vindicate citizen interests, and not unfairly disadvantage the defendant by holding the case in a distant location.¹⁷⁰ Third, pretrial delay results in a degradation of the evidence—assuming the delay is postindictment and the defense knows they need to be collecting evidence.¹⁷¹

Fourth, joinder and severance rules that consolidate charges or defendants to a single trial may expose the jury to unfairly prejudicial evidence and increase the likelihood that a jury will not be able to accurately distinguish the various charges and defendants.¹⁷² As more counts are added, the defendant is more likely to be convicted of one of the charges, and that charge is more likely to be the most serious of the charges.¹⁷³ Similarly, when defendants were tried jointly, they were more likely to be convicted (83 percent, as compared to 73 percent for those who stood trial alone).¹⁷⁴

Fifth, a lack of required government disclosure makes it extremely difficult for defense counsel to strategize effectively. These specifically include: a bill of particulars of the case (evidentiary matters, names of defendants' coconspirators, or the overt acts committed in furtherance of the conspiracy), *Brady* obligations (prosecutors must turn over favorable evidence to the defense, including inducement offers made to a prosecutor's witness), discovery rules (defendants are entitled to the names of government witnesses or their statements before trial), and a duty to preserve evidence

168. Andrew D. Leipold, How the Pretrial Process Contributes to Wrongful Convictions, 42 *Am. Crim. L. Rev.* 1123, 1124, 1148–54 (2005).

169. *Id.* at 1130.

170. *Id.* at 1132.

171. *Id.* at 1142.

172. *Id.* at 1142–43.

173. *Id.* at 1145.

174. *Id.* at 1146.

(government failure to preserve exculpatory evidence is only a violation of due process when the value of the evidence was known before it was destroyed and the police acted in bad faith).

Finally, weak guilty pleas from those who are innocent¹⁷⁵ can result from lack of faith in the system, police coercion, or the wish to minimize the risk of going to trial if the prosecutor offered a substantially reduced sentence.

II. INSTITUTIONAL DEVELOPMENT OF INNOCENCE PROJECTS

Wrongful convictions have been documented throughout history with incidents in 1611, 1660, 1792, 1819, 1820, and 1835—not including the Salem witch trials.¹⁷⁶ These cases followed a similar pattern in which the “victim” is found to be alive and well after the suspect is sentenced. For example, in 1820, Jesse and Stephen Boorn were convicted of murdering their brother-in-law, Russell Colvin, and sentenced to execution in Vermont before Colvin was found alive and well, living in New Jersey.¹⁷⁷

Since the nineteenth century, numerous scholars have identified hundreds of wrongfully convicted individuals.¹⁷⁸ These wrongful convictions

175. See also Tim Bekken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. Mich. J.L. Reform 547 (“[T]he adversarial system should provide for a plea of innocent, as opposed to only a not guilty plea, [which] would require the defendant and the prosecution to engage in a truth-seeking function. The prosecution would have to investigate with a view toward finding exculpatory evidence, rather than expecting the defendant to produce it. The defendant would have to submit to interrogation, and his attorney would have to affirm that the defendant is innocent. Jury instructions at trial would ensure that the prosecution and defendant acted in good faith, and where a defendant pleaded innocent, submitted to interrogation, and then still faced trial the prosecution would be required to prove guilt to a standard higher than beyond a reasonable doubt.”).

176. Frank R. Baumgartner et al., *Decline of the Death Penalty and the Discovery of Innocence* 53 (2008); Alan W. Clarke & Laurelyn Whitt, *Bitter Fruit of American Justice: International and Domestic Resistance to the Death Penalty* 113–14 (2007); Stuart Banner, *The Death Penalty: An American History* 121–22 (2002).

177. Bluhm Legal Clinic, Center on Wrongful Convictions, *America’s First Wrongful Conviction*, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/vtBoorn-Summary.html>.

178. See generally Edwin M. Brochard, *Convicting the Innocent* (Elliott Press 2008) (1932) (describing 65 cases); Michael L. Radelet et al., *In Spite of Innocence*, (Northeastern University Press 1994) (1992) (describing over 400 cases from the 1900’s).

were not the product of Americans who did not “care that innocent men and women were rotting in prison or on death row, but rather [because] most people simply couldn’t accept the fact that such miscarriages of justice could happen on a large scale.”¹⁷⁹ However, once Americans (finally) recognized the massive scope of this injustice, “there was a great deal of interest.”¹⁸⁰ Unfortunately, it took almost 200 years of documented wrongful convictions before innocence projects truly become popular, as evidenced by the formation of over sixty innocence projects in the past twenty-five years in the United States.¹⁸¹

The proliferation of “innocence” as a movement can be traced to the anti-death penalty movement approximately three decades ago. The anti-death penalty movement was searching for tactics to increase its public appeal.¹⁸² Prior tactics that focused on moral and religious arguments against taking another human’s life were losing traction and appeal. Thus, the anti-death penalty movement had begun to stall and reinvented itself by using innocence as a messaging tactic to convince the American public to support abolition.¹⁸³ The “innocence argument reopened the fundamental issue of the death penalty” movement by shifting the focus to “an imperfect criminal justice system.”¹⁸⁴ The movement believed that capital punishment supporters could be convinced that performing an actual execution was too risky, as demonstrated by the wrongful execution of innocent individuals.¹⁸⁵ “It is commonly, indeed virtually universally, believed that emphasis on the possible execution of the innocent is the best strategy to broadly reform or

179. Bluhm Legal Clinic, Center on Wrongful Convictions, About Us, <http://www.law.northwestern.edu/wrongfulconvictions/aboutus/>.

180. *Id.*

181. Innocence Network, Member Organizations, <http://www.innocencenetwork.org/members.html>. This number is likely low because not all innocence projects are necessarily members of the Innocence Network, but the Innocence Network is the only umbrella organization for innocence projects.

182. Note, A Matter of Life and Death: The Effect of Life-without-Parole Statutes on Capital Punishment, 119 *Harv. L. Rev.* 1838 (2006).

183. Lawrence C. Marshall, The Innocence Revolution and the Death Penalty, 1 *Ohio St. J. Crim. L.* 573, 577 (2004).

184. Michael L. Radelet, The Role of the Innocence Argument in Contemporary Death Penalty Debates, 41 *Tex. Tech. L. Rev.* 199, 220 (2008).

185. Stephen B. Bright, Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent, 2001 *Wis. L. Rev.* 1, 2 (2001).

even to abolish the death penalty.”¹⁸⁶ Innocence was considered strategically superior to prior tactics because of the “underlying psychological horror to the thought that someone who was innocent was executed”¹⁸⁷ and the later focus on “science and fact”¹⁸⁸ through advancements like DNA testing.

At approximately the same time the anti–death penalty movement was developing its “innocence strategy,” the grandfather of the current innocence projects, Centurion Ministries, was formed. In 1983, “subsequent to earning a Masters of Divinity degree from Princeton Theological Seminary, [James C. McCloskey] officially founded Centurion Ministries, Inc.”¹⁸⁹ McCloskey left a lucrative career in management consulting to pursue his spiritual calling at the seminary that led to the creation of Centurion Ministries (though the organization is purely secular). McCloskey “named the organization Centurion Ministries after the Roman Centurion who proclaimed while standing at the foot of the cross, ‘Surely, this one is innocent.’”¹⁹⁰

In 1998, fifteen years after its founding, Centurion was operating with a budget exceeding half a million dollars, a staff of five and a handful of volunteers, in a five-room office space in Princeton, New Jersey.¹⁹¹ Despite Centurion’s seemingly modest resources, in their first fifteen years, before the wave of recently formed innocence projects, they reviewed approximately 1,200 requests for assistance per year and freed twenty-five individuals.¹⁹²

This is remarkable success in numerous ways (compare *infra* Part III). First, Centurion’s half-million-dollar budget is equivalent to almost three-quarters of a million dollars today (adjusting for inflation),¹⁹³ which is well

186. Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 *J. Crim. L. & Criminology* 587, 607 (2005).

187. Jeffrey L. Kirchmeier, *Dead Innocent: The Death Penalty Abolitionist Search for a Wrongful Execution*, 42 *Tulsa L. Rev.* 403, 408 (2006).

188. Jennifer L. Culbert, *Dead Certainty: The Death Penalty and the Problem of Judgment* 117 (2008).

189. Centurion Ministries, *About Us*, <http://www.centurionministries.org/aboutus.html>.

190. *Id.*

191. Cynthia L. Cooper, *Touched by a Centurion*, *ABA Journal*, Apr. 1998 at 24.

192. *Id.* at 25.

193. U.S. Bureau of Labor Statistics, *Inflation Calculator*, <http://data.bls.gov/cgi-bin/opicalc.pl>.

above the average innocence project budget. Second, the vast majority of their funding comes from Wall Street. For example, investment banker Jay Regan, who prevailed on charges of financial manipulation, afterward joined Centurion's board to help others and raise funds for Centurion.¹⁹⁴ Third, Centurion is a corporation, so although donations are accepted, they are not tax deductible and Centurion cannot benefit from the various non-profit exemptions and benefits. Fourth, Centurion uses the strictest criteria for accepting cases: namely, the requestor must be free of any prior serious felony convictions and currently sentenced to life in prison or death. Fifth, Centurion's strict selection criteria carries into their working philosophy. Specifically, as Associate Director Kate Hill Germond explained, "It's like winning the lottery to get us to take on [your] case."¹⁹⁵ Further, although McCloskey promises clients free service until he wins their freedom, he also explains that "he will abandon them in an instant if he discovers they have lied."¹⁹⁶ Current innocence projects, even if they share Centurion's feelings, are substantially more humble. Sixth, and most notably, DNA exonerations were barely known when Centurion began freeing wrongly convicted individuals, so their exonerations were achieved the harder, old-fashioned way.¹⁹⁷

If Centurion is the grandfather of organizations formed to free wrongly convicted individuals, the Innocence Project is the father of the current wave of innocence projects. Created in 1992 by Barry C. Scheck and Peter J. Neufeld, the Innocence Project is a nonprofit organization affiliated with the Benjamin N. Cardozo School of Law at Yeshiva University.¹⁹⁸ Beginning in 1988, Scheck and Neufeld became involved in litigating the use of forensic DNA testing as evidence.¹⁹⁹ This ultimately led to an influential study by

194. Cooper, *supra* note 191, at 25.

195. *Id.*

196. Ted Rohrlich, Minister of Justice, *Los Angeles Times Magazine*, Dec. 23–30, 1990, at 10.

197. See also *supra* note 25.

198. Innocence Project, About the Innocence Project, <http://www.innocenceproject.org/about/>.

199. In 1930, it was discovered that there were four blood types: A, B, AB, and O. Prior to DNA, criminal investigations were limited to "blood matching." DNA is composed of smaller molecules than blood, so it is more resistant to bacterial destruction. In 1983, Kary Mullis began developing a method for causing existing DNA molecules to replicate themselves, which would allow a single DNA fragment to identify its distinct owner. In 1993, Mullis received the Nobel Prize in chemistry for his discovery. Scheck et al., *supra* note 38, at 35–38.

the National Academy of Sciences on forensic DNA testing and state and federal legislation setting standards for using DNA testing.²⁰⁰ Today, the Innocence Project is the most recognized such organization in the world and has a staff of 50 people.²⁰¹ Unlike Centurion, whose circumstances initially dictated the acceptance of non-DNA cases (because DNA testing was still in its infancy), the Innocence Project only accepts cases in which the prisoner could be freed through DNA evidence.²⁰² As these words are written, there have been 272 DNA exonerations.²⁰³ These people have spent an average of thirteen years in prison and include seventeen people who spent time on death row.²⁰⁴

Although the DNA exonerations are impressive, the Innocence Project has been instrumental in making systematic changes to the criminal justice system via several nonlitigation paths. The Innocence Project laid the foundation for other innocence projects by creating the Innocence Network.²⁰⁵ The Innocence Network serves as a resource for existing innocence projects by providing a Brief Bank of approximately sixty amicus briefs on issues that other projects may face.²⁰⁶ Further, the Innocence Network provides a general community for innocence projects to help and support one another by holding annual conferences, providing a “Statement Concerning Victims” to address the concerns of working to free wrongly convicted individuals, and maintaining links to scholarly information and to contact information for other projects.²⁰⁷ In addition, the Innocence Project “consult[s] with legislators and law enforcement officials on the state, local, and federal level” to improve legislation concerning DNA and

200. Innocence Project, About the Organization: Scheck & Neufeld, <http://www.innocenceproject.org/Content/137.php>.

201. Innocence Project, About the Organization, Innocence Project Staff, <http://www.innocenceproject.org/about/Staff-Directory.php>.

202. Innocence Project, About, Mission Statement, <http://www.innocenceproject.org/about/Mission-Statement.php>.

203. *Id.*

204. *Id.*

205. Innocence Project, About the Innocence Project, <http://www.innocenceproject.org/about/> (“a group of law schools, journalism schools and public defender offices across the country that assists inmates trying to prove their innocence whether or not the cases involve biological evidence which can be subjected to DNA testing”).

206. Innocence Network, Brief Bank, http://www.innocencenetwork.org/brief_bank.

207. Innocence Network, About, <http://www.innocencenetwork.org>.

non-DNA aspects of the criminal justice system through research, training, and scholarship.²⁰⁸

It is said that imitation is the sincerest form of flattery. As the Innocence Project tallied success after success around the country, interest in creating additional innocence projects began to grow. Although slowly at first, a grassroots effort by law school clinical programs and independent organizations began to raise funds to establish additional innocence projects. These projects were organized, structured, and funded like the nonprofit Innocence Project, although some followed the ideals of Centurion Ministries and accept all types of innocence claims (including DNA).²⁰⁹ Currently, more than sixty innocence projects are operating in the United States, and approximately thirty more are operating in Canada, the United Kingdom, Australia, and New Zealand.²¹⁰

It took hundreds of years since the first documented wrongful conviction case to develop a system capable of addressing wrongful convictions. The success of innocence projects to free wrongly convicted individuals and reform our criminal justice system provides hope, yet more and better assistance is still needed.

III. CHALLENGES FACED BY INNOCENCE PROJECTS

From September 2009 to February 2010, twenty-two interviews were conducted with geographically diverse innocence projects to learn about their projects and specifically their challenges to evaluate factors leading to their success that could be used to help current and future project

208. Innocence Project, About the Innocence Project, <http://www.innocenceproject.org/about/>. For a comprehensive discussion of how to start an innocence project clinic at a law school, see generally Jan Stiglitz et al., *The Hurricane Meets the Paper Chase: Innocence Projects' New Emerging Role in Clinical Legal Education*, 38 Cal. W. L. Rev. 413 (2002). See *infra* note 219, at 1102–27, for a discussion on how to define the scope of the project.

209. In 2001, Brooklyn Law School founded the Second Look Program to focus exclusively on non-DNA cases, but the project is no longer operating. In 2009, the University of Michigan Law School opened an innocence project that does not accept DNA cases (see University of Michigan Law School, News & Information, <http://www.law.umich.edu/news-andinfo/Pages/April2008.aspx>). Michigan's program was likely possible because the Thomas M. Cooley Innocence Project also operates in Michigan, accepts DNA cases, and serves a very similar geographic region (the schools are approximately one hour apart by car).

210. See also *supra* note 181.

improve.²¹¹ Seventeen interviews were conducted over the phone, four projects submitted written replies, and one interview was held in person. Each verbal interview lasted from thirty and ninety minutes, and modest follow-up was necessary with over half of the projects (including all the written replies) to clarify and correct potential inconsistencies in replies. Requests to participate were limited to projects that have been operating for five to eleven years (the youngest qualifying project began in 2004) to focus on systemic issues that established projects face and new projects should expect to face in the coming years.²¹² Further, this avoided issues relating to learning curves in brand new projects. Additionally, the two oldest projects were excluded because of their national scope, substantial differences in experience because of their age, and the difficulty of keeping their statistical responses confidential.²¹³ The average innocence project interviewed was founded in 2001.²¹⁴ Finally, innocence projects operated by law firms²¹⁵ or government agencies²¹⁶ were excluded because of their

211. The author wishes to express tremendous gratitude to the participating innocence projects: Arizona Justice Project, Arkansas Innocence Project, California and Hawaii Innocence Project (southern California), Downstate Illinois Innocence Project, Duquesne Law Post-Conviction DNA Project (Pennsylvania), Georgia Innocence Project, Innocence Project of Florida, Innocence Institute of Point Park University (Pennsylvania), Innocence Project Northwest (Washington), Innocence Project of Minnesota, Mid-Atlantic Innocence Project (includes Washington, D.C., Virginia, and Maryland), New Mexico Innocence Project, North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Ohio Innocence Project, Pace Post-Conviction Project, The Midwestern Innocence Project (includes Arkansas, Oklahoma, Missouri, Kansas, Iowa, and Nebraska), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Innocence Project (Michigan), and Wisconsin Innocence Project.

212. At least a dozen projects were “too new” to qualify, and discussions are likely underway to form new projects around the country.

213. The two oldest projects are Centurion Ministries based in New Jersey and founded in 1983 and the Innocence Project based in New York City and founded in 1992. See *supra* Part II.

214. The interviewed innocence projects were founded from 1998 to 2004.

215. The New England Innocence Project is based in Boston and was founded in 2000 by Goodwin Proctor LLP to handle cases from Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont, and the Colorado Innocence Project recently moved from Arnold & Porter LLP to the University of Colorado School of Law. University of Colorado School of Law, News, <http://lawweb.colorado.edu/news/showArticle.jsp?id=567> (Jan. 29, 2010).

216. As of October 20, 2009, at least six innocence projects were operated or strongly affiliated with state government agencies: Connecticut Innocence Project, Delaware

unique access to financial resources and professional contacts. In total, twenty-six projects qualified for inclusion in the survey, and interviews were conducted with twenty-two of those projects.²¹⁷

To better understand the internal operations and challenges these projects face, a series of discrete and open-ended questions were asked (see *infra* Appendix A). The questions were designed to initiate a discussion of how the projects functioned, so specific individualized follow-up questions were asked of every project based on their particular replies to gain detailed information of the project's internal workings. Upon completing the interviews, the data was collected and analyzed for two purposes: (1) to determine whether particular characteristics correlated to an increase in exonerations, and (2) to determine the issues and challenges that innocence projects face. These conclusions were the basis for recommendations discussed later in this article (see *infra* Part IV). To allow for honest and thorough answers, all identifying replies were promised confidentiality. Part III.A will report the discrete statistical findings influencing the projects' successes. This will serve as a foundation for Part III.B, which reports on the issues the projects face as they strive for success.

A. Statistical Success of Innocence Projects

The ultimate goal for innocence projects is to put themselves out of work by eliminating any possibility that an innocent person could ever be wrongly convicted. Practically, success is defined by locating and exonerating wrongly convicted individuals as efficiently as possible. To evaluate the level of success achieved by innocence projects, it is necessary to provide a foundational understanding of their internal processes and modest background on postconviction procedures. Subsequently, an analysis of the statistics will be provided to quantify the success.

Office of the Public Defender, Kentucky Innocence Project, Maryland Office of the Public Defender Innocence Project, Office of the Appellate Defender—Reinvestigation Project (New York), and Oklahoma Indigent Defense System—DNA Forensic Testing Program.

217. One project declined to participate, and the remaining four projects did not respond to multiple participation requests.

1. The Internal Process

Each innocence project has implemented a similar system to receive, evaluate, and respond to requests from individuals with claims of innocence. However, our criminal justice system has two types of innocence: (1) factual or actual innocence, where the individual did not commit the crime (e.g., the individual was in another state at the time the crime was committed); and (2) legal innocence, where there is one or more reasons—procedural (e.g., evidence that should have been suppressed) or legal (e.g., self-defense or consent)—why the individual should not have been convicted of the crime. The vast majority of innocence projects only accept cases of factual innocence, though some are beginning to accept cases associated with manifest injustice like battered woman syndrome or extremely disproportionate sentences.

The process begins with a written or verbal request for assistance. The average project receives approximately 600 requests per year.²¹⁸ Legal innocence claims are rejected outright by the projects focusing on factual innocence. Requestors with ambiguous or factual innocence claims must complete a lengthy questionnaire to help the project evaluate the claim's merit. If the questionnaire is not included with the original request for assistance, the projects reply to the requestor with the questionnaire or instructions for how to access the questionnaire. The questionnaire essentially asks discrete who, where, and when questions and substantive what and why questions through open-ended and closed formulations.²¹⁹ Intentional redundancy is used to stress the critical issues. The questionnaire also asks for permission for the project to discuss the case with others as appropriate. When the questionnaire is returned, the projects review it looking for new evidence or untested evidence (when DNA is involved) and to determine if the request meets the project's internal criteria.

Although the specifics of the internal criteria vary among projects, they generally include these questions: (1) Is the claim actual innocence or legal innocence?²²⁰ (2) Has the applicant exhausted the appeals process? (3) Is

218. The number of requests range from 40 to almost 1150 per year.

219. Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 Neb. L. Rev. 1097, 1120 (2003).

220. Only a small minority of innocence projects will accept cases of legal innocence or claims viewed as "manifest injustice." The vast majority of innocence projects require the claim to be of actual innocence, and four of the twenty-two projects interviewed only handle DNA cases.

the applicant currently represented by counsel? (4) Is enough time left on the applicant's sentence to make the multiyear process worthwhile? Questionnaires not automatically rejected (e.g., the claim is for legal innocence, and the project accepts only actual innocence cases) are reviewed (often by law students) in conjunction with the appellate brief(s), and a recommendation memo is written. The recommendation memo will contain a brief summary of the facts, the factual innocence claim, any new evidence, and a final recommendation of detailed next steps if the case has merit. If the memo recommends additional investigation, it will be reviewed by a staff attorney and a final "leave open" or "close" determination will be made regarding the status of the request.

The average project receives approximately sixty-six cases per year that require serious investigation, but it may take longer than a year to complete the investigation for all sixty-six cases.²²¹ If additional investigation is necessary, the investigative process will be extremely case-specific depending on the requestor's claim, but may include: interviewing the requestor, searching for new DNA, testing existing DNA, interviewing people involved in the case (witnesses, experts, family members), obtaining trial transcripts and/or police reports, investigating the crime scene, and/or meeting with the requestor's prior counsel and/or prosecutor. As the investigation progresses, a continuous and evolving dialogue within the project takes place to determine the most effective strategy and next steps.²²² If enough evidence is gathered, the project will file a writ of habeas corpus (which may be preceded by a motion to be appointed counsel in DNA cases, so the project can file a separate motion obtain DNA testing before determining if a habeas motion is appropriate) to allow for discovery rights and an evidentiary hearing to determine if the requestor has been wrongfully convicted.²²³

221. Only sixteen projects provided data for this question. The number of cases seriously investigated per year ranges from 12 to 225. It is worth noting that some projects limit their investigation to a number they can realistically complete in a timely fashion, and other projects keep a file of worthy cases even if they will not begin investigation for six to eighteen months. Projects that limit the investigation of cases may be rejecting real claims of innocence by individuals who may not have any other options for assistance. However, accepting all potentially worthy cases creates a massive bottleneck of required investigation and requires a triage system to determine which cases to investigate first.

222. For a discussion about how to define the scope and select cases for a new innocence project, see generally Medwed, *supra* note 219, at 1102–27.

223. The writ of habeas corpus literally translates to "produce the body" as this is a judicial mandate to bring the convicted to court to determine if a wrongful conviction occurred.

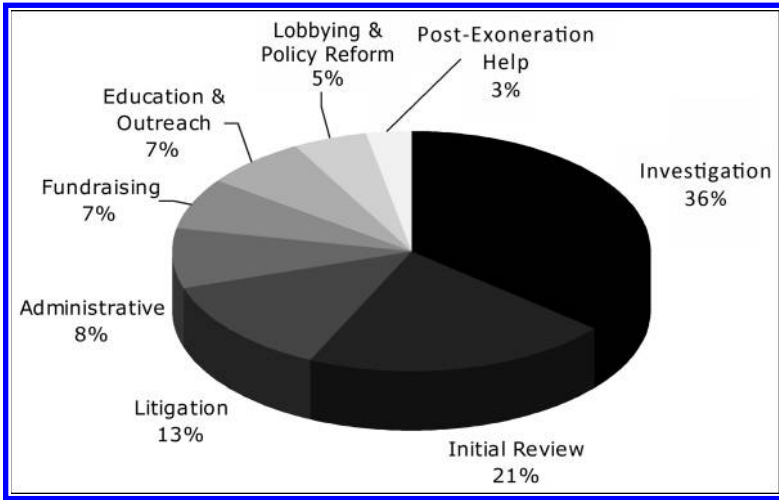
Like most organizations, innocence projects are also involved in a variety of necessary activities that do not relate directly to their cases. These activities include post-exoneration help, administrative tasks, fundraising, education and outreach, and lobbying and policy reform. Table 1 demonstrates the average distribution of time spent between these tasks.²²⁴

Habeas corpus relief is initially sought in state court after the traditional postjudgment appeals have concluded (which is why projects require the requestor to exhaust the appeals process before requesting assistance). Although specific details may differ from state to state, the general habeas process is similar. Assuming the project successfully obtained new evidence, the writ of habeas corpus will be filed to explain how the new evidence demonstrates that the client was wrongly convicted and arguing for discovery rights and an evidentiary hearing. The court will determine if a decision can be made on the existing writ or if additional information is necessary. If the writ is denied, a project can consider a federal habeas writ (for a detailed discussion on federal habeas, see generally Charles Doyle, Congressional Research Service Report for Congress, *Federal Habeas Corpus: A Brief Legal Overview* (2006)). If the writ is approved, the court will issue an order to show cause, which gives the project discovery rights and counsel attaches. Usually, the state will file a response to the initial writ, and the project will reply. After considering all the motions, the court will either deny the writ or issue an order to show cause. An order to show cause allows the project to conduct additional discovery, leading to a subsequent motion explaining why their client was wrongly convicted, which the state will likely oppose. Since factual issues are usually in dispute, the court will hold an evidentiary hearing and rule on the cause motions. The project has the burden to prove that a reasonable jury would not convict their client by a preponderance of the evidence when considering the new evidence with the old evidence. If the court grants the writ, the client is officially exonerated. Denial of the writ usually results in appeals to the state Court of Appeals or Supreme Court.

In DNA cases, the process is slightly different. The project files a motion to be appointed counsel (which is statutorily mandated in some states if the criteria are met) and then a motion to grant DNA testing. The state usually files an opposing motion, and the project can reply. After a hearing, the court will grant or deny the motion to test. If the DNA is tested and the results determine that the client is not the donor of the tested material, the state can consent to release the convicted. If the state will not consent despite the DNA results, the project will file a habeas writ (as described above) based on the results. If the DNA motion to test is denied, the project will file a writ of mandate or prohibition in the Court of Appeals, and then a petition for review in the state Supreme Court if necessary. Handout from California Innocence Project to clinical students, *State Post-Conviction Procedures*, Oct. 21, 2010 (on file with author).

224. Projects were asked to allocate time percentages based on their experiences and recollections, and twenty-one of twenty-two projects responded. The projects were not required to track time. Thus, projects may have allocated time as they hoped or expected it was being spent. However, most projects carefully considered all the questions, especially this one, and provided good-faith answers. Some even requested additional time to consider this particular question.

Table 1. Average time distribution per task



2. The Data

The twenty-two projects have exonerated a combined total of 108 individuals²²⁵ in their combined 175 years of existence. In the twelve months prior to the interviews, the twenty-two projects reviewed over 13,000 requests for assistance. On average, an innocence project reviews approximately 1,750 requests for every exoneration won.²²⁶ Exoneration is not the only measure

225. The actual number of reported exonerations was 108.5. Successful exonerations, especially DNA exonerations, may involve the resources of multiple innocence projects (like the original Innocence Project in New York), so projects claim partial credit, which results in data of half of an exoneration. Individuals who were factually innocent and freed by innocence projects but not officially exonerated were counted as exonerations (this accounted for no more than 3 percent of the total exonerations). Two projects also claim a total of fourteen additional victories that include clemency (like the release of an inmate for time served), legal innocence exonerations (like battered woman syndrome), and sentencing injustices. These statistics will be excluded from the forthcoming analysis to ensure uniform comparisons between projects and to avoid skewing the results because only two projects accept these requests. However, these projects rightly include these victories when performing internal evaluations of their success or promoting themselves to the public and/or funders.

226. The approximation is based on a calculation from the total number of exonerations per project (0 to 14) and total number of cases reviewed per project (approximately 40 to 1150 per year) from the twenty-two interviewed innocence projects. This statistic is undoubtedly inflated because it assumes projects have received their current number of requests every

of project success²²⁷ and not necessarily the most accurate measure of project success,²²⁸ but it is the cleanest and simplest. Thus, exoneration will be used as the benchmark to analyze how various factors correlate to success (number of exonerations).²²⁹

Correlations between the factors discussed below and exonerations were meaningful, especially for finances. As the specific factor increased, a stronger correlation tended to exist.²³⁰ The following sections will discuss the correlations of finances, people-power, time distribution, age, number of cases reviewed, and state-specific characteristics including population, location, and wealth.

a. Finances

Often, an increase in financial resources leads to an increase in success because the financial flexibility allows obstacles and challenges to be overcome more easily. Finances were the strongest correlation of any factor, with a near linear relationship. The financial correlation existed in both analyzed

year since inception (to substitute for the unknown data of increasing requests since inception to the current levels), and because it includes the cases reviewed from projects who have yet to secure any exonerations.

227. For innocence projects that accept legal innocence claims, earning clemency or reductions of grossly unfair sentences are also considered successes.

228. The use of exoneration as a measure of success disproportionately favors some innocence projects over others. For example, projects in jurisdictions with “better” criminal justice laws have fewer wrongful convictions. Similarly, projects in states with many wrongful convictions have an easier time securing exonerations because the cases are more abundant, especially if the state is heavily populated. Furthermore, exoneration disproportionately favors projects that exclusively accept DNA cases over projects that accept any actual innocence claims and over projects that accept claims of legal innocence or manifest injustice, because DNA cases are often the shortest and easiest cases to pursue (though none are objectively short or easy). Correspondingly, these variables also make a cost-per-exoneration measure of success very challenging to interpret between projects. However, such a measure could be useful to compare projects within the same state or to compare exonerations within a given project.

229. It is worth reiterating that this analysis is merely a progress snapshot of twenty-two innocence projects from September 2009 to February 2010. Exoneration data from projects initially interviewed in September 2009 was updated in February 2010 as appropriate.

230. However, the individual factors were not controlled to exclude other influences; the following tables are simple, two-variable plots. For example, the success of projects with higher annual budgets could also be attributed to a project’s age (though age was analyzed, and the correlation was not nearly as meaningful).

formats: (1) as a snapshot that compared the current annual budget with past exonerations,²³¹ and (2) as an average annual budget with total number of exonerations since the project was founded.²³²

In general, the correlation is quite strong, but weakens slightly when analyzing specifics (see Table 2). For example, the six best-funded projects also had the greatest number of exonerations, and the seven projects with the least funding had the lowest number of exonerations. However, the best-funded project was not the most successful, but the project with the least funding did have the lowest number of exonerations. Further, the two projects with the second-highest funding (at \$300,000) had vastly different results: one project had one of the lowest exoneration rates (two), and the other had the highest (twelve).²³³ Although financial wealth does not guarantee success, it certainly increases the possibility, and the data suggest that success will be limited for projects with budgets below \$225,000—the “sweetspot” or “breaking point.”²³⁴ No project with a budget of \$200,000 or less has secured more than three exonerations, and every project but one with a budget of \$225,000 or more has secured at least five exonerations. The average annual budget is \$207,843 based on the fourteen projects that provided this data. In no way should this be interpreted to mean that projects with budgets at or below \$200,000 are ineffective. Rather, this should be viewed as an opportunity to greatly increase their success with a modest budgetary increase.

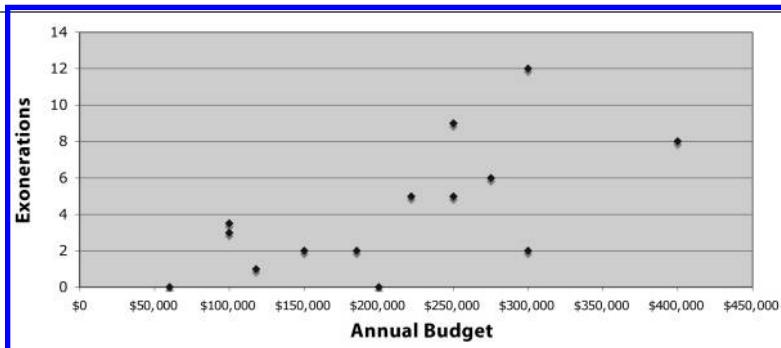
231. This assumes that today’s best-funded projects were always the best-funded projects, which is supported by the modest average budgetary data. Eight projects either declined to provide their current annual budget or could not provide a reliable answer.

232. Average annual budget was determined by viewing projects’ IRS Form 990s. Although the forms had financial information from inception, they often lacked the most current financial data. Thus, a project’s current budget was also used in the immediately preceding year if the 990s left a gap. For example, if Form 990 provided data from a project’s inception through 2007, and the project reported a \$150,000 budget for 2009, \$150,000 was also used for 2008 to generate the average. These forms were available for nine projects.

233. One project reported fourteen exonerations, but this project declined to provide financial information, and none could be found through other public sources.

234. It is beyond the scope of this article to address the issue of valuing human life, but it is worth noting that the average exoneration cost is \$333,239. Not surprisingly, non-DNA exonerations are significantly more costly than DNA exonerations, and the majority of wrongful convictions, like Wong’s (see *supra* Part I.B), are without testable evidence. “Such cases are notoriously difficult to litigate given the absence of a method to prove innocence to a degree of scientific certainty.” Medwed, *supra* note 37, at 356–57.

Table 2. Correlation between current annual budget and exonerations ($n = 14$)



Although the sample size is small (nine of twenty-two interviewed projects), the correlation for average budget since inception and total number of exonerations is even stronger, and supports the conclusions from Table 2. Table 3 shows a strong linear relationship with no substantial outlier. Additional data would be useful and should be sought if this analysis is updated.

b. Staff and Volunteers

One would expect more people-power to result in more exonerations because more bodies and minds would be working on the accepted cases and sifting through the requests to find the most promising innocence claims. However, the total number of full-time staffers alone does not guarantee

Table 3. Correlation between average annual budget and exonerations ($n = 9$)

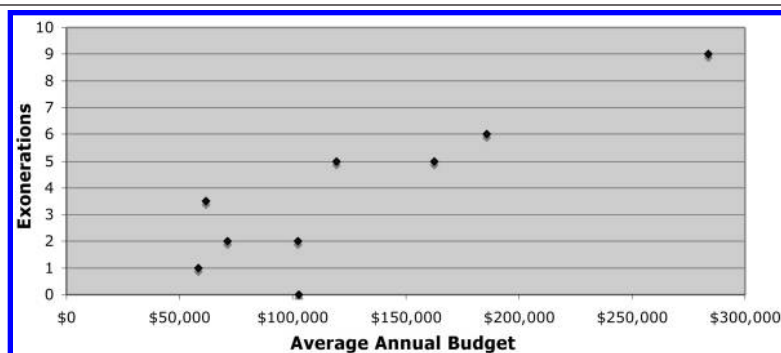
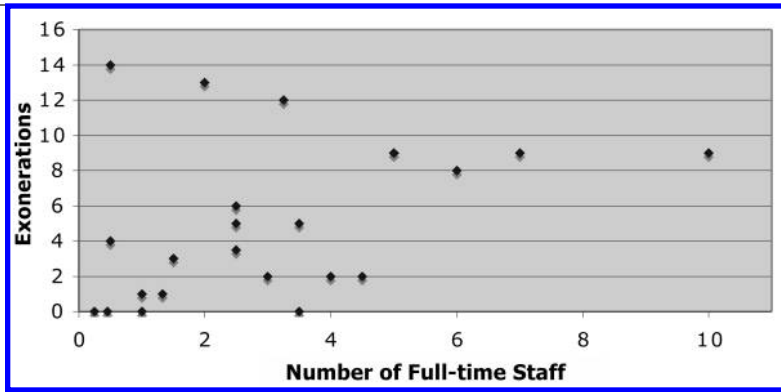


Table 4. Correlation between full-time staff and exonerations (n = 22)

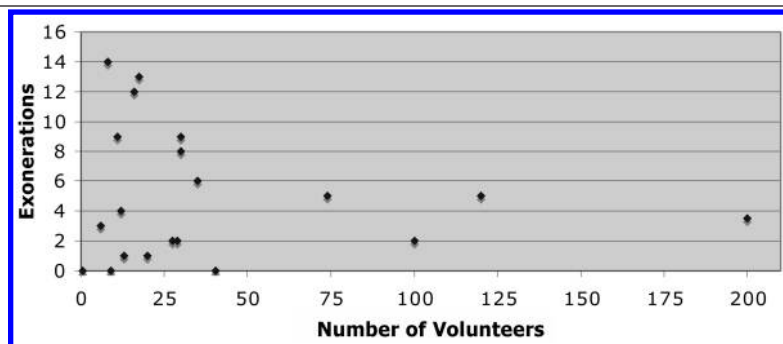


success, and the relationship is nonlinear (see Table 4). For example, projects can be equally successful with five staffers (nine exonerations) or with ten staffers (nine exonerations). Further, the two most successful projects (fourteen and thirteen exonerations) have two or less staffers, which is the same number of staffers as the projects with the fewest number of exonerations (one or none). Like the finances discussion directly above, there is some resemblance of a “sweetspot” or “breaking point” with five or more staffers. Whereas the most successful projects have less than five staffers, every project with at least five staffers have earned at least eight exonerations.

Like most nonprofit organizations, innocence projects depend upon volunteers to complete substantive aspects of their work, which could be a strong influence on a project’s degree of success. Thus, staff size alone may not be an accurate representation of a project’s ability, and the number of volunteers must be considered. Despite objectively small staffs (the average project only has three staffers), the number of volunteers does not provide a particularly reliable measure for success (see Table 5).^{235,236} For example, six projects with nine to eighteen volunteers earned between zero and thirteen exonerations, and four projects with twenty-five to thirty volunteers earned

235. The following data points on Table 5 represent two projects: nine exonerations and thirty volunteers, and zero exonerations and nine volunteers.

236. Since the average number of volunteers per project (approximately forty) substantially outweighs the average number of staffers (approximately three), the correlation between total help and exonerations is almost identical to the correlation between volunteers and exonerations.

Table 5. Correlation between volunteers and exonerations ($n = 22$)

between two and ten exonerations. Here too, there appears to be a sweet-spot, or point of diminishing returns, at fifty volunteers. However, unlike prior sweetspots, there is an inverse relationship between increasing the factor and exonerations. No project with more than fifty volunteers has won more than five exonerations, and the project with the most volunteers (200) has been one of the least successful projects.²³⁷ This relationship is discussed in greater detail in Part IV.B.

c. Time Distribution per Task

Table 6 depicts the percentage of time each project dedicates to eight possible tasks associated with their work. Not every project participates in every possible task, and twenty-one of twenty-two projects provided answers to this question.²³⁸ All projects spend a substantial amount of time performing an initial review of requests for assistance and investigating cases. Comparing top and bottom projects (i.e., projects with most and least exonerations) showed a meaningful correlation between amount of time spent performing initial review and exonerations. Specifically, the top three projects (at least twelve exonerations) and the top seven projects (at least eight exonerations)

237. Of the 837 volunteers that were reported by the innocence projects and represented in Table 5, 647 were students enrolled in a law school clinical course related to the innocence project, 53 were similar to (mostly part-time) interns, and 137 were professionals like lawyers or private investigators that were only called upon as needed. Isolating the clinical students or isolating and combining the students and interns had no significant impact on the results when compared to the total number of volunteers shown in Table 5.

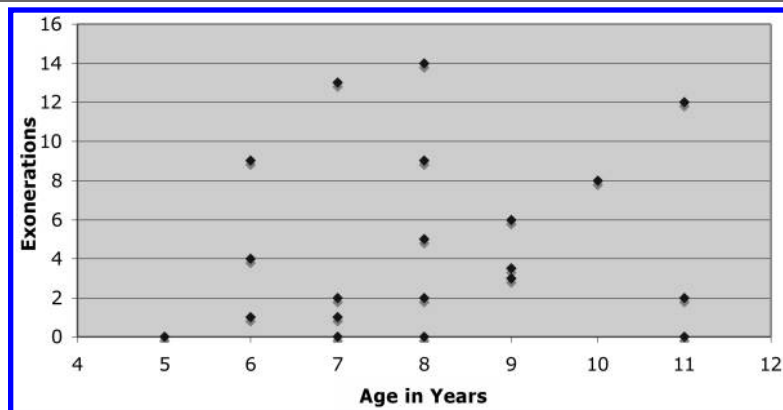
238. See *supra* note 224.

Table 6. Distribution of time per task per project

	<i>Exonerations</i>	<i>Initial Review</i>	<i>Investigation</i>	<i>Litigation</i>	<i>Post-Exoneration Help</i>	<i>Administrative</i>	<i>Fundraising</i>	<i>Education & Outreach</i>	<i>Lobbying & Policy Reform</i>
Project 1	14	25	50	0	0	10	10	5	0
Project 2	13	10	60	20	1	3	2	2	2
Project 3	12	10	25	40	5	5	2	5	8
Project 4	9	12.5	12.5	25	2.5	12.5	12.5	20	2.5
Project 5	9	9	18	18	13.5	13.5	13.5	9	4.5
Project 6	9	8	46	30	0	0	5.5	5.5	5.5
Project 7	8	20	30	25	5	5	10	0	5
Project 8	6	5	75	7.5	0	7.5	0	2.5	2.5
Project 9	5	25	25	15	0	10	10	10	5
Project 10	5	15	25	5	15	10	10	10	10
Project 11	4	32	4	6	5	11.5	18	12	12
Project 12	4	20	45	15	0	0	0	0	20
Project 13	3	5	35	5	5	10	20	15	5
Project 14	2	11	59.5	11	0	11	2	2	3.5
Project 15	2	25	56.5	6.5	0	4.5	2	3.5	2
Project 16	2	10	40	5	0	10	10	15	10
Project 17	1	25	40	15	0	10	0	5	5
Project 18	1	35	15	15	0	20	0	10	5
Project 19	0	25	25	3	5	10	20	10	2
Project 20	0	25	50	5	0	10	5	5	0
Project 21	0	80	15	0	0	2	3	0	0

*This data was rounded to nearest 0.5%. As a result, data for Projects 5, 6, and 11 total 99%, 100.5%, and 100.5%, respectively.

spent 15 percent and approximately 13 percent, respectively, on initial review, whereas the bottom five projects (zero or one exoneration) and bottom nine projects (no more than two exonerations) spent approximately 38 percent and over 26 percent, respectively. Additionally, comparing the very top and very bottom projects showed a meaningful correlation between amount of time spent performing additional investigation and exonerations. Specifically, the top three projects spent 45 percent of their time investigating, and the bottom five projects spent approximately 29 percent of their time investigating. However, expanding the analysis beyond the very top and very bottom projects, the correlation disappears as the top grouping spends over 34 percent of their time investigating, and the bottom grouping spends over 37 percent of their time investigating.

Table 7. Correlation between age and exonerations ($n = 22$)²³⁹

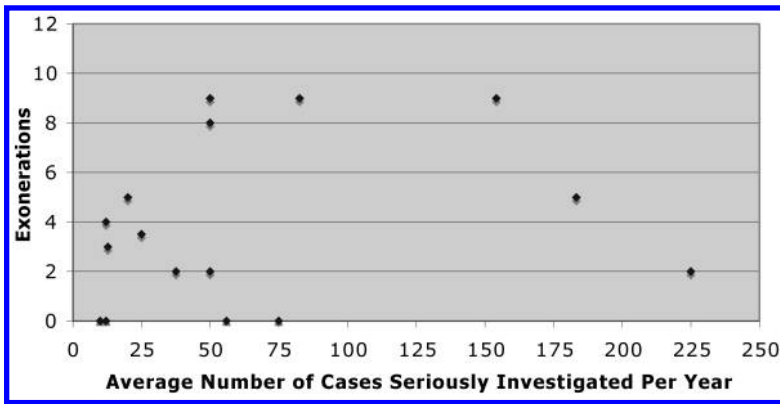
d. Age of the Innocence Project

As a project ages, efficiency is often expected to improve—perhaps a new system or set of criteria is developed to find the most promising claims of innocence. Yet overall, little correlation between age and exoneration exists (see Table 7). For example, the six projects that are eight years old have vastly differing exonerations, ranging from zero to fourteen.²³⁹ Year eight could also serve as a benchmark for projects to compare themselves with their peers. For example, a project with five exonerations in year eight should consider itself on par with other projects. Similarly, projects with more than five exonerations by year eight are above average, and projects with less than five exonerations are below average. As noted extensively throughout, exonerations take many years to complete, and projects should account for their individualized exoneration cycles.

e. Number of Cases Seriously Reviewed

The nature of innocence projects makes them objectively inefficient. The fear of missing or overlooking an actual innocence claim from the hundreds or thousands of requests causes projects to spend time evaluating cases of properly convicted individuals. The results suggest that selecting

239. The following data points on Table 7 represent two projects: eight years and five exonerations, and six years and nine exonerations.

Table 8. Correlation between cases seriously investigated and exonerations (n = 16)

fewer cases to review is more important than reviewing a higher number of cases—quality trumps quantity (see Table 8). However, in practice, this is extremely difficult to implement because innocence projects are literally an innocent person's last (and often best) hope of exoneration.

Where a private corporation is willing to sacrifice a handful of customers if it will exponentially increase their profits, an innocence project will not make a similar sacrifice because they rightly fear overlooking an actual innocence claim. Thus, every case gets reviewed, and many cases certainly receive more attention than they merit. Of course, this is not the fault of innocence projects as it is extremely difficult to determine how much review is necessary until the review has been completed.²⁴⁰ Further, almost all innocence projects accepting non-DNA cases have at least one example of a case they seriously investigated and came to believe the client was innocent, but a court determined that existing evidence was not sufficient for exoneration or the necessary evidence did not exist. Undoubtedly, these cases were properly selected for review even though an exoneration was not secured.

Nonetheless, the results suggest that investigating more than 100 cases per year could be detrimental. To some extent, the number of cases seriously investigated per year may be beyond a project's control because projects in

240. A future study should attempt to analyze all the cases seriously investigated (within a particular project or from many projects) to determine if particular characteristics or trends can be found that will help projects improve their selection of cases for serious investigation or review.

heavily populated jurisdictions or in jurisdictions with poor criminal justice laws may have more requests for help (as opposed to becoming better at selecting cases to investigate). However, for projects that are less successful (and the results clearly show that projects investigating approximately 50 cases will range in success from none to most), investigating more than 175 cases per year seems inefficient.²⁴¹

f. State Characteristics: Total Population, Prisoner Population, and State Revenues

This final section reports on the influence of specific state characteristics on exonerations. Specifically, the impact that total population per state, prisoner populations per state, and state revenues have on the number of exonerations. However, to maintain the project's confidentiality, the fifty states were divided into quartiles (Top, Second, Third, and Bottom) for each issue, so the specific project data could be combined and reported.²⁴²

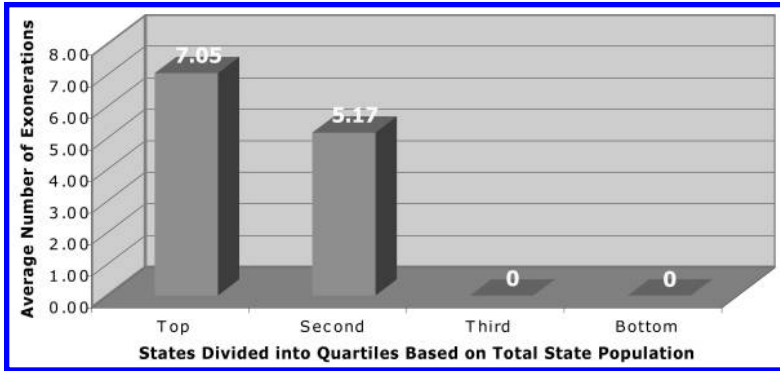
The projects in states with greater populations won more exonerations. In general, the more people in a state, the more prisoners that state houses. Thus, the number of average exonerations per project based on total state population and prison population was extremely similar (see Table 9 and Table 10). Specifically, the projects in the top quartile of state population averaged 7.05 exonerations (77.5 total), compared to 6.63 exonerations (79.5 total) for projects in the top quartile of prison populations.²⁴³ The

241. No correlation factor is more worthy of a reference to *supra* note 228 than the number of cases seriously investigated, as this related directly to a variety of circumstances beyond the control of the particular innocence project.

242. Since the scope of this paper was limited to the data from projects with specific characteristics (the projects were not randomly selected), the aggregate and average number of exonerations per quartile are reported to mitigate against disproportionate aggregate results associated with having almost all qualifying projects fall within the top quartiles and few qualifying projects in the lower quartiles. Specifically, state population and state revenue had only one qualifying project in the third and fourth quartiles, and prison population had only three projects in the third and fourth quartiles combined. This quartile discrepancy can be partly explained because a handful of innocence projects represent many of the states in the bottom two quartiles, and either those projects did not meet the criteria for this paper or no project exists specifically for that state. Therefore, reporting the averages may be more useful than the aggregate totals.

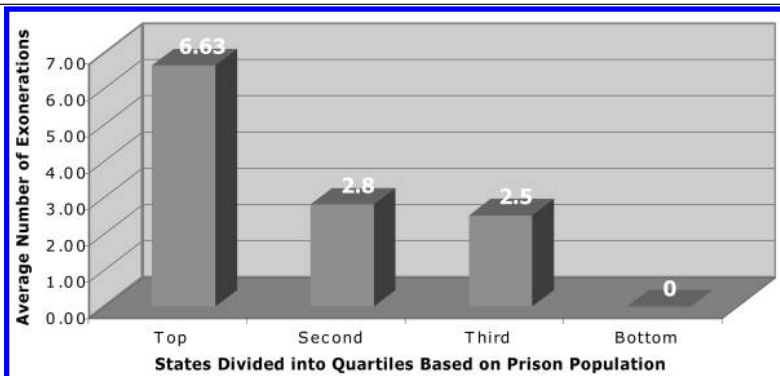
243. Less than half of the states in the second quartile had qualifying projects. Further, less than 20 percent of the projects from the third and fourth quartiles qualified; thus, the data from the bottom quartiles was incomplete and not analyzed.

Table 9. Average number of exonerations per Innocence Project based on total state population



magnitudes of prison populations mirrored the total populations in the top quartile (the only quartile containing interviewed projects that correspond to more than 50 percent of the states). In fact, only two states (and corresponding projects) changed quartiles based on total population and prison population, and one of the two barely changed. The first project moved from the very top of the second quartile in total state population to the very bottom of the top quartile in prison population. The second project dropped about 25 percentile places from the top of the second quartile in total population to the top of the third quartile in prison population, which explains the increase in the third quartile of prison population when compared to state population.

Table 10. Average number of exonerations per Innocence Project based on state prisoner populations



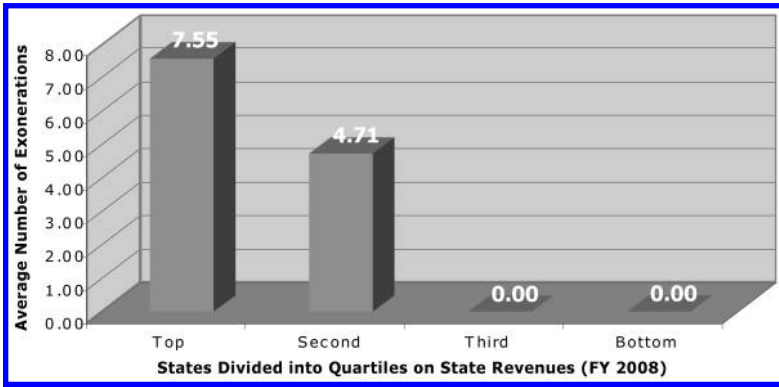
One may expect more wrongfully convicted individuals to arise from states with greater populations, but the projects in those states also have to sort through more requests to find the cases with merit. Theoretically, it could be easier to find the most promising cases from a smaller pool of prisoners, as fewer requests would have to be evaluated. However, the initial findings support the former theory.²⁴⁴ This suggests that innocence projects in states with larger populations may be more successful at identifying the most promising cases because they receive more requests for help and get more practice at distinguishing the requests with the most merit. However, one project admitted a realistic concern that a “high volume of requests equals a lower quality of decisions.” One might infer that since projects receiving more requests can select the most promising cases, projects receiving fewer requests spend more resources on less promising cases, but this seems inaccurate as explained previously in “Number of Cases Seriously Investigated” (see *supra* Part III.A.2.e).

Similar to the relationship between high state and prison populations and exonerations, there is also a strong relationship between the states with the highest annual budgets for fiscal year 2008 and the average number of exonerations per project (see Table 11). The top quartile produced an average exceeding seven exonerations per project; the second quartile, approaching five exonerations per project; and the bottom half produced no exonerations.

Furthermore, not surprisingly, there is a strong relationship between population and revenue, as more people pay more taxes. Specifically, seven of the projects remained in the top quartile for state revenues as well as total population and prisoner population. When the projects that make up the quartiles are compared between state revenues and total state population, only two projects changed: they fell by approximately one quartile. Interestingly, when the projects that make up state revenues are compared to total prison populations, two projects that were in the top quartile of prison population were in the second quartile in state revenue (these projects were in states that have significantly less money than other states, but significantly more prisoners).

244. As more research is conducted, these discrepancies may disappear. If not, additional research to explain this difference may be needed, but this is beyond the scope of this paper. See *supra* note 240.

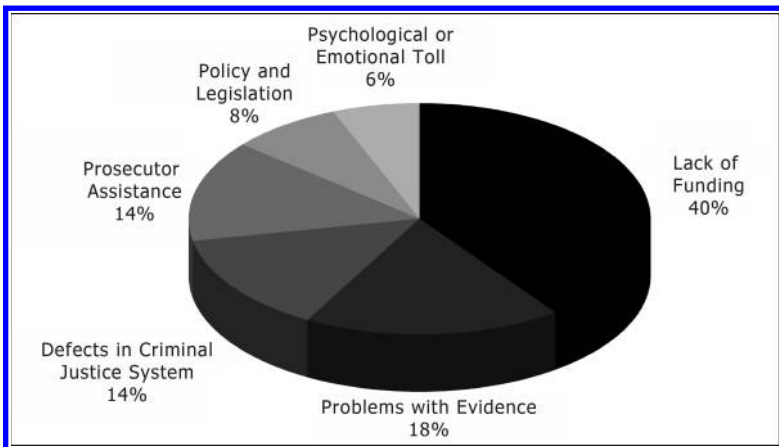
Table 11. Average number of exonerations based on state revenues



B. Issues Preventing Innocence Projects from Achieving Greater Success

Although these issues became readily apparent during general conversation, each project was asked specifically to identify the biggest challenges their organization faces (see Table 12). Most organizations had a “top three” list, but organizations were neither required to provide three replies nor limited to three replies. Further, some replies were grouped into one category (e.g., hiring more attorneys, hiring an office manager, and increased cash flow would all be grouped into the “funding” category). The twenty-two

Table 12. Innocence Projects reported challenges



organizations named issues in six different categories: lack of funding (and accompanying volunteer inefficiencies), problems with obtaining evidence, defects in the criminal justice system, prosecutorial assistance, policy and legislation, and the psychological and emotional toll of the work.

1. Lack of Funding and Volunteer Issues

“Funding hangs over everybody’s head.”²⁴⁵ The lack of funding was the most reported issue, with twenty of the twenty-two projects mentioning financial challenges. Naturally, a lack of funding makes it very difficult to hire additional staff to complete the resource-intensive preliminary review and subsequent investigation to find the cases ripe for litigation. A modest increase in funding would allow projects to hire in-house investigators to help track down materials, people to evaluate the merits of an innocence claim, and case screeners or paralegals for initial review of requests. The review and the investigation stages are almost always the bottlenecks at projects. Somewhat surprisingly, additional funding was not necessarily needed for the actual litigation as projects have had much success attracting pro bono private counsel as lead or cocounsel for cases.

However, the lack of funding is more systemic than an inability to hire additional people-power.²⁴⁶ Foundations are becoming increasingly driven by benchmarks for success, so funding decisions are often made based on the comparative impact of their grant. Therefore, almost by definition, innocence projects are at a massive disadvantage when compared to other grant applicants because much time is spent reviewing and investigating unwarranted claims of innocence to find the cases where people have actually been wrongly convicted. Further, it is not unusual for an exoneration to take a decade, especially for a non-DNA case, and this duration will (unfortunately) not be comparatively impressive to foundations who are looking for more immediate impact and return on their investment. To maximize their impact, foundations are moving toward funding projects that create systemic change, like criminal justice policy reform, instead of general innocence project work that includes review, investigation, and

245. Interview with an innocence project executive director who requested anonymity (Sept. 14, 2009).

246. This is especially true for projects that are not associated with a university because the university typically provides office space, utilities, and supplies.

litigation of individual cases. This is especially true for projects that accept manifest injustice cases (e.g., battered woman syndrome or extremely disproportionate sentences) in addition to actual innocence cases, as this funding would be used to help an individual who did commit a crime even if they were not culpable.

Finally, a lack of funding requires innocence projects to rely on volunteers (students and attorneys), who do tremendous work, but are naturally less invested and may have slightly different interests than the full-time staffers. For example, when working with law school clinics, at least one project has faced a conflict between the educational values of the clinical work and the functional values of needing the students (like everyone involved with the project) to complete their casework responsibilities.²⁴⁷ Further, territorial issues arise when multiple projects are in close geographic proximity as efforts may be unknowingly duplicated, so additional coordination is required to avoid the possible duplication, which requires additional resources.

2. Problems with Accessing Evidence

One project summarized the problems with accessing evidence by stating that “material evidence only exists in approximately 20 percent of cases and without the material evidence it is extremely difficult to meet the applicable standards.”²⁴⁸ The specific problems with accessing evidence can be divided into the direct and indirect consequences of missing or unavailable evidence. For example, there are direct consequences because innocence projects lack access to evidence preservation rooms, so it can be extremely difficult to determine if evidence exists and where it is preserved. If a project can determine that the evidence was previously destroyed, the project may attempt to track down the expert who testified about the relevant forensics or ballistics evidence. The difficulties of establishing if evidence even exists directly impact a project’s evaluation of whether to investigate further or to accept a case.

247. For a discussion about the pedagogical impact of innocence projects as law school clinics, see generally Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 *Clinical L. Rev.* 231 (2006); Medwed, *supra* note 219, at 1127–50.

248. Telephone interview with Dr. Robert Schehr, Executive Director, Northern Arizona Justice Project (Feb. 8, 2010).

If an innocence project is appointed counsel to the individual, they can potentially obtain a subpoena to improve their access to evidence. However, in some states, the court will not appoint the innocence project as counsel for the individual until they can demonstrate that evidence exists. As stated above, this is problematic because projects lack access to the evidence, because they cannot get a subpoena, because they have not yet been appointed counsel. If the project proceeds with the investigation without being appointed counsel, then the project may not get reimbursed from the state for their work (assuming the state does reimburse projects), and all expenses must be paid out of pocket.

Further, projects must be wary of indirect consequences that may (further) stigmatize the individual requesting assistance. For example, if an innocence project gets appointed counsel, successfully obtains a subpoena to obtain evidence, but ultimately finds no existing evidence, the project will withdraw their representation, which could prejudice an individual who has a very strong legal innocence claim. When another person looks at the case docket and sees that an innocence project was representing the individual, but is no longer providing legal counsel, the person may think, “If an innocence project withdrew, surely this person was properly convicted,” even if a strong legal innocence claim exists.

3. Defects in the Criminal Justice System

As one project stated, there are “systematic defects in the criminal justice system, so we have a moral imperative to identify those defects and find ways to remedy them.”²⁴⁹ Another project stated that our criminal justice system is “intellectually dishonest.”²⁵⁰ As discussed above (see *supra* Part I), deficiencies in the criminal justice system make the work of innocence projects necessary. Specifically, the following three deficiencies were mentioned: procedural hurdles, lack of compliance with existing laws, and ill-equipped public defender services. Several projects mentioned difficulties overcoming the procedural hurdle of statutes of limitations. Because most projects will not accept a case until the individual has exhausted available

249. Telephone interview with an innocence project executive director, but name withheld for confidentiality reasons (Sept. 11, 2009).

250. Telephone interview with an innocence project executive director, but name withheld for confidentiality reasons (Feb. 8, 2010).

appeals, which often takes years, the statute of limitations to file the appropriate motion by an innocence project has often expired.²⁵¹ The nature of litigation and the appellate process is slow, but it could move quicker if existing laws were better followed. For example, several states have open-record laws that should facilitate quick turnover of transcripts and files from the government to innocence projects, yet obtaining these materials can take months. However, none of these defects would be nearly as prevalent if all defendants had adequate assistance from public defenders. One project suggested that cloning the best public defender programs and implementing the clones into all fifty states would greatly reduce the number of wrongly convicted individuals.

4. Prosecutor Cooperation

Related to the problems with accessing evidence is the relationship between prosecutors and innocence projects. Although it can be extremely difficult for innocence projects to obtain information about evidence, an “open-minded” prosecutor’s office could easily obtain the necessary information. The prosecutor’s office has the right to withhold evidence and force the innocence project to argue in court why they need the evidence. Innocence projects have indeed been successful in arguing such motions, but this further delays the process and requires the projects to expend additional resources.

Although the success of innocence projects has improved the relationships and collaboration efforts with some prosecutors, there is a general sense that the opposite effect also happens, which results in detrimental side effects to innocence projects. When innocence projects were just beginning, prosecutors were able to maintain confidence that their prior convictions were sound. However, as more and more exonerations became public, some prosecutors became less cooperative because a successful exoneration meant that the prosecutor had not only convicted an innocent person but left the real offender at large. “No one wants to be wrong, so they try to avoid putting themselves in that corner.”²⁵² In some instances,

251. Statute of limitations laws and the corresponding exceptions vary by state. For a more comprehensive discussion of statute of limitations laws, see Peter Neufeld, Preventing the Execution of the Innocent: Testimony before the House Judiciary Committee, 29 Hofstra L. Rev. 1155, 1157 (2001).

252. Telephone interview with an innocence project executive director, but name withheld for confidentiality reasons (Sept. 10, 2009).

the criminal justice system is becoming more about the reputation of the prosecutors involved (and a corresponding political career, see *supra* Part I.E) than the pursuit of justice.

5. Politics and Policy

A handful of projects mentioned that if legislators were more “open-minded” about the reality that innocent individuals are currently imprisoned and that “wrongful convictions happen and it’s not just a fluke,” that would be a great step toward facilitating systemic criminal justice policy reforms. However, the projects also understand legislators’ fear that criminal justice policy reforms may appear to “cripple the law enforcement” capabilities, which could harm legislators’ bids for reelection. For example, one project was disappointed in their state’s current identification system because it was designed by law enforcement and fails to utilize “the best scientific methods.” Additionally, another project cited the need to lower the standard of proof required to secure exemptions for motions that have exceeded the statute of limitations. Finally, there is a belief that politics inappropriately “play a role in Governor’s clemency decision.”²⁵³ The goal should be “smart on crime” not “tough on crime.”²⁵⁴ Unfortunately, the average project only spends 5 percent of its time on lobbying and policy reform because of limited resources and the need to exonerate those who are currently wrongfully convicted (see *supra* Part III.A.1).

6. Psychological and Emotional Obstacles

To find the innocent individuals, innocence projects must sift through the requests of hundreds or thousands of truly guilty individuals. However, working with the guilty individuals does not seem to be the primary source of psychological or emotion strain. Instead, the strain comes from deceit. It is not uncommon for projects to have at least one story of a case they spent years working on, where the individual consistently professed innocence, they finally obtained the evidence to test, and then learned that the DNA results matched the individual who had been professing innocence

253. See *supra* Part I.C regarding the case of Ochoa and Danziger.

254. Telephone interview with John T. Rago, Associate Professor of Law, Duquesne Law Post-Conviction DNA Project (Jan. 18, 2010).

for years.²⁵⁵ One project admitted that eight of the twenty-five DNA tests the project conducted matched the individual professing innocence.

The strain can also come from helplessness. After working on a case for years, sometimes innocence projects come to a dead-end. The necessary evidence could not be found, a key witness may have died, or the courts denied the last motion. Even though the innocence project believes in their heart that the person is innocent, there is nothing to be done and they have to move on. Sometimes the project does not have the heart to actually close the case, just in case something comes up in the future, but they still have to have “the conversation” with the individual. Further, each project has so many outstanding cases that spending time on a case that will not prove successful takes that time away from another case that could be successful.

IV. RECOMMENDATIONS

Overall, innocence projects are doing a remarkable job—especially considering their extremely limited resources. Many senior staffers have agreed to accept lower or no compensation to continue the projects’ work. The following recommendations relating to finances and selection of cases, volunteer involvement, duplicative efforts, fundraising, access to DNA databases, improving internal statistics, and clearly articulating the difference between factual and legal innocence are modest, but would improve the efficiency without sacrificing the integrity of the projects’ missions.²⁵⁶

A. Financial Incentives and Self-Selection of Cases

Like public defenders, none of the innocence projects charge their clients for representation for fear that an innocent individual will not contact them because of insufficient financial resources. Unfortunately, this also allows properly convicted people who falsely profess their innocence to

255. Several projects mentioned an internal (nonpublic) study from one innocence project that reported approximately half of DNA tests they conducted either matched the individual claiming innocence or were inconclusive.

256. The surveyed projects were given the opportunity to review this article, including the recommendations, in full. To the extent the projects responded with critiques or concerns, they were addressed and cited within.

expend project resources—case review, investigation, and litigation perhaps including testing DNA evidence—before finding out the inmate was lying (see *supra* Part III.B.6). This “playing the lottery” mentality in hopes of finding another person’s DNA or using new technology that might question the prior results could be discouraged if projects charged a nominal fee to review the questionnaire.

Initially, before innocence projects had established their reputation of integrity and success, such a fee may have seemed like a scam. However, today, with 272 DNA exonerations, it seems quite reasonable to charge an individual \$20 to review their case. The inmate may not have \$20 in his prison account, but if the individual was truly innocent, it seems likely that his family or a friend could muster enough money. Since the average project reviews approximately 600 requests, this fee could generate approximately \$12,000 to assist their work. In addition, the fee may reduce total requests by eliminating “lottery players,” thereby allowing projects to spend more time on worthwhile requests. Overall, this would make it easier to identify the truly innocent requests from the “lottery players.”

Charging indigent individuals a fee for legal representation borders on blasphemy in the criminal justice community and may cause people to recoil. However, the overall lack of efficiency inherent in the mission of innocence projects may permit this exception. Perhaps a fee waiver could be included for individuals who truly cannot afford the fee. Often, fee waivers rely on tax returns to demonstrate insufficient funds, but this does not seem appropriate for incarcerated individuals. Instead, an inmate might be required to submit with the general application two letters or completed forms from a family member, friend, or another individual (like a prison counselor or prior attorney) familiar with the inmates financial situation to confirm that the inmate is deserving of a fee waiver. Of course, this is susceptible to fraudulent waiver claims, but the goal of the fee and the corresponding waiver is to discourage “lottery players” from siphoning resources from legitimate innocence claims. This will improve efficiency simply by decreasing the inefficient activity of the review process. Even if the weeding mechanism fails, at least projects will be increasing their revenues.²⁵⁷

257. Another counterargument against instituting a fee program is that the administrative processing of hundreds of fees will increase the administrative burden on innocence projects. Of course, this is true, but will the overall efficiency improve with an increase in funds

One innocence project expressed a concern that instituting a fee program will incentivize sham innocence projects to appear in correctional facilities and trick inmates into paying a fee for little to no help. The sham project may be run by a deceptive individual hoping to capitalize on a marginalized section of the population or by unqualified attorneys. However, just as word spreads through correctional facilities about innocence projects, word will spread if such a sham organization appears. Further, the list of projects associated with the Innocence Network could be kept in prison libraries for concerned inmates. Alternatively, a family member or friend could contact the project on the inmate's behalf to evaluate legitimacy (especially if the family member or friend is providing the fee).

B. Increase the Quality of Volunteer Involvement: Interns/Externs and Students From Nonlegal Disciplines

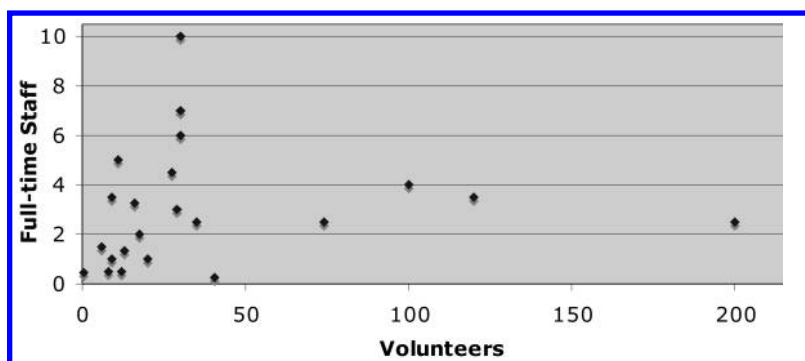
Although there is no linear correlation between increasing volunteer involvement and increasing exonerations (see *supra* Part III.A.2.b, showing as many exonerations from projects with fewer volunteers), volunteers can help projects plow through the 13,000+ requests received in 2009 to find the promising claims of innocence.

All projects utilized some type of volunteer assistance. Eighteen of the twenty-two projects interviewed worked with at least one student clinic in a law school, but the projects expressed varying levels of satisfaction (see *supra* Part III.B.1). In some instances, the students were clearly critical to the success of the project's investigation,²⁵⁸ but in other instances, the clinical oversight was extremely cumbersome and detracted from actual case work because highly skilled staffers were supervising too many lesser-skilled volunteers working on less critical tasks. Table 13 demonstrates the relationship between particular projects' reliance on volunteers and the projects' number of full-time staffers.

Intuitively, a project with fewer staff members may need to rely on more volunteers. But a handful of projects (especially those with over fifty

and/or a decrease in requests? The answer is unknown, but it seems worth trying, especially for established projects with a reputation in the community.

258. See Arizona Justice Project, Profiles: Byron Lacy, http://www.azjusticeproject.org/profiles_byron.php (students were instrumental in exonerating Byron Lacy because their investigation established that the "bullet that was said to have come from Byron Lacy's gun was in fact larger than the bullet hole in the skull of the victim").

Table 13. Correlation between projects' full-time staff and volunteers ($n = 22$)

volunteers) may be overestimating the value of volunteers to the project's overall detriment. These projects may be better served by overseeing a smaller number of students who can dedicate more time to the project, like full-time summer interns or academic externs,²⁵⁹ instead of overseeing the clinical program. It was extremely surprising to learn that only six projects utilized volunteers outside of the university structure (like summer interns or externs during the school year).

University clinical programs have pedagogical requirements to meet the academic clinical standards, which poses a slight conflict of interest. For example, serious case investigation and actual litigation provides the most benefit to clinical students (although these assignments often last several years, discrete tasks are assignable). However, these more in-depth assignments cause a lack of institutional knowledge about the case, and the case loses consistency when parts of it are assigned to future students. Thus, this type of long-term assignment is significantly more appropriate for a full-time, 40-hour-per-week intern or extern because they will likely make more progress and provide a smoother transition because of their longer and deeper commitment. Instead, understaffed projects should assign lesser pedagogical tasks like initial case review and writing recommendation memos to clinical students, but these tasks may not meet the pedagogical clinical requirements. Additionally, the student clinics could perform some preliminary investigation by visiting the scene or testing the stated

259. Many law schools define "externship" as an internship where the student receives a semester of academic credit in exchange for the full-time work experience.

timeline of the incident prior to writing the memos. Alternatively, if clinical students must perform the long-term investigation, the clinic should invest in case management software like CaseMap. This will maintain the integrity of the institutional knowledge and seamlessly pass the knowledge from student to student. The software will allow projects to “organize and connect case facts, legal issues and key players.”²⁶⁰ Although the software is not free, a free thirty-day trial is available for schools with LexisNexis representatives.²⁶¹

Although externs are recommended for understaffed projects, all projects could benefit from externs. Furthermore, all projects could benefit by working with student organizations instead of or in addition to student clinics. This is especially true for schools that do not have an innocence project clinic. UCLA School of Law has an innocence project student group that has partnered with the California Innocence Project.²⁶² The project comes to UCLA once a semester to perform a mandatory training session for students wishing to participate. After successfully completing the training, students are given an actual case to review and write the recommendation memo. Of course, this requires a commitment from the student organization, but once established, the student group can review dozens of cases a year for the project while gaining meaningful legal experience. In five semesters, approximately seventy-five UCLA law student volunteers have reviewed approximately 250 cases.

Finally, innocence projects should consider seeking help from non-legal disciplines that have looser curriculum requirements and correspondingly more flexibility in ways to help. Journalism programs, especially with students interested in investigative journalism, may have more skills that directly translate to the work need by innocence projects. For example, Anthony Porter was convicted of murdering Marilyn Green and Jerry Hillard in Chicago in 1982.²⁶³ Largely from the investigative efforts of David Protesse and the students at the Medill Innocence Project at Northwestern University’s Medill School of Journalism, it was discovered that Porter was mentally incompetent and innocent. Their investigative efforts resulted in

260. CaseSoft, CaseMap—Case Analysis Tool, <http://www.casesoft.com/casemap/casemap.asp>.

261. See *supra* note 248.

262. In the interest of full disclosure, it should be noted that the author was the founding member and chair of this student organization at UCLA School of Law.

263. See *Look Anew at this Murder Case*, Chicago Tribune, Jan. 30, 1999, at 20.

an interview of the prosecution's chief eyewitness, who recanted his testimony and explained that he falsely accused Porter under police pressure.²⁶⁴ Additionally, the students discovered evidence suggesting the guilt of another individual, Alstory Simon. The students discovered that Simon had a financial dispute with one of the victims over a drug sale on the night of the murder. Further, the students obtained an affidavit from Simon's wife, who was with him the night of the murder, stating that she saw Simon shoot the victims. Next, the students obtained an affidavit from Simon's nephew stating that Simon said he "had taken care of Jerry and Marilyn" when he returned to their apartment that night. Finally, the students videotaped a confession by Simon in 1999.²⁶⁵ Porter was freed from death row on February 5, 1999.²⁶⁶

C. Combine Resources to Eliminate Duplicative Efforts

Duplication of efforts is a legitimate concern of innocence projects sharing the same geographic area. For example, without proper coordination, the same case could be reviewed and investigated at multiple projects if each received a separate request from an inmate. In addition, duplication can create conflicts between innocence projects in two circumstances: when law schools in close geographic proximity want to house their own innocence projects, and when an established innocence project in the community is completely independent from one or more nearby law schools that want to create their own innocence projects.²⁶⁷

In the first instance, older projects have been successfully distributing cases to the newly formed project(s), since both projects have their own staff and volunteers. This distribution system remains necessary so long as the projects are serving overlapping geographic regions. If no established project exists, the schools should consider combining resources to create one project (or at least sharing a coordinator if geographically feasible) until the project becomes large enough to split and each school can house

264. Medwed, *supra* note 107, at 165.

265. *Id.* at 166.

266. Medill Innocence Project, <http://www.medillinnocenceproject.org/>.

267. Most innocence projects are housed within a law school, but at least nine of the projects interviewed operate as an independent 501(c)(3) from the law school (with the exception of instructing a clinical course).

their own. This is similar to way high schools in small communities combine students to field particular sports teams.

However, the second instance is more problematic. The independent innocence project often finds itself in a supervisory role, coordinating the efforts between their project and the schools' projects because the independent project is more established and unbiased. Not surprisingly, the independent project lacks the necessary coordination resources. Coordinating the efforts of multiple projects to prevent duplication, regardless of the size of the geographic area served, is a significant time commitment. In such instances, all parties involved would be better served if each clinic contributed \$5,000–\$10,000 into a fund allowing the independent project to hire a coordinator until the new projects are sufficiently established.

D. Make Discrete Funding Requests

Innocence projects should at least be partially funded by the state and federal government.²⁶⁸ To this end, a handful of projects earned a National Institute of Justice grant to perform DNA testing, but many were denied and the grant may not be used for non-DNA cases.²⁶⁹ Every project confirmed that successful exonerations take multiple years, but no project expressed making discrete funding requests based on specific needs of individual cases. On average, innocence projects spend less than 8 percent of their time on fundraising and have had moderate success, so requests of modest size with strong ties to personal stories may be quite successful.

For example, one project has spent years tracking down a witness in the United States because they are confident their client is innocent. However, after years of efforts, they strongly believe the individual is likely in a specific east African country. The project lacked the resources to continue the investigation abroad and did not attempt to raise funds to continue the investigation. After investing years of resources, this case could make a

268. See Dave Michaels, *Accused May Receive More Aid*, Dallas Morning News, Nov. 20, 2004, 4A (a Texas Court of Appeals judge is calling for more funds for law school-based innocence projects); Thompson, *What Price Is Justice?*, *supra* note 25, at 38 (only one state, North Carolina, has an Innocence Inquiry Commission, and others do not seem likely to follow any time soon).

269. U.S. Dept. of Justice, Office of Justice Programs, National Institute of Justice, Solicitation: Solving Cold Cases with DNA <http://www.ncjrs.gov/pdffiles1/nij/slooo933.pdf>.

compelling grant proposal for the specific purpose of tracking down this individual. Projects may be rightly concerned about the resources required to write a dozen or more of these specific funding requests, but this could be overcome by grouping a handful of a project's most promising cases into a single grant proposal. Their request may be more successful because grantors will not be funding the "grind work" of sifting through the meritless cases. In addition to submitting these requests to foundations, this strategy may be particularly appealing to individual, high-value donors because of the modest amounts requested and personal ties to specific cases.²⁷⁰

Although unlikely, this strategy does pose the risk of funding cannibalization for the specific project and the overall innocence project community. Funders may want to support only the specific requests from individual cases and refuse to fund the general operation, which is necessary for the projects to develop the most promising cases that these funders would be willing to support. Essentially, funders may tell the projects to find general funding elsewhere, but return when they have specific cases. Hopefully, funders who have given resources to innocence projects in the past will understand that funding only discrete tasks of specific cases will ultimately cause the project to fail. Thus, this approach may be best utilized when approaching new high-value donors or reapproaching existing funders for a supplement to the general funding the project has already received.

E. Increase Access to DNA Databases

As noted above (see *supra* Part III.B.4), some prosecutors are less than excited to help innocence projects because successful exonerations notify the public that the real offender is at large. Like the logic behind making discrete and modest funding requests, innocence projects may consider approaching governors, state legislators, and prosecutors to improve their access to DNA databases. The average project spends approximately 5 percent of its time on lobbying and policy reform efforts (see *supra* Part III.A.1). If projects adopt the recommendation to utilize full-time interns or externs,

270. Admittedly, not all projects have access to high-value donors, but many projects have email distribution lists that could be used to generate funds from individual donors or from local schools, faith-based organizations, or neighborhood groups organizing fundraisers for specific cases or tasks. Projects would need to be mindful of confidentiality issues associated with sharing information about their client's case when requesting donations, but in such circumstances obtaining the client's consent seems plausible and reasonable.

they can probably double this percentage. Typically, a project's lobbying/policy reform efforts consist of a wide-ranging platform of criminal justice reform. Instead, projects may consider focusing on one discrete issue, like limited access to DNA databases.

This particular issue is appealing for three reasons. First, it would provide a direct and immediate benefit from expediting the testing process. Second, unlike lobbying for reforms like double-blind line-up testing or mandatory video-taping of suspect questioning, this does not have the appearance of telling law enforcement how to perform their jobs. Third, projects may be able to help prosecutors find the real offender. For example, if a project tested the DNA of a piece of evidence against the DNA of the convicted and the result was inconclusive, this may not be sufficient to free their client. Depending on the type of DNA and where it was found, prosecutors may argue that just because the DNA did not match the project's client, that does not mean the client is innocent. However, prosecutors are more likely to believe that the client is innocent if the unknown DNA sample was run through a DNA database and matched with another individual who has a history of committing similar offenses. If innocence projects had access to these databases, then they could run the inconclusive samples without having to wait for the government approval. This would help their client and the prosecutor build a case against the real offender.

F. Improve Internal Statistics

Aside from financials and total number of exonerations, very few projects maintain reliable statistics. For example, none of the projects systematically tracked the time spent on particular tasks (see *supra* Part III.A.1), so inefficiencies are difficult to identify. Perhaps a project believes they are only spending 5 percent on administrative needs, but they are actually spending 20 percent when calculated (based on actual replies from projects). Further, although all projects knew approximately how many requests for assistance they received this year, only eight of twenty-two projects recorded the number of requests they received in any prior years. Similarly, most projects knew how many requests were being seriously investigated at present, but were unclear about historical totals of cases seriously investigated. If projects had a historical record of requests and the number of cases they seriously investigated, they would be able to create a benchmark average and test adjustments to improve efficiency and effectiveness. Additionally, the responses

to “How many individuals did you believe to be innocent, but were unable to assist?” were so unreliable that the question was dropped from the survey. Presumably, this is less troubling because projects often have no way to know that they are unable to help until they complete their investigation, although one cannot be sure about trends or similarities because statistics are not available.

Projects are unquestionably strapped for resources, and keeping additional statistics is more work and not directly related to exonerating wrongly convicted individuals today. However, projects should attempt to take a long-term perspective because keeping accurate internal statistics and records could greatly improve their efficiency and effectiveness in the future.

If keeping internal statistics is simply not possible (or if the project is newly formed), the project should consider adjusting (or aiming) toward the “sweet spots” and “breaking points” from the above-mentioned factors (see *supra* Part III.A.2). In lieu of project-specific statistics, these “sweet spots” could be used as a baseline or to create a project model that could be tailored to a project’s specific needs. Although the data in Part III.A.2 demonstrates only correlations to successful exonerations, the results or “sweet spots” are worth summarizing: an annual budget of \$225,000, four paid staffers, and no more than forty volunteers, and located in a state with a high population and high revenue, spend approximately 15 percent of the project’s time on initial review and seriously investigate at least fifty cases a year.

G. Distinguish Factual Innocence from Legal Innocence for Requestors and Students

A reoccurring difficulty faced by innocence projects is articulating the difference between legal innocence and factual innocence to the individuals requesting assistance. Typically, these individuals must exhaust the appellate process before a project will consider their case. During the appellate process, the appellate counsel is usually focused on appealing legal issues from the prior trial that could invalidate the conviction. Thus, by the end of the appellate process, these individuals are often confused about the difference between factual and legal innocence, and mistakenly believe that legal issues are the only way to overturn their conviction. This is demonstrated by the amount of time spent discussing legal innocence claims

rather than factual innocence claims in their questionnaire replies—despite instructions to focus on factual innocence claims.

This uncertainly causes projects to spend additional time sorting out the factual claims from the legal claims, and often results in a recommendation to do additional preliminary investigation before making a decision to seriously investigate the case. If the requestor had a better understanding about the difference between factual and legal innocence, much of the additional preliminary investigation could be avoided.

This issue can be overcome by clearly articulating and emphasizing the difference between factual and legal innocence on the questionnaire. For example, the questionnaire could tell the requestor to determine if the argument explains (1) why the conviction or sentence was legally improper, illegal, or unfair (these are often legal innocence claims and therefore irrelevant); or (2) why the individual could not or did not commit the crime, or why it is impossible for the convicted to have committed the crime (these are often factual innocence claims and therefore very relevant). To this end, projects may consider adding a chart to the questionnaire that would classify arguments as generally regarding legal or factual innocence and stressing the importance of focusing on the factual innocence claims (see Table 14).

The above-mentioned tactics can also be used to acquaint students or volunteers with the difference between factual and legal innocence. These students and volunteers could also benefit from reviewing hypotheticals from prior cases.²⁷¹

271. Below are two hypothetical situations designed to train volunteers on the difference between factual and legal innocence. *Hypothetical #1*: (1) Client was convicted of murder, rape, and adultery (in a make-believe state where adultery is still considered a crime). (2) Client explained that he met the victim at a known singles bar where the victim told him she was single, but the victim lied and had been married for several years. (3) Client claimed that the sexual relations were consensual; in fact, he claims the victim seduced him, and the victim's friend testified that the victim told her that she was going to seduce him. (4) Later that evening, the victim was shot and killed when she was returning home. *Analysis*: First, the charge of rape turns on the degree of consent. Whether the parties had sexual relations is not in dispute; the only dispute is the degree of consent that existed. Thus, this is an issue of legal innocence, not factual innocence. Because the parties did engage in sexual relations, it is possible that the client could have raped the victim. The testimony suggesting that the victim planned to seduce the client is not relevant to the client's factual innocence; in fact, it supports the notion that the client and the victim had sexual relations, which eliminates the possibility of factual innocence. Second, the client had sexual relations with a married

Table 14. Criteria for legal or factual innocence

<i>Legal innocence</i>	<i>Factual innocence</i>
<ul style="list-style-type: none"> • Procedural issues at trial (such as voir dire, denial of specific motions, denial of specific evidence like expert testimony, matching charges with crime—overcharging or double-charged, prosecutorial misconduct, cumulative effect arguments) • Miranda rights • Sentencing issues (such as enhancements, three strikes classifications, consecutive sentencing) • Ineffective assistance of counsel 	<ul style="list-style-type: none"> • Alibi • New witness testimony • DNA (new testable item or new testing technique) • Misidentification • Recantation or perjured testimony • False confessions • Prosecutorial misconduct (such as witness intimidation, withholding evidence)

VI. CONCLUSION

For the first time in fifty years, the U.S. Supreme Court used their “original jurisdiction” power to grant petitioner Troy Davis’s request for an evidentiary hearing after it became increasingly clear that Georgia was poised to execute a potentially innocent man. In 1991, Davis was convicted of

individual, so adultery was committed. It is not relevant that the client thought the victim was single or that they met at a singles bar; factual innocence does not consider the mens rea component of a crime. Third, the client may have a factual innocence claim for the murder if he had an alibi for when the victim was shot or if DNA was found on the bullet or gun that did not match the convicted. *Note:* DNA evidence is often used in rape cases, but it is not applicable in this case because the parties agree that sexual relations occurred.

Hypothetical #2: (1) Client was convicted of two murder charges: one prior to trial and one while in state prison. (2) The murders happened years apart, but the trials were combined. (3) The client has a strong alibi for the first murder. (4) For the second murder, the defendant and the victim were locked in a prison cell at the time, and the defendant claims self-defense. (5) The client is serving two consecutive life-without-parole sentences. *Analysis:* A potential client may have many arguments pertaining to these facts, but there are at least four very obvious arguments. First, any potential prejudice from trying the murders together is an issue of legal innocence: it explains why the conviction was unjust. Second, the alibi is an excellent example of factual innocence: if the individual was not at the crime scene, the individual could not have committed the crime. Third, self-defense is an admission of responsibility with a potential justification: if the individual committed the crime, there is no claim of factual innocence. Fourth, arguing that the prosecutor should have charged the client for manslaughter (instead of a more serious homicide version) for the second murder goes to legal innocence: it explains why the charge was improper or unjust.

murdering a police officer in Georgia two years earlier.²⁷² Three men, including Davis, were haggling a homeless man outside of Burger King when the gun-holder struck the victim with a handgun.²⁷³ An off-duty police officer providing security to Burger King approached the scene, and the gun-holder shot and killed the officer. At trial, the prosecution presented seven eyewitnesses alleging that Davis shot the officer, but only two of those testimonies remained intact, and one of those is from Red Coles, the man Davis believes shot the officer.²⁷⁴ Three informants, individuals the police had in custody, submitted affidavits that their testimony against Davis was inaccurate at best and a complete lie at worst.²⁷⁵ The police never investigated Coles as a suspect, despite the fact that ten individuals' affidavits suggested that Coles may have been the real culprit.²⁷⁶ Davis's fate is pending, and Amnesty International USA, one of Davis's strongest advocates, admits it "does not know if Troy Davis—or [Coles]—is guilty or innocent of the crime."²⁷⁷ However, "[t]he substantial risk of putting an innocent man to death clearly provides an adequate justification" so the U.S. Supreme Court granted an evidentiary hearing, which was unconscionably denied by the district court in Georgia.²⁷⁸ Unfortunately, on March 28, 2011, the U.S. Supreme Court denied Davis's writ of habeas corpus and his fourth execution date could be set two weeks after Georgia announces it has reestablished its execution protocol.²⁷⁹

The least our legal system must do is embrace modest recommendations to minimize the chance that an individual could be wrongly convicted and assist those who may already be wrongly convicted. Our criminal justice

272. David Von Drehle, *Davis Ruling Raises New Death-Penalty Questions*, *Time Magazine*, Aug. 18, 2009.

273. *Id.*

274. Amnesty International USA, "Unconscionable and unconstitutional": Troy Davis Facing Fourth Execution Date in Two Years (2009), at 17 and 20–24, <http://www.amnesty.org/en/library/asset/AMR51/069/2009/en/71011b30-ob83-4a23-932b-2fc205546d1c/amr510692009en.pdf>.

275. *Id.* at 19–20.

276. *Id.* at 25–29.

277. *Id.* at 1.

278. *In re Davis*, 130 S. Ct. 1, 2009 U.S. LEXIS 5037, *2 (U.S. Aug. 17, 2009). On August 24, 2010, Judge William T. Moore Jr. held that Davis had not met the "extraordinarily high" standard for demonstrating his innocence during the evidentiary hearing. *In re Davis*, 2010 U.S. Dist. LEXIS 87340, *140 (S.D. Ga. Aug. 24, 2010).

279. *In re Davis*, 131 S. Ct. 1808 (2011).

system is dreadfully slow in adjusting to injustices, but it is hoped that innocence projects will be able to increase their efficiency and effectiveness as they continue their tireless efforts to exonerate individuals who were wrongly convicted by our criminal justice system.

APPENDIX A: RESEARCH QUESTIONS FOR INNOCENCE PROJECTS

A. General Open-Ended Questions:

1. What process do you use to review the requests for help?
2. Do you have a set of criteria to determine which cases to litigate?
3. Is there ever a conflict between a case you would like to bring, but can't? If so, how do you resolve this?
4. In general, why do you think you might or have failed to get an exoneration after you've agreed to assist someone?
5. What are the biggest challenges that your organization faces?
6. If you had the ability to magically change or adjust anything, what would you do?
7. In addition to the direct litigation assistance, are you participating in any larger criminal justice reform advocacy? If so, in what way?

B. Specific Questions:

1. Confirmation of year founded.
2. How many requests do you review per year (or have you reviewed in total)?
3. How many exonerations have you assisted with, and how many of those were DNA vs. non-DNA?
4. How many paid staff? How many staffers are attorneys?
5. Are you affiliated with a law school clinic, or do you work with a law school clinic? Please explain.
6. Approximately how many volunteers do you use per year? Of the total number of volunteers, how many are clinic-affiliated students, non-clinic affiliated students, attorneys, and non-attorney adults?

7. Current yearly budget?
8. Please estimate the percent of time your organization spends on the following (the total should = 100%):
 - a. Initial Review of new request for assistance
 - b. Additional Investigation of potential cases you may accept
 - c. Litigation for accepted clients
 - d. Post-exoneration help for clients
 - e. Administrative needs
 - f. Fundraising
 - g. Education/Outreach
 - h. Lobbying/Policy Reform