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THE NEED FOR AN INNOCENCE NETWORK IN TEXAS

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On May 25, 1991, the State of Texas sentenced Odell Barnes to death for the murder of his girlfriend Helen Bass.[1] To convict Barnes, the State presented evidence that blood, matching the victim's blood type, was found on Barnes's clothes, that Barnes's fingerprints were found on a

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1. Charlton et al., *The Wrong Man – The Odell Barnes Affair, at* http://www.justice denied.org/odell.htm (last visited Mar. 24, 2005).

lamp at the crime scene, the testimony of an eyewitness, and the testimony of two other men who claimed to have seen Barnes in possession of the weapon used to kill the victim.[2] Each piece of evidence put forward by the prosecution was of questionable credibility.[3] First, Barnes was Bass's lover; it was natural that his fingerprints were found in her bedroom.[4] Second, the eyewitness apparently saw Barnes—a man he hardly knew—at night on a dimly-lit street from forty yards away, while wearing tinted glasses.[5] Third, substantial evidence suggests that one of the State's key witnesses had been offered a deal in an unrelated drug charge.[6] The other eyewitness provided testimony that conflicted with statements made by other witnesses in the case.[7] Finally, when Barnes's post-conviction attorneys later conducted DNA testing on the blood found on Barnes's clothes, they discovered that, while it was the victim's blood, the sample contained substantial amounts of citric acid, a substance commonly used by laboratories to preserve blood samples.[8] Dr. Kevin Ballard, who conducted the DNA tests, stated that the blood found on Barnes's clothes had to have come from a laboratory and that "this [was] the most blatant case of tainted evidence I've ever seen."[9]

Despite rigorous post-conviction representation by criminal defense attorney Gary Taylor, the State of Texas executed Odell Barnes on March 1, 2000.[10] Based on the evidence available at the time of his execution, it seems highly likely that Barnes went to his death an innocent man.

I. INTRODUCTION

The very same month as Barnes's execution, Professor David Dow of the University of Houston Law Center started the Texas Innocence Network as a clinical program for law students at the University of Hous-

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2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. Bob Burtman, *Killing Time*, HOUS. PRESS, Jan. 20, 2000, *available at* http://www.houstonpress.com/issues/2000-01-27/feature.html. Additionally, it should be noted that Barnes's court appointed attorney openly admitted to his own ineptitude after the conclusion of the trial. *See* Charlton, *supra* note 1.
10. In an attempt to raise public awareness of the Barnes case, Gary Taylor, along with the other post-conviction attorneys involved in the case, drafted a report. *See* Charlton, *supra* note 1. The report is available at www.justicedenied.com (last visited Mar. 24, 2005). A record of Odell Barnes's execution is kept online by the Texas Department of Criminal Justice at http://www.tdcj.state.tx.us/stat/executedoffenders.htm (last visited Mar. 24, 2005).

ton.[11] Since that time, the project has screened close to 3,500 claims of actual innocence, found over 150 claims of merit, and has been successful in freeing two innocent men from prison: Josiah Sutton and James Byrd.[12]

Professors Robert Dawson and William Allison, with the help of criminal defense attorney David Sheppard, started a similar project in 2003 at the University of Texas Law School.[13] Dawson claims that in the short time since its inception, the project has investigated over 500 claims of actual innocence and found ten claims of actual merit.[14]

Over the past twelve years, innocence projects have sprouted up like mushrooms across the country in response to perceived flaws in the criminal justice system.[15] The first such program was the brainchild of Professors Barry Scheck and Peter J. Neufeld of Cardozo Law School in New York.[16] As of 2002, innocence projects had been involved in the exoneration of close to 100 innocent people who had otherwise exhausted their post-conviction appeals.[17] Since 1973, with or without the assistance of an innocence project, 115 death row inmates have been freed from prison after proving their innocence.[18]

On November 5, 2004, the Texas Court of Criminal Appeals (CCA) sponsored an invitational conference on actual innocence attended by law professors, prosecutors, and criminal defense attorneys from around the State.[19] CCA Judge Barbara Hervey stated beforehand that the conference was intended to create a statewide innocence network to be operated through the State's various law schools.[20] Robert Dawson hoped the conference would create two or three new Texas based innocence projects.[21] Before the start of the conference, Dean Bill Piatt of St.

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11. Mary Alice Robbins, *Court of Criminal Appeals Funds Conference on Actual Innocence*, TEX. LAW., Aug. 23, 2004, at 4, *available at* http://www.texaslawyer.com.

12. *Id.*

13. *Id.*

14. *Id.*

15. Ellen Yankiver Suni, *Ethical Issues For Innocence Projects: An Initial Primer*, 70 UMKC L. REV. 921, 922 (2002) (describing the different paradigms in which innocence projects organize themselves and discussing some professional responsibility concerns that are especially important to such projects).

16. *See generally* Innocence Project, *About this Innocence Project*, *at* http://www.innocenceproject.org/about/index.php (last visited Mar. 24, 2005).

17. Jan Stiglitz et al., *The Hurricane Meets the Paper Chase: Innocence Projects' New and Emerging Role in Clinical Legal Education*, 38 CAL. W. L. REV. 413, 414-15 (2002) (illustrating the normal activities of a student enrolled in an innocence project using the first person perspective of a fictional student).

18. *Innocence and the Death Penalty*, *at* http://www.deathpenaltyinfo.org/article.php?did=412&scid=6 (last visited Mar. 24, 2005).

19. Robbins, *supra* note 11.

20. *Id.*

21. *Id.*

Mary's University School of Law expressed an interest in forming such a project at his institution.[22] According to David Dow, another goal of the conference was to institutionalize a statewide innocence network where different law schools could work closely together to help free innocent people from prison.[23] It is still too early to tell whether the goals of the conference will come to fruition any time soon.

The need for an innocence network is particularly acute in the State of Texas. The past few years have seen an embarrassing scandal at the Houston Police Department Crime Laboratory, and more crime lab scandals appear to be on the horizon.[24] What follows here is a discussion of the ways in which innocence projects operate, the particular challenges they face in Texas, and the reasons why the need for such projects is particularly pressing.

II. Historical Background

A. *The Growth of Clinical Programs*

The past thirteen years has seen the birth and steady growth of clinical innocence projects around the country,[25] but their history can be traced back even further.[26] Centurion Ministries, a faith-based organization out of Princeton, New Jersey, holds the distinction of being the first innocence project in the United States.[27] Founded in 1983 by former corporate executive turned Christian minister James McCloskey, Centurion Ministries has been responsible for freeing fourteen innocent men and women from prison.[28] It only takes on cases where an inmate has been sentenced to either life in prison or death, and where an inmate is completely factually innocent of the crime for which he or she has been convicted.[29] Similar projects were started up across the country and many, including Centurion Ministries, continue to operate to this day.[30]

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22. *Id.*

23. *Id.*

24. Steve McVicker, *More DPS Labs Flawed*, Hous. Chron., Mar. 28, 2004, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/2470016.

25. Stiglitz, *supra* note 17, at 421.

26. Suni, *supra* note 15, at 926-27.

27. National Association of Criminal Defense Lawyers, *Centurion Ministries*, *at* http://www.criminaljustice.org/public.nsf/Freeform/CenturionMinistries?OpenDocument (last visited Mar. 24, 2005).

28. *Id.*

29. *Id.*

30. *Id.*

B. *DNA Testing*

An important event in the history of innocence projects was the use of deoxyribonucleic acid (DNA) as evidence in criminal proceedings.[31] In 1987, British Scientist Dr. Alec J. Jeffreys used DNA for the first time as forensic evidence to exclude a suspect in a rape case.[32] The police then collected DNA samples from thousands of men living in the area, and, as a result, finally determined who the real offender was.[33] That same year, Robert Melias, also from Great Britain, became the first man ever to be convicted on the basis of DNA evidence, with Tommy Lee Andrews of Florida following close behind.[34]

The birth of forensic DNA, or "DNA fingerprinting" as it is termed in the scientific community, quickly led to a new development in the field of legal education.[35] In 1992, the first clinical innocence project was founded at Cardozo Law School in New York for the purpose of conducting DNA testing on prisoners with viable claims of innocence.[36] Representation was limited, and still is, to cases where untested DNA evidence exists, and where an inmate has exhausted all other post-conviction remedies.[37] Since the founding of the clinical program at Cardozo Law School, other innocence projects have sprung into existence. Many have broader scopes of representation, such as impeachable testimony or ineffective assistance of counsel,[38] but almost all clinical innocence projects focus on conducting post-conviction DNA testing.[39]

The admittance of DNA evidence in post-conviction proceedings received a warm welcome from the American court system, but it took some time before procedures for its admittance developed with precision.[40] In the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court paved the way for the admittance of DNA evidence at trial by ruling that it was not necessary for an expert's opinion to be

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31. John T. Rago, *"Truth or Consequences" and Post-Conviction DNA Testing: Have You Reached Your Verdict?*, 107 DICK. L. REV. 845, 855-58 (2003).

32. EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 4 (1996).

33. *Id.*

34. *Alec Jeffreys and the Birth of Forensic DNA*, *at* http://home.iprimus.com.au/dna_info/dna/JA_DNA_LegSci_2.html (last visited Mar. 30, 2005).

35. Stiglitz, *supra* note 17, at 421.

36. Innocence Project, *supra* note 16.

37. *Id.*

38. Stiglitz, *supra* note 17, at 421-22.

39. *Id.*

40. James P. O'Brien, Jr., *DNA Fingerprinting: The Virginia Approach*, 35 WM. & MARY L. REV. 767, 768 (1994) (critiquing Virginia's approach to the admittance of DNA evidence).

based on generally accepted scientific techniques, provided that the techniques comported with the standards of reliability and relevance laid out by the Federal Rules of Evidence.[41] This ruling was rightly applied to the admittance of DNA evidence.[42] The majority opinion was troubling, however, in that it seemed to place faith in Federal Judges to decide when a scientific technique comported with the Federal Rules of Evidence, and when it did not.[43] In his dissent, Justice Rehnquist took the majority's reasoning to task by stating:

> I defer to no one in my confidence in federal judges; but even I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its 'falsifiability,' and I suspect that some of them will be, too.
>
> I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role.[44]

While *Daubert* represented the Federal system's resolution of the evidentiary problems associated with DNA evidence, State courts had begun struggling with the same issue much sooner.[45] For instance, in *Spencer v. Virginia*, the Supreme Court of Virginia placed the burden of deciding which scientific technique was more reliable on the jury.[46] According to the Virginia Supreme Court, "It was the jury's function to weigh and reconcile the testimonies of the medical examiner and the serologist. If their testimonies conflicted, the jury was empowered to resolve the conflict."[47] Importantly, the Court did not address the issue of whether techniques of analyzing DNA evidence had gained enough support among scientists so as to be admissible in criminal proceedings, it simply assumed they had.[48]

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41. 509 U.S. 579, 597 (1993).

42. Barry C. Scheck, *DNA and Daubert*, 15 CARDOZO L. REV. 1959, 1962 (1994) (providing an analysis of how Daubert's framework should be applied to cases where DNA evidence is used).

43. *See Daubert*, 509 U.S. at 593.

44. Scheck, *supra* note 42, at 1961.

45. *Compare* West Virginia v. Woodall, 385 S.E.2d 253 (W. Va. 1989) (holding that the burden of proving that a scientific technique is not generally accepted falls upon the party seeking exclusion), *with* Spencer v. Virginia, 384 S.E.2d 775 (Va. 1989) (placing the burden of deciding whether a scientific technique is reliable upon the jury); *see also* People v. Castro, 545 N.Y.S.2d 985 (N.Y. App. Div. – Bronx County 1989) (holding that DNA evidence satisfied the *Frye* Test, and is generally accepted in the scientific community).

46. *Spencer*, 384 S.E.2d at 775.

47. *Id.* at 780.

48. *See id.* at 777.

In contrast, the Supreme Court of Appeals of West Virginia, directly addressing the issue, held that, since DNA analyses had become so generally accepted among scientists, they should be admissible in a criminal trial.[49] An appellate court in New York also took this approach.[50]

III. Professional Responsibility Concerns for Innocence Projects

A. *Professional Responsibility Concerns Specific to an Innocence Network*

Issues of professional responsibility tend to revolve around the organization of a particular legal institution. While Innocence Projects and clinical programs generally are bound by the same rules of professional conduct as law firms, a statewide network, such as the one proposed by the Texas Court of Criminal Appeals,[51] would necessarily require sharing confidential information among member-institutions on a regular and continuing basis.[52] Quite obviously, this would decrease the possibility of duplicate services provided by different projects. However, such information-sharing is not immune from professional and ethical concerns. Specifically, Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct would preclude projects from entering a client's name into such a database without the client's consent.[53] Accordingly, an innocence project should include written consent forms in its initial intake paperwork, informing the client that representation will not commence unless the inmate agrees to be entered into the database.[54]

Even with ethical limitations, a database of inmates who have applied for the legal services of an innocence project would be beneficial for many reasons. First, there is little danger that disclosure will jeopardize the representation of the inmate in any way. The only information that will be disclosed is the inmate's name and contact information, and the only people who will have access to the database will be employees of various innocence projects. Second, unlike most law firms, innocence projects are not free-market participants. Rather, they offer legal services for free. As a consequence, resources are often tight, especially when considering the high cost of DNA testing and the number of per-

49. *Woodall*, 385 S.E.2d at 260.

50. *Castro*, 545 N.Y.S.2d at 995.

51. Robbins, *supra* note 11.

52. *See* Innocence Project, *Mission*, *at* http://www.innocencenetwork.org/about/mission.php (last visited Mar. 24, 2005).

53. Tex. Disciplinary R. Prof'l Conduct 1.05 (Vernon 2004).

54. Suni, *supra* note 15, at 934.

sons currently serving prison sentences.[55] Thus, it is vital that when one innocence project has determined the merits of an inmate's case, other innocence projects are so informed. Otherwise, inefficiencies will result and projects will serve less than the maximum number of wrongfully convicted persons possible.

B. *Unique Professional Responsibility Concerns for Innocence Projects: Structural Paradigms*

In addition to confidentiality issues, innocence projects face several other unique ethical concerns that are worth discussing here.[56] For this discussion, it is important to remember the basic purpose of an innocence project: to free innocent people from prison. Additionally, innocence projects usually take up cases on behalf of those who have already exhausted their post-conviction remedies.[57] Thus, most of the day-to-day operations of an innocence project involve screening cases and selecting those that have actual claims of merit.[58] As mentioned previously, this work is vital because innocence projects offer free legal services to those who have been wrongfully convicted, and inmates languishing in prison with almost no post-conviction remedies left have little disincentive to apply.[59] Moreover, proving your innocence, especially through the use of DNA, tends to be expensive, and virtually unaffordable to indigent inmates.[60]

1. "No Representation Model"

The particular professional responsibility concerns facing a fledgling innocence project will invariably depend upon the way the project is structured.[61] In her article, *Ethical Issues for Innocence Projects: An Initial Primer*, Professor Ellen Yankiver Suni spells out three organizational paradigms to which innocence projects typically adhere.[62] The first is what she terms the No Representation Model, a project whose members are typically not attorneys or even law students.[63] A clergy-based organiza-

55. The Urban Institute, *As Texas's Prison Population Experiences Five-Fold Growth Since 1980, Urban Centers Contend with Former Inmates* (Mar. 19, 2004), *at* http://www.urban.org/url.cfm?ID=900689 (last visited Mar. 25, 2005) (noting Texas prison population has increased to over 150,000).

56. Suni, *supra* note 15, at 923.

57. *Id.* at 925.

58. *Id.*

59. *Id.*

60. *Id.* at 923.

61. *Id.*

62. *Id.* at 926-31.

63. *Id.* at 926-29.

tion such as Centurion Ministries is a prime example of a No Representation Model.[64] Another example is a project formed by journalism students who conduct investigations of inmates' cases and use the power of the media to set them free.[65]

The biggest professional responsibility concern for a No Representation Model is the fact that they are not run by attorneys.[66] As such, neither the Model Rules of Professional Conduct nor the Texas Disciplinary Rules of Professional Conduct apply.[67] While this model has benefits, one of its drawbacks, from a lawyer's perspective, is that communications with inmates are not protected by confidentiality rules.[68] Consequently, the information may be disclosed to third parties; indeed, disclosure is mandatory if demanded by a subpoena.[69]

2. "Full Representation Model"

The Second type of innocence project is what Suni calls a Full Representation Model.[70] Typically, these projects are formed at law schools with existing criminal defense clinics, and are capable of providing a broad range of legal services to indigent inmates.[71] A distinguishing feature of the Full Representation Model is that such projects will continue to represent an inmate even after it becomes apparent that the inmate's claim of innocence is without merit.[72] In Suni's words, "While the possibility of actual innocence is a major factor in a case being selected for representation, continued belief in actual innocence is not a prerequisite for continued representation."[73] Examples of this type of project include the Center for Wrongful Convictions at Northwestern Law School and the California Innocence Project at California Western School of Law.[74]

Innocence projects adhering to the Full Representation model most closely resemble a traditional attorney-client relationship.[75] As a result, such an institution would be directly governed, in nearly all respects, by a state's ethical rules. Because of the intensive screening process that most Full Representation projects conduct, a unique concern to them is

64. *Id.* at 926-27.
65. *Id.* at 927.
66. *Id.* at 931.
67. *Id.*
68. *Id.* at 935.
69. *Id.*
70. *Id.* at 928-30.
71. *Id.* at 928.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

whether an attorney-client relationship has actually been established.[76] Although neither the ABA Model Rules of Professional Conduct nor their Texas counterparts speak directly to this point,[77] Texas courts have established a workable rule through substantive case law.[78] Specifically, Texas courts have routinely held that:

> The legal relationship of attorney and client is purely contractual and results from the mutual agreement and understanding of the parties concerned based upon clear and express agreement of the parties as to the nature of the work to be undertaken and the compensation agreed to be paid therefore. The contract of employment may be implied by the conduct of the two parties. All that is required is that the parties explicitly or by their conduct manifest an intention to create the attorney client relationship.[79]

While this statement of the law has its origins in civil cases, the rule has made its way into the criminal law.[80] Courts interpret the law through an objective standard where they try to determine whether a neutral, objective observer would think that the lawyer and the client had a "meeting of the minds."[81] The subjective intent of either party is irrelevant.[82] Courts will determine on a case-by-case basis whether or not the facts of a particular case indicate that the "conduct" of the parties establishes an attor-

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76. *Id.* at 931.

77. *Id*; *see also* MODEL R. PROF'L CONDUCT R. 1.18 (2004) (mandating duties to prospective clients).

78. *See* Barcelo v. Elliott, Eikenburg, & Stiles, P.C., 923 S.W.2d 575, 577 (Tex. 1996); Upton v. State, 853 S.W.2d 548, 556-57 (Tex. Crim. App. 1993); Vinson & Elkins v. Moran, 946 S.W.2d 381, 405-6 (Tex. App. – Houston 1997, writ dism'd by agr.); Terrell v. State, 891 S.W.2d 307, 313 (Tex. App. – El Paso 1994, writ dism'd); Yaklin v. Glusing, Sharpe, & Krueger, 875 S.W.2d 380, 383 (Tex. App. – Corpus Christi 1994, no writ); Kotzur v. Kelly, 791 S.W.2d 254, 257 (Tex. App. – Corpus Christi 1990, no writ); Parker v. Carnahan, 772 S.W.2d 151, 156 (Tex. App. – Texarkana 1989, writ denied); Dillard v. Broyles, 633 S.W.2d 636, 643 (Tex. App. – 1982, writ ref'd n.r.e.); Shropshire v. Freeman, 510 S.W.2d 405, 406 (Tex. Civ. App. – Austin 1974, writ ref'd n.r.e.); Prigmore v. Hardware, 225 S.W.2d 897, 899 (Tex. Civ. App. – 1949, no writ); *see also* section 14 of the Restatement:

> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person, and either:
> (a) the lawyer manifests to the person consent to do so; or
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows orb reasonably should know that the person reasonably relies on the lawyer to provide the services.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

79. Parker v. Carnahan, 772 S.W.2d 151, 156 (Tex. App. – Texarkana 1989, writ. denied).

80. Terrell v. Texas, 891 S.W.2d 307, 313 (Tex. App. – El Paso 1994, pet. dism'd)

81. *Parker*, 772 S.W.2d at 156.

82. *Terrell*, 891 S.W.2d at 313.

ney-client relationship.[83] Accordingly, an innocence project must be careful not to lead potential clients to believe that they already represent them, especially because the case-screening process generally involves multiple contacts with an inmate before representation is actually commenced.[84] Suni suggests that disclaimers should be inserted into each pre-representation contact with an inmate.[85]

Once an attorney-client relationship has been established between an inmate and an innocence project, certain duties arise between the two parties that present unique professional and ethical concerns.[86] First, according to Suni, is the duty of confidentiality.[87] Confidential information, under the Texas Rules, consists of both privileged information, as defined by the Texas and Federal Rules of Evidence, as well as unprivileged information—*i.e.*, any information provided by a client that does not fall within the definition of "privileged information."[88] Importantly, the duty of confidentiality attaches during the initial investigative work conducted by attorneys in order to determine whether or not to represent a client.[89] This means that all communications made with an inmate during the initial screening process are confidential and may not be disclosed.[90]

Second, either during the course of the screening process or during actual representation, it may be necessary to contact an inmate's previous attorneys in order to obtain information relating to his or her case.[91] To complicate matters, an inmate's previous attorneys are similarly bound by the duty of confidentiality and are unlikely to hand over information without the express written consent of the client.[92] Thus, before contacting any previous counsel, an innocence project should first obtain the consent of the inmate.[93]

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83. See Barcelo v. Elliott, Eikenburg, & Stiles, P.C., 923 S.W.2d 575, 577 (Tex. 1996); Upton v. Texas, 853 S.W.2d 548, 556-57 (Tex. Crim. App. 1993); Vinson & Elkins v. Moran, 946 S.W.2d 381, 405-6 (Tex. App. – Houston 1997, writ dism'd by agr.); *Terrell*, 891 S.W.2d at 313; Yaklin v. Glusing, Shapre, & Krueger, 875 S.W.2d 380, 383 (Tex. App. – Corpus Christi 1994, no writ); Kotzur v. Kelly, 791 S.W.2d 254, 257 (Tex. App. – Corpus Christi 1990, no writ); Parker v. Carnahan, 772 S.W.2d 151, 156 (Tex. App. – Texarkana 1989, writ. denied); Dillard v. Broyles, 633 S.W.2d 636, 643 (Tex. App. – 1982, writ ref'd n.r.e.); Shropshire v. Freeman, 510 S.W.2d 405, 406 (Tex. Civ. App. – Austin 1974, writ ref'd n.r.e.); Prigmore v. Hardware, 225 S.W.2d 897, 899 (Tex. Civ. App. – 1949, no writ).

84. Suni, *supra* note 15, at 934.

85. *Id.*

86. *Id.*

87. *Id.*

88. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 (Vernon 2004).

89. TEX. DISCIPLINARY R. PROF'L CONDUCT Preamble (Vernon 2004).

90. *Id.*

91. Suni, *supra* note 15, at 939.

92. *Id.* at 939-40.

93. *Id.*

Third, innocence projects often employ third parties to conduct investigation into a particular case, such as DNA experts and private investigators.[94] As long as these parties are employed as agents of the innocence project, the project will bear responsibility for any of the agents' breaches of confidentiality.[95] Project coordinators, therefore, must stress to these parties that confidentiality is required on their part.[96]

3. "Limited Representation Model"

The third and final type of innocence project is what Suni calls the Limited Representation Model.[97] In this model, representation is only afforded to inmates who continually show actual, meritorious innocence claims.[98] Thus, if members of a project come to believe during the course of representation that their client is lying and is actually guilty, the project will withdraw from representing that inmate.[99] This means that Limited Representation projects necessarily engage in a much more thorough screening process than either their No Representation or the Full Representation counterparts.[100] This presents not merely professional responsibility concerns, but serious ethical dilemmas: if a project does extensive investigation into an inmate's case, and then declines representation, does that tend to show that the inmate is guilty?[101] Similarly, if a project withdraws from representation after an attorney-client relationship has been established, does that indicate that the inmate is guilty?[102] There are no firm answers.[103] It is, therefore, particularly important for these types of projects to present inmates with informed consent forms concerning the scope of their representation.[104] If an inmate refuses to sign these forms, a project should decline representation.[105]

IV. Tools of the Trade: Ch. 64 of the Code of Criminal Procedure

In 2001, Texas joined a handful of states throughout the nation when it changed its Code of Criminal Procedure to include a provision for the

94. *Id.* at 941.
95. Tex. Disciplinary R. Prof'l Conduct R. 5.03 (Vernon 2004).
96. Suni, *supra* note 15, at 941.
97. *Id.* at 929.
98. *Id.*
99. *Id.*
100. *Id.* at 933-35.
101. *Id.* at 929.
102. *Id.* at 929-30.
103. *Id.*
104. *Id.* at 932-34.
105. *Id.* at 933-34.

admittance of post-conviction DNA evidence.[106] This change provides a vehicle for Innocence Projects around the state to use their clients' DNA in the courtroom.[107] Nonetheless, Innocence Projects operating in Texas need to be aware of limitations that the law imposes.

In sum, the statute allows testing to be ordered when 1) the evidence is still in existence and is in a condition that makes DNA testing possible; 2) a chain of custody has been established to sufficiently show that the evidence "has not been substituted, tampered with, replaced, or altered in any material respect"; 3) the identify of the offender was or still is an issue in the case; and 4) the offender can show by a preponderance of the evidence that a) the offender would not have been convicted if exculpatory DNA evidence had been presented at trial and b) the motion for DNA testing is not made to unreasonably delay the execution of a sentence.[108] Despite its seemingly broad application, the Texas Court of Criminal Appeals has, on several occasions, interpreted it rather narrowly.[109] One such case is *Kutzner v. State*, where a death row inmate made a motion for post-conviction DNA analysis on the skin scrapings found beneath the victim's fingernails.[110] The trial court denied the motion, and the Court of Criminal Appeals affirmed.[111] The court noted that a substantial amount of evidence, biological and otherwise, was already amassed against Kutzner and that ordering testing on the skin scrapings would not, in and of itself, prove the defendant's innocence.[112] In other words, Kutzner had not proved by a preponderance of the evidence that the DNA evidence, if admitted, would exculpate him.[113]

One of the reasons for introducing this comment with the story of Odell Barnes is that it casts doubt upon soundness of the Court's ruling in *Kutzner*. Barnes died before the creation of Chapter 64, but were he still alive, the new law would likely not have saved him. Presumably, the Court of Criminal Appeals, following *Kutzner*, would conclude that the other evidence presented against Barnes at trial, regardless of how weak it was, would be such that the admittance of DNA evidence would not have led to his acquittal.

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106. TEX. CODE CRIM. PROC. ANN. art. 64.01 et seq. (Vernon 2004).

107. *Id.*

108. TEX. CODE CRIM. PROC. ANN. art. 64.03 (Vernon 2004).

109. Kutzner v. State, 75 S.W.3d 427 (Tex. Crim. App. 2002). For an interesting assessment of *Kutzner* and other cases dealing with Chapter 64, see generally Daryl E. Harris, *By Any Means Necessary: Evaluating the Effectiveness of Texas DNA Testing Law in the Adjudication of Free-Standing Claims of Actual Innocence*, 6 SCHOLAR 121 (2003) (analyzing why Texas courts have been reluctant to grant DNA testing under the statute).

110. *Kutzner*, 75 S.W.3d at 429.

111. *Id.*

112. *Id.* at 439.

113. *Id.*

V. THE NEED

In late October 2004, Republican Judge Tom Price of the Texas Court of Criminal Appeals issued a dissenting opinion in the case of Dominique Green, which called for a moratorium on executions of offenders from Harris County.[114] Green had challenged his conviction, in part, based on possible problems with the ballistics tests conducted by the Houston Police Department's Crime Lab.[115] He also pointed out that undocumented DNA evidence had recently been discovered inside the lab that might have changed the outcome of his trial.[116] In light of this evidence, Judge Price contended that the prudent course of action would be to "delay further executions until we have had a chance to have this evidence independently verified. Once a death sentence is carried out, you cannot reverse that."[117] Instead, over protests from the victim's family members, the State of Texas executed Dominique Green on October 26, 2004.[118]

The story of the Houston Crime Lab provides the most compelling reason why an innocence network should be established in Texas. What follows below is a brief description of the scandal and a discussion of how it is illustrative of a much larger problem.

A. *A Leak in the Roof*

In November of 2002, KHOU, a Houston television station, aired a story on its nightly newscast that questioned the credibility of work being conducted by the Houston Police Department Crime Lab.[119] The report cited five different cases in which questionable DNA analysis procedures were used to convict defendants in Harris County.[120] In response, Acting Police Chief Tim Oettmeier launched an independent audit of the lab's conditions and procedures.[121] The results of the audit were shocking.[122] The report concluded that the lab "[was] not designed to minimize con-

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114. Roma Khanna, *Judge Reissues Call to Halt Executions: Moratorium would Include All Capital Cases Tied to HPD Lab*, HOUS. CHRON., Oct. 26, 2004, at B1, *available at* http://www.chron.com/cs/CDA/ssistory/metropolitan/2866619.

115. *Id.*

116. *Id.*

117. *Id.*

118. Rhea Davis et al., *Execution Ends Week of Pleas DNA Lab Worries Are Not Enough to Spare Green*, HOUS. CHRON., Oct. 27, 2004, at A1, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/topstory/2868675.

119. Peggy O'Hare, *HPD Lab Audit has a Way to Go*, HOUST. CHRON., Jan. 19, 2003, *available at* http://www.chron.com/cs/CDA/printstory.mpl/special/crimelab/1742005.

120. *Id.*

121. *Id.*

122. Mike Glenn, *Auditors Find Problems with HPD's Crime Lab: Evidence of DNA Contamination Cited*, HOUSTON CHRON., Jan. 23, 2003, *available at* http://www.chron.com/cs/CDA/printstory.mpl/special/crimelab/1747351.

tamination" because technicians from each of the lab's divisions worked together in a central area.[123] The auditors also reported that important scientific equipment in the lab had not been properly fixed or calibrated, and perhaps most notoriously, the auditors found that a leak in the roof of the building had contaminated evidence.[124] Water had seeped into the lab during Tropical Storm Alison in 2001 and destroyed 35 DNA samples.[125] The fallout from this report was devastating and swift. Within a month and a half, Josiah Sutton, a man convicted of rape at the age of 16 and sentenced to 25 years behind bars, was freed from prison due to the shoddy DNA testing that was used to convict him.[126] Two years later, Texas Governor Rick Perry officially pardoned Sutton of any wrongdoing.[127] Sutton's post-conviction attorney was David Dow of the University of Houston Law Center's Texas Innocence Network.[128]

B. *A Break in the Dam*

Sutton's release was only the beginning of the fallout surrounding the scandal. In the months to come, several lab employees were subject to disciplinary action, and one was even fired.[129] However, the fired analyst was later reinstated after she proved that the errors she committed were not the result of her individual negligence, but rather a product of systematic managerial flaws at the lab.[130] Documents surfaced that showed Chief of Police Brad Bradford and Mayor Lee P. Brown had known of

123. *Id.*

124. *Id.*

125. Roma Khanna & Steve McVicker, *Sutton Freed Because of Faulty DNA Evidence in Rape Case*, HOUS. CHRON., Mar. 12, 2003, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/1815633.

126. *Id.*

127. Associated Press, *Houston Crime Lab Shows Off New Equipment*, HOUS. CHRON., June 30, 2004, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/2656109.

128. Andrew Tilghman, *Judge Wants Sutton's Rape Conviction Thrown Out*, HOUS. CHRON., Apr. 13, 2004, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/2501546.

129. Roma Khanna & Steve McVicker, *Fired DNA Analyst to Return to Work at Crime Lab*, HOUS. CHRON., Jan. 27, 2004, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/2374307.

130. *Id.*

problems at the lab for at least four years.[131] The exposed negligence prompted Bradford's resignation.[132]

Hundreds of old DNA samples, along with other materials had to be retested, and it was discovered that in several cases evidence had been either lost or destroyed.[133] In May 2004, an independent court of inquiry was formed to investigate whether former lab director James Bolding had committed aggravated perjury in a sexual assault case by exaggerating his credentials in a deliberate attempt to mislead the jury.[134] Bolding narrowly escaped prosecution when it was found that the applicable statute of limitations had passed.[135] Most recently, George Rodriguez, a man convicted of rape in 1987, was freed from prison after proving that the DNA tests that led to his conviction included significant inaccuracies, and when done properly, they excluded him as a possible suspect.[136] Rodriguez was represented by Barry Scheck of the Innocence Project at Cardozo Law School.[137]

The lab scandal worsened in August 2003 when employees discovered 280 boxes of undocumented evidence stashed away in a property room at the lab.[138] The boxes contained evidence from approximately 8,000 cases, some of which were over twenty-five years old.[139] The discovery prompted Houston's current Chief of Police, Harold Hurtt, to call for a

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131. Roma Khanna & Steve McVicker, *Mayor Knew of Lab Woes: Others contradict Brown's Benign Assessment*, HOUS. CHRON., Jan. 27, 2004, at A21, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/1797077.

132. *Id.*; Peggy O'Hare & S.K. Bardwell, *Embattled Bradford Retires in September: Cites Wife's Pregnancy Instead of HPD Woes*, HOUS. CHRON., July 18, 2003, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/2000783.

133. Steve McVicker, *DNA Lab Retesting Raises Questions in Eight More Cases*, HOUS. CHRON., July 9, 2004, at A27, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/2670090.

134. Rad Sallee, *Judge to Limit Finding in DNA Lab Hearing: Ruling Will Be on Claim of Perjury*, HOUS. CHRON., July 2, 2004, at A29, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/2658348.

135. Steve McVicker, *Judge Rejects Court of Inquiry: Rules Legal Time Frame Has Expired in Ex-DNA Lab Chief's Alleged Perjury*, HOUST. CHRON., July 15, 2004, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/2681745.

136. Roma Khanna, *Man Convicted of Rape on Faulty DNA Evidence Set Free*, HOUS. CHRON., Oct. 8, 2004, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/2837075.

137. Andrew Tilghman, *DA Says Flawed Labwork led to Rape Conviction*, HOUS. CHRON., Sep. 30 2004, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/2823261.

138. Roma Khanna, *Police Turn Up Hundreds of Boxes of Evidence From Crime Lab*, HOUS. CHRON., Aug. 26, 2004, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/2761292.

139. *Id.*

moratorium on executions of inmates from Harris County.[140] The moratorium would only last for as long as it takes to sort through the material contained in the boxes.[141]

C. *A Larger Problem*

The Houston Crime Lab scandal is not an individual pocket of inefficiency and corruption, but rather a reflection of disturbing national trends. In a recent study, the Chicago Tribune surveyed 200 DNA and death row post-conviction exonerations, and found that in nearly a quarter of them the original convictions were the result of either faulty crime lab work, or fraudulent testimony by a lab analyst.[142] Recently, the Montana Supreme Court rejected a petition filed by the Innocence Network of Cardozo Law School, which was joined by concurring statements of five former Montana Supreme Court Justices, seeking independent review of more than 200 cases in which the testing methodologies used by the Montana Crime Lab were questionable.[143] Commenting on the work of former Lab Director Arnold Melnikoff, the petition stated, "[i]f 'juicing' the testimony, offering unprofessional statements, and making scientifically unsupportable claims was his gold standard, we must infer that this is the standard of practice that he conveyed to his employees. Many of these staff [members] now hold supervisor positions at the lab."[144]

Arnold Melinkoff, founder and director of the Montana Crime Lab for nearly twenty years, developed certain methodologies as standard procedures, which have recently been challenged as faulty and inaccurate.[145] Three men that he helped convict of rape have since been set free.[146] His latest employer, the Washington State Police Crime Lab, fired him after conducting and releasing an audit of his work that accused him both of falsifying testimony in order to assist prosecutors and conducting sloppy toxicology work.[147] To challenge Melnikoff's work and methodologies,

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140. Roma Khanna, *Police Chief Calls For Halt of Executions Until Evidence Confirmed*, HOUS. CHRON., Sept. 30, 2004, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/2823255.

141. *Id.*

142. Maurice Possley et al., *Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S.*, CHI. TRIB., Oct. 21, 2004, at C1, *available at* http://www.chicagotribune.com/news/specials/chi-0410210285oct21,1,2210813.story?coll=cchii-newshed.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

the Innocence Project assembled a team of forensic scientists that investigated his work.[148]

In Richmond, Virginia, the State Crime Lab has been under fire for the questionable work of Jeff Ban, one of the lab's analysts.[149] It began when several independent audits found that Ban's faulty lab work had led to the wrongful conviction of death row inmate Earl Washington, Jr.[150] After Washington's release, four separate independent analysts conducted an evaluation of Ban's work, and each found that it was questionable and deserved further review.[151] Although the lab was extremely resistant to any outside scrutiny, a recent executive order from Governor Mark Warner has opened the lab's doors to independent inspectors.[152]

The crime labs in Virginia and Montana are but two of the many lab scandals that have rocked the criminal justice field in recent years.[153] Many Lab officials maintain the scandals are evidence that lab technicians and employees are diligently policing themselves.[154] However, this represents a half-truth. It is perhaps true that these scandals have forced labs to review their procedures, employees, and facilities, but these reviews have hardly been the product of internal free will. In almost every instance, labs have only opened their doors to inspection following a challenge to test results by a criminal defendant.[155] Further, calls for independent review have generally been met with strong resistance.[156] It took a Governor's mandate for an independent review to be conducted at the Virginia State Crime Lab, and in Houston, an audit has taken place only after constant pressure from the Texas Innocence Network and the local press.[157]

Many suggest that ensuring that labs are compliant with current FBI lab standards is the solution to the problem, yet even the FBI's crime lab has not been without scandal.[158] In the middle of the 1990s, an FBI lab whistleblower sparked an inquiry into charges of mishandling evidence, which lead to the firing of several employees and the retooling of the

148. *Id.* Recently, Montana's Attorney General conducted a review of 270 cases in which Melnikoff testified, but that review did not include a reexamination of any DNA evidence. *Id.* A challenge to this review by the Innocence Project followed. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

lab's practices and procedures.[159] As a result of the investigation, former FBI Lab analyst Jacqueline Blake pleaded guilty to making false statements about following the Lab's standard procedures in May 2004.[160]

With these scandals in mind, the Texas Legislature passed a bill in 2003 that requires the Texas Department of Public Safety (DPS) to supervise all public laboratories within the state, and bring them up to current accreditation standards by 2005.[161] While this new law is a step in the right direction, it is not without its problems—most notably, the fact that several of the Department's own crime labs have previously been closed or otherwise become a source of controversy after the discovery of problems through internal audits.[162] Crime labs in Austin, El Paso, Garland, Lubbock, Corpus Christi, McAllen, and Waco, along with Houston, were found to employ lab technicians who did not know how to interpret DNA test results or properly test lab machinery to ensure that it had been cleaned.[163] Other problems included test results that did not include essential statistical probabilities, a possibility that separate DNA samples had been commingled causing contamination, a general lack of lab security, and a failure to put DNA test results into the FBI's National DNA Database.[164] After the recent legislation was passed, the Department was criticized for having misled legislators about its ability to ensure that all labs were in compliance with national accreditation standards.[165]

VI. A System of Accountability

The roots of the tendency to resist independent review was also explored by the Chicago Tribune in an interview with former lab technician Janine Arvizu.[166] Ms. Arvizu currently manages her own consulting firm and does a substantial amount of work with criminal defense attorneys around the country.[167] She explained that crime lab directors and technicians have a tendency to view themselves as the "good guys," which instills in them hostility towards independent review.[168] According to Ms.

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159. *Id.*
160. *Id.*
161. James Kimberly, *House Passes Crime Lab Bill: Would Require Accreditation*, Hous. Chron., May 2, 2003, at A27, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/1892891.
162. Steve McVicker, *DPS Secretly Shuttered DNA Lab*, Houst. Chron., Mar. 15, 2004, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/2449425.
163. McVicker, *supra* note 24.
164. Possley, *supra* note 142.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*

Arvizu, "Their attitude, you don't encounter elsewhere: We work for the good guys. We're the white hats. They're very uncomfortable with this idea of independent oversight, which is a fundamental precept of laboratory quality assurance."[169] Arvizu explains that in the world of DNA laboratories, higher stakes are involved because people's liberty, and sometimes lives, are at stake.[170] Despite this fact, she claims that standards at crime labs are relatively low, and this may be due to the fact that the general public has little interest in the fates of criminal defendants: "There's no upswelling of people who feel they're at risk from failures by crime labs. It will take the son of a federal judge to be wrongfully convicted on the basis of flawed forensics to make the kind of quantum improvement in forensic quality standards that needs to happen."[171]

While Arvizu's cynicism is genuine and wise, another way to ensure that the integrity of a particular crime lab no longer comes into question is to increase the risks and consequences involved in producing sloppy work. Creating an innocence network, both here in Texas and possibly nationally, may pave the way for the creation of a system of strict liability with regard to the test results that crime labs produce for juries. In a sense, the function of crime laboratories is to produce a product that will help members of a jury to assess whether a defendant is guilty or innocent.[172] It is a product that is complex and often not fully understood by citizens who serve as jurors, even with the assistance of expert witnesses.[173] And because expert witnesses are just that, experts, it is perfectly natural that juries should give their testimony great weight when considering the results of a lab test.[174]

The relationship between a crime laboratory and a jury is comparable to that of a manufacturer and a consumer. One of the seminal cases in the evolution of modern products liability theory is *Escola v. Coca Cola Bottling Co.*, in which Judge Traynor, in a concurring opinion that has become more widely read than the majority opinion, makes the case for holding product manufacturers to an "absolute liability" standard.[175] Justice Traynor states, "In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has

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169. *Id.*

170. *Id.*

171. *Id.*

172. Flynn McRoberts et al., *Forensics Under the Microscope: Unproven Techniques Sway Courts, Erode Justice*, CHI. TRIB., Oct. 17, 2004, at C1, *available at* http://www.chicagotribune.com/news/printedition/chi-0410170393oct17,1,3375660.story.

173. *Id.*

174. *Id.*

175. Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."[176] He justifies his position by pointing out that manufacturers are in the best position to foresee and prevent certain dangers present in the products that they manufacture.[177] He also makes the case that consumers are not best suited to determine the quality of a particular product, and they often accept that a product is safe "on faith":

> The consumer no longer has means or skill enough to investigate for himself the soundness of a product. . . and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks. . . . Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trademark. . . . Manufacturers have sought to justify that faith by increasingly high standards of inspection. . . . The manufacturer's obligation to the consumer must keep pace with the changing relationship between them.[178]

When lab technicians place a product in front of a jury, the implication is that the defendant is guilty or innocent beyond a reasonable doubt.[179] But, as stated above, the product is a complex scientific report that is difficult for the average citizen serving on a jury to interpret.[180] It is therefore imperative that those responsible for the output of the product take certain steps to ensure it was manufactured with the utmost of care, and that the results it depicts are accurate. Otherwise, faulty DNA tests will almost certainly "cause injury to human beings" because they will likely result in the incarceration or execution of persons who are entirely innocent. To look at the problem from a different angle, such inaccurate results could permit the release of persons guilty of criminal offenses into the general public.

This hypothetical system of crime lab accountability is already at the threshold of becoming a reality. Laboratory managers and staff are being scrutinized to ensure that they are qualified for their positions, and being replaced if that proves not to be the case.[181] Laboratories, at least in Texas, are being compelled through legislative action to comply with cur-

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176. *Id.*

177. *Id.* at 440-41.

178. *Id.* at 443.

179. McRoberts, *supra* note 172.

180. *Id.*

181. Lise Olson & Roma Khanna, *DNA Lab Analysts Unqualified: Review Finds Education, Training Lacking*, HOUS. CHRON., Sept. 7, 2003, at A1, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/2085350. Kimberly, *supra* note 161.

rent national standards. There lacks but one crucial element to give birth to this system: a means of enforcement. This is where an innocence network based out of Texas's several law schools could play a vital role. Virtually every crime lab scandal has resulted from an inmate challenging the findings of his tests in post-conviction proceedings.[182] The labs may police themselves, and make changes in the wake of a public outcry, but this process of internal review is almost always instigated by a criminal defendant who is able to prove that the original DNA analysis performed in his case was faulty.[183] It stands to reason then that by continually challenging the results arrived at by laboratories in criminal cases, innocence projects may play a key role in forcing technicians to exercise reasonable care.

VII. RECOMMENDATIONS

What has come before is a discussion of professional responsibility concerns specific to the creation of an innocence network in Texas as well as a brief discussion of why such a network is needed. What follows, is a list of recommendations that I would make for law schools seeking to participate in the network.

First, all new innocence projects should be organized around Suni's "Limited Representation Model."[184] There are several reasons for this. Principally, based upon what can be gleaned from current events, there are likely to be many innocent people locked away in the prisons and jails of this State.[185] The integrity of labs has been called into question not only in Houston, but in various other jurisdictions.[186] A network of clinical programs that focus their attention on actual innocence, as opposed to procedural errors, will reach as many of these innocent persons as possible. Further, freeing innocent people from prison (or saving them from the execution chamber, as the case may be), is but one goal of an innocence project. Another is to persuade the members of the general public that problems exist within the criminal justice system, problems that require their scrutiny.[187] Nothing will convince members of the State Legislature that a problem exists more than phone calls from constituents. To this end, innocence projects need to be as certain as possible that those they represent, win or lose, are actually innocent, because bringing

182. Possley, *supra* note 142.
183. *Id.*
184. Suni, *supra* note 15, at 929-30.
185. McVicker, *supra* note 24.
186. *Id.*
187. Innocence Project, *supra* note 52.

cases of questionable merit into the public's eye will only serve to harm the reputation of the projects.

Second, the clinics should focus on the admittance of DNA evidence, without limiting themselves to other viable methods of post-conviction work when they are required. The clinics should accept two types of DNA cases: 1) cases where there is new DNA evidence that has surfaced since the original trial, or cases where old DNA evidence has never before been tested; and 2) cases where DNA evidence has been falsified, tampered with, or where there is an appearance of impropriety on the part of lab technicians. These cases may be more difficult to locate than cases that fall within the first category, and indeed the two may be one and the same. However, as the case of Odell Barnes illustrates, they do exist, and are some of the grossest miscarriages of justice imaginable.[188]

Finally, at least one supervising attorney at each innocence project should be skilled in the ways of dealing with the press. The work of the Texas Innocence Network at the University of Houston's Law School may have put a crack in the integrity of the Houston Police Department's crime lab, but it was the investigative work of journalists at the Houston Chronicle and KHOU News that brought the story directly into the public spotlight.[189] Therefore, it is important that innocence projects operating within Texas be able to cooperate and work well with members of the press.

188. Charlton, *supra* note 1.

189. Associated Press, *Hot Topic: HPD Crime Lab*, HOUST. CHRON., Nov. 17, 2004, *available at* http://www.chron.com/content/chronicle/special/03/crimelab/.