AN OUNCE OF PREVENTION:

WHY THE INNOCENCE MOVEMENT SHOULD FOCUS ON PROSCRIPTIVE PRE-CONVICTION MEASURES INSTEAD OF ABOLITION OF THE DEATH PENALTY

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I. INTRODUCTION

When eyewitnesses identify defendants as perpetrators during criminal trials, juries almost always return a guilty verdict. Unfortunately, researchers consistently find that eyewitness identification is inherently inaccurate and unreliable.[1] The Supreme Court of the United States acknowledged the broad scope of the problem as early as 1967, when it referenced Edwin M. Borchard's famous study of wrongful convictions, stating, "the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[2] Since Borchard's 1932 study, there has been no remedy for the problem of wrongful conviction based on mistaken identification. In Samuel Gross's

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1. Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliablility of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1, 2–3 (2007); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542 (2005); Alberto B. Lopez, *$10 and A Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 675 (2002); Barry C. Scheck, *Barry Scheck Lectures on Wrongful Convictions*, 54 DRAKE L. REV. 597, 604 (2006); Sandra Guerra Thompson, *Beyond A Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1490 (2008); Suzannah B. Gambell, Comment, *The Need to Revisit the* Neil v. Biggers *Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189, 190 (2006); Richard A. Wise et al., *A Survey of Defense Attorneys' Knowledge and Beliefs About Eyewitness Testimony*, CHAMPION Nov. 2007, at 18 [hereinafter Wise et al., *Survey*]; The Innocence Project, Understand the Causes: Eyewitness Misidentification, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Jan. 17, 2008) [hereinafter The Innocence Project, Causes]; *cf.* Steven B. Duke et al., *A Picture's Worth A Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 1–2 (2007) (arguing that conversational testimony is a more common cause of wrongful convictions than eyewitness testimony).

2. United States v. Wade, 388 U.S. 218, 228 (1967) (citing EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE (1932)).

study of exonerations in the United States from 1989 to 2003, sixty-four percent of the cases involved at least one eyewitness misidentification.[3]

Because of its unreliability, eyewitness testimony is the primary cause of wrongful convictions.[4] Juries rarely, if ever, believe an eyewitness could be mistaken about identification.[5] However, deoxyribonucleic acid ("DNA") evidence has overturned an alarmingly high rate of convictions based on the testimony of eyewitnesses.[6] Overall, seventy-five to eighty-five percent of convictions overturned by DNA testing involved mistaken eyewitness identification.[7]

Part II of this Comment examines the scope of the problem of mistaken eyewitness identification and outlines the factors in the pretrial and trial phase that lead to wrongful convictions. Part III examines how proscriptive measures can reduce the number of wrongful convictions based on mistaken identification. Part IV argues that the innocence movement, which focuses largely on the death penalty debate,[8] should shift its focus away from abolition of the death penalty. Instead, the innocence movement's primary objective should be to prevent the occurrence of wrongful convictions by focusing on proscriptive measures during the pretrial and trial phases of litigation.

Shifting focus to prevention is more preferable than a continued focus on the death penalty's abolition for three reasons. First, pre-conviction improvements will be easier to achieve than abolition because they are far less political. Second, a pre-conviction focus will affect greater change because proscriptive measures will prevent wrongful convictions, whereas abolition affects only the small percentage of cases where the defendant receives the death penalty. Third, the innocence movement's focus should be to prevent wrongful conviction because preventative measures are easier to implement in a justice system heavily weighted

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3. Gross et al., *supra* note 1, at 542.

4. Fradella, *supra* note 1, at 3–4 (citing William David Gross, Comment, *The Unfortunate Faith: A Solution to the Unwarranted Reliance Upon Eyewitness Testimony*, 5 TEX. WESLEYAN L. REV. 307, 313 (1999)); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 79; The Innocence Project, Causes, *supra* note 1. *But see* Duke et al., *supra* note 1, at 1–2.

5. Fradella, *supra* note 1, at 4; Garrett, *supra* note 4, at 81; Michael H. Hoffheimer, *Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials*, 80 J. CRIM. L. & CRIMINOLOGY 585, 588–90 (1989); Gambell, *supra* note 1, at 191; The Innocence Project, Causes, *supra* note 1.

6. Fradella, *supra* note 1, at 3; The Innocence Project, Causes, *supra* note 1.

7. Fradella, *supra* note 1, at 3; The Innocence Project, Causes, *supra* note 1.

8. *See* Jeffrey L. Kirchmeier, *Dead Innocent: The Death Penalty Abolitionist Search for a Wrongful Execution*, 42 TULSA L. REV. 403, 414 (2006).

against post-conviction relief.

II. THE SCOPE OF THE PROBLEM: MISTAKEN IDENTIFICATION BEFORE AND DURING TRIAL

To understand how mistaken eyewitness identification can lead to an overwhelming number of wrongful convictions, one must examine both pretrial and trial factors. The problem of mistaken identification begins during a crime, when the witness' perception is compromised greatly.[9] Then, from the moment law enforcement begins to investigate, the overriding goal of finding the perpetrator creates a scenario that compounds the problem of mistaken eyewitness identification.[10] Police are under tremendous public pressure to solve crimes to restore a sense of safety in the community.[11] This pressure, combined with a lack of physical evidence, can result in mistaken identification and conviction.[12] Particularly in high-profile murder cases, police may be more compelled "to pressure others . . . for the evidence they need [through] suggestiveness in the identification process or influence of other forms . . . ."[13] Finally, after a mistaken eyewitness testifies at trial, a wrongful conviction is likely to occur because juries are swayed by eyewitness testimony.[14]

A. Pretrial Factors Leading to Mistaken Eyewitness Identification

Convictions based on mistaken eyewitness identification begin when the witness observes a crime. Multiple variables during a crime contribute to a mistaken identification during an investigation.[15] Specifically, stress factors present when a crime occurs decrease the accuracy and reliability of identification.[16] If a witness does not identify the perpetrator shortly after the crime, the witness' accuracy decreases over time.[17]

When police begin an investigation, the pretrial process furthers the

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9. Gross et al., *supra* note 1, at 543.
10. *See* Gambell, *supra* note 1, at 192–93.
11. Lopez, *supra* note 1, at 677.
12. Margery Malkin Koosed, *The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications*, 63 OHIO ST. L.J. 263, 280–81 (2002).
13. *Id.*
14. Fradella, *supra* note 1, at 4; Hoffheimer, *supra* note 5, at 588–90.
15. *See* Thompson, *supra* note 1, at 1501; Wise et al., *Survey*, *supra* note 1, at 23; Gambell, *supra* note 1, at 198.
16. *See* Thompson, *supra* note 1, at 1501.
17. *Cf.* Gambell, *supra* note 1, at 198.

possibility of mistaken identification due to suggestive techniques such as show-ups and simultaneous lineups.[18] Additionally, suggestive actions by administrators and the difficulty of cross-racial identification can contribute to wrongful identifications.[19] The following sections trace the problem of mistaken identification from the time the crime occurs through the process of police investigation.

1. Stress Factors Present When a Crime Occurs

If the eyewitness is also the victim of the crime, the emotional impact of the crime may influence the victim's ability to perceive correctly and remember accurately.[20] Witnesses who experience high levels of stress form less accurate memories.[21] In fact, the victim of a violent crime is under stress "far beyond optimum levels for cognitive functioning...."[22] This kind of stress creates a "tunnel memory effect," in which some details are vividly remembered while others are poorly recalled.[23] Unfortunately, most people believe that stress improves memory, a fallacy that leads jurors to impute credibility to a witness' testimony.[24]

An example of the effect of stress on perception occurs when a crime involves a weapon, causing the victim to focus on the weapon.[25] This leaves the victim unable to absorb other details and results in mistaken identifications at least half of the time.[26] Despite its impact on misidentification, the average juror is unaware of a witness' perceptual impairment due to so-called weapon focus.[27]

2. Police Investigation

As police officers begin their investigation and try to locate eyewitnesses to a crime, the time that passes contributes to mistaken

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18. *Id.* at 193.

19. *See* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 936 (1984); Gambell, *supra* note 1, at 193.

20. *Cf.* United States v. Wade, 388 U.S. 218, 230–31 (1967); Gambell, *supra* note 1, at 198.

21. Thompson, *supra* note 1, at 1501; *see also* Wise et al., *Survey*, *supra* note 1, at 23; Richard A. Wise et al., *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 817 (2007) [hereinafter Wise et al., *Solution*].

22. Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial and Prosecutorial Responsibility for Improving the Criminal Justice System*, 27 N.Y.U. REV. L. & SOC. CHANGE 507, 514 (2002).

23. Wise et al., *Survey*, *supra* note 1, at 23.

24. Gross, *supra* note 4, at 316–17.

25. Gambell, *supra* note 1, at 198.

26. *Id.*

27. Gross, *supra* note 4, at 315.

identification. As time elapses between a crime and an eyewitness' identification of a suspect, the likelihood of misidentification increases.[28] According to research, memory follows a "forgetting curve" whereby memories fade up to "fifty percent within an hour, sixty percent in the first twenty-four hours, and gradually decline[] thereafter."[29] In addition to the inherent problems with eyewitness identification, if police locate an eyewitness, several methods used during police investigation are overly suggestive and lead to misidentifications.[30] This section outlines the methods and circumstances of a police investigation that contribute to the problem of eyewitness misidentification.

a. Show-ups

When the police find an eyewitness to a crime, they may use the show-up method to identify the suspect.[31] In a show-up, police ask an eyewitness to observe one person and then the witness is asked if this person is the culprit.[32] This technique is frequently cited as being unnecessarily suggestive because the witness often presumes the police have correctly identified the person presented as the perpetrator.[33] Despite the fact that mistaken identification happens more often in show-ups than lineups, police use show-ups more often.[34]

In a powerful example of both the suggestive nature of a show-up identification and the unreliability of memory over time, a woman who was sexually assaulted identified McKinley Cromedy as her attacker eight months after the crime.[35] When she initially reported the crime, she viewed photographs, including one of Cromedy, but she failed to identify anyone in the photographs as her assailant.[36] Eight months later, however, she identified Cromedy as her attacker from behind a one-way

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28. Gambell, *supra* note 1, at 197.

29. *Id.*; *see* Harvey Gee, *Race and the American Criminal Justice System: Three Arguments About Criminal Law, Social Science, and Criminal Procedure*, 85 U. DET. MERCY L. REV. 115, 125 (2008); Gambell, *supra* note 1, at 197.

30. Gambell, *supra* note 1, at 193.

31. *See id.*

32. Thompson, *supra* note 1, at 1504; Gambell, *supra* note 1, at 193.

33. Thompson, *supra* note 1, at 1504; Gambell, *supra* note 1, at 193; *see* Kirchmeier, *supra* note 8, at 419–20 (describing the case of Larry Griffin, in which police showed the eyewitness one photograph of Griffin, and this eyewitness' testimony led to Griffin's conviction despite the lack of any other evidence linking him to the crime).

34. Amy Luria, *Showup Identifications: A Comprehensive Overview of the Problems and a Discussion of Necessary Changes*, 86 NEB. L. REV. 515, 516 (2008); Thompson, *supra* note 1, at 1504.

35. State v. Cromedy, 727 A.2d 457, 459 (N.J. 1999).

36. *Id.*

mirror, after walking past him on the street.[37] Cromedy was convicted largely based on her testimony although there was no forensic evidence to connect him to the crime.[38] This case also involved cross-racial identification, another notoriously unreliable form of eyewitness misidentification, making it a compelling example of both the suggestive nature of show-ups and the undue weight juries give to eyewitness testimony.[39]

b. Simultaneous Lineups

The familiar lineup often seen on television that shows a row people standing next to each other and observed by an eyewitness through a one-way mirror is called a simultaneous lineup.[40] Simultaneous lineups can lead to mistaken identification because the eyewitness "make[s] a relative judgment... [by] select[ing] the member of the lineup who most resembles the eyewitness'[] memory of the culprit relative to the other members of the lineup."[41] Natural error results from an eyewitness' identification of a person in a simultaneous lineup or photograph array who is not the actual perpetrator, but a person whose appearance most closely resembles that of the perpetrator.[42] In lineups that do not include the perpetrator, misidentification can occur seventy-two percent of the time.[43] In fact, in a majority of DNA exonerations involving simultaneous lineups or photograph displays, the actual perpetrator was not among the people or images shown to the witness.[44] Studies have shown that in simultaneous lineups, witnesses who were able to correctly identify a culprit "would simply identify another (innocent) suspect upon the removal of the culprit's photograph."[45] In addition, victims are also poor witnesses because lineups, which are often used in violent crimes such as robbery and rape, "present a particular hazard that a victim's understandable outrage may excite vengeful or spiteful

37. *Id.*

38. *Id.*

39. *See id.* at 466.

40. Gambell, *supra* note 1, at 194.

41. *Id.*; *see also* Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice"*, 76 FORDHAM L. REV. 1337, 1390 (2007); Scheck, *supra* note 1, at 607; Sussman, *supra* note 15, at 515–17; Thompson, *supra* note 1, at 1505–06.

42. Scheck, *supra* note 1, at 607; Sussman, *supra* note 15, at 514–15. A photograph array involves showing an eyewitness a series of photographs simultaneously. Sussman, *supra* note 15, at 514–15.

43. Gambell, *supra* note 1, at 194 (citing David L. Feige, *"I'll Never Forget That Face": The Science and Law of the Double-Blind Sequential Lineup*, CHAMPION, Jan. 2002, at 28).

44. Mosteller, *supra* note 41, at 1390.

45. Sussman, *supra* note 22, at 517.

motives."[46]

c. Cross-Racial Identification

An additional problem with misidentification occurs when a witness identifies a suspect of another race. This kind of identification tends to result in greater error compared to occasions where a witness identifies someone of the same race.[47] Additionally, "cross-racial identifications by witnesses are disproportionately responsible for wrongful convictions."[48] The "own-race" phenomenon shows that people are overwhelmingly better able to recognize and correctly identify members of their own race.[49] As a result, pretrial procedures such as lineups are even more prone to error when they involve cross-racial identification.[50] If an eyewitness views a lineup of members of another race, the lineup is subject to inaccuracy concerns of both relative judgment and cross-racial identification.[51] Although cross-racial impairment may be a result of typically homogenous social groups and not a direct result of outright racism, it remains one of the greatest causes of misidentification.[52]

d. Suggestive Actions by Administrators

If an administrator of a lineup or show-up knows the suspect's identity, the administrator may give suggestive verbal or nonverbal cues to witnesses.[53] Even subtle or unintentional suggestion has grave potential for the miscarriage of justice.[54] The power of suggestion is even greater if the witness did not have a substantial opportunity to observe the perpetrator.[55] If an administrator suggests the suspect is in a lineup or in photographic images, the witness is more likely to identify one of the people as the perpetrator even if the actual culprit is not present.[56] If an administrator does not inform the witness that the perpetrator may not be present, more than three-quarters of witnesses

46. United States v. Wade, 388 U.S. 218, 230 (1967).

47. Gambell, *supra* note 1, at 200.

48. Johnson, *supra* note 19, at 934.

49. John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 211 (2001); *see* Johnson, *supra* note 19, at 938–46.

50. *See* Johnson, *supra* note 38, at 949–50.

51. *See id.*

52. *See* Rutledge, *supra* note 49, at 212–13.

53. Gambell, *supra* note 1, at 195; *see* Scheck, *supra* note 1, at 606–07; Sussman, *supra* note 22, at 514–15; Thompson, *supra* note 1, at 1505.

54. United States v. Wade, 388 U.S. 218, 228–29 (1967).

55. *Id.* at 229.

56. *See id.* at 233; Mosteller, *supra* note 41, at 1399–1400.

will still attempt to identify a suspect.[57] Additionally, there may be "postidentification taint," whereby an administrator comments on the validity of a witness' identification.[58] If the administrator indicates the witness correctly identified a suspect, the

witness may become more confident of the identification and thus more convincing at trial.[59]

B. Trial and Conviction Based on Mistaken Eyewitness Identification

After an identification is made, the powerful phenomenon of tunnel vision drives police and prosecutors to pursue a suspect identified by an eyewitness, even if there is a lack of corroborating evidence.[60] Tunnel vision drives investigators to discover evidence that points to the suspect they have already apprehended.[61] When a mistaken identification is made before trial, the same mistaken identification will most likely be made during trial testimony, as an eyewitness "is not likely to go back on his word later on, so that in practice the issue of identity may... be determined there and then, before the trial."[62] Compelling eyewitness testimony at trial is supremely convincing to jurors, and this increases the likelihood that an innocent person will be convicted based on mistaken eyewitness testimony.

An eyewitness' confidence in her identification of a perpetrator is very persuasive to a jury, although confidence is rarely indicative of actual accuracy.[63] Juries equate an eyewitness' conviction with truth.[64] If a witness vehemently testifies he remembers something accurately, a

57. *See* Gambell, *supra* note 1, at 195.

58. Scheck, *supra* note 1, at 606–07.

59. *Id.*; *see also* Thompson, *supra* note 1, at 1505 (stating mistaken identifications in show-ups produce greater confidence during in-court identification); Gary L. Wells, *Field Experiments on Eyewitness Identification: Towards a Better Understanding of Pitfalls and Prospects*, 32 LAW & HUM. BEHAV. 6, 8 (2008); Wise et al., *Solution*, *supra* note 21, at 817–18.

60. *See* Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. THIRD WORLD L.J. 75, 89–90 (2008); *see also* Susan A. Bandes, *Framing Wrongful Convictions*, 2008 UTAH L. REV. 5, 21 (2008); Thompson, *supra* note 1, at 1508; Wise et al., *Solution*, *supra* note 21, at 847.

61. Wise et al., *Solution*, *supra* note 21, at 847.

62. United States v. Wade, 388 U.S. 218, 229 (1967).

63. Gambell, *supra* note 1, at 202; H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, COLO. LAW., Sept. 2003, at 14; *see* Hoffheimer, *supra* note 5, at 588–90; Johnson, *supra* note 19, at 946; Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1124 (2005); Mosteller, *supra* note 41, at 1390; D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 786 (2007); Rutledge, *supra* note 49, at 208–09.

64. *See* Hoffheimer, *supra* note 5, at 588–90; Furman, *supra* note 63, at 14.

jury will believe the witness.[65] Unaware of the unreliability of eyewitness testimony, juries typically presume such testimony is credible.[66] Additionally, juries are often sympathetic to eyewitnesses,[67] particularly if the eyewitness was the victim of a crime.[68]

Jurors' "unfortunate faith" in the accuracy of eyewitness testimony leads to wrongful convictions much too frequently.[69] Juries believed to overestimate witnesses' perceptual abilities are also the subject of criticism.[70] In particular, eyewitness testimony is so persuasive to juries that it results in convictions, even without other corroborative evidence of guilt or with contradictory evidence of innocence.[71] In fact, the veracity of eyewitness testimony persuades jurors "even in extremely doubtful circumstances."[72]

In one famous case, James Newsome spent fifteen years in prison for murder before being exonerated.[73] When police officers questioned Newsome about an armed robbery, they believed his alibi.[74] However, police used him in a lineup for a murder investigation related to the armed robbery, and he was ultimately convicted for that murder.[75] At trial, the primary evidence against Newsome was eyewitness testimony from two people who both identified him in a pretrial lineup.[76] Cross-racial identification also played a role in this case, as "the jury was all white, the victim was white, and Newsome [was] black."[77] Additionally, evidence came to light that one of the eyewitnesses was threatened and coerced into identifying Newsome as the perpetrator, which went beyond the subtle suggestive techniques observed in test administrators.[78] Police also pointed out Newsome in the lineup to the second eyewitness—an overly suggestive, directive technique that no doubt led the witness to identify Newsome as the perpetrator.[79]

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65. *See* Hoffheimer, *supra* note 5, at 588–90.
66. *See id.*; Gross, *supra* note 4, at 317, 320.
67. Hoffheimer, *supra* note 5, at 589–90.
68. *See* Gross, *supra* note 4, at 317.
69. *See id.* at 313.
70. Leipold, *supra* note 63, at 1124.
71. *See* Lopez, *supra* note 1, at 675; Rutledge, *supra* note 49, at 207–10; Furman, *supra* note 63, at 14.
72. Johnson, *supra* note 19, at 946.
73. Newsome v. McCabe, 256 F.3d 747, 748–49 (7th Cir. 2001).
74. *See* People v. Newsome, 443 N.E.2d 634, 636 (Ill. App. Ct. 1982).
75. *See McCabe*, 256 F.3d at 749.
76. *Id.*
77. Garrett, *supra* note 4, at 46.
78. *McCabe*, 256 F.3d at 749; Garrett, *supra* note 4, at 46.
79. Garrett, *supra* note 4, at 47.

III. PROSCRIPTIVE MEASURES

As eyewitness misidentification is the leading cause of wrongful convictions,[80] reforms should be instituted at both the pretrial and trial phase to decrease the incidence of erroneous identification. Reforms to the pretrial phase are important because if an erroneous identification is made before trial, it will be made again at trial, often resulting in a wrongful conviction.[81] The majority of the pretrial reforms are "inexpensive, readily available, and beneficial to law enforcement . . . [because they would] increase the reliability of investigations and prosecutions."[82] The low costs and significant benefits of these reforms also reinforce an underlying goal of creating an "efficient, expeditious, and reliable system [of justice]."[83] Additionally, convicting the true perpetrator serves the justice system's fundamental goal of ensuring finality and legitimacy.[84] The following sections detail the improvements that can be made at the pretrial phase—such as modifications to lineup and show-up procedures—and proscriptive measures at the trial phase—such as admitting expert testimony and jury instructions on the unreliability of eyewitness identification.

A. Pretrial: Lineup and Show-Up Improvements

1. Elimination of Show-Ups Except Under Exigent Circumstances

Lineups and show-ups are subject to a myriad of problems including relative judgments by eyewitnesses, difficulty with cross-racial identifications, and administrator suggestiveness.[85] When an eyewitness is only shown one photograph or observes a single person, false identification is highly likely because the witness assumes law enforcement has already identified the correct person as the perpetrator.[86] One proscriptive measure would be the elimination of show-ups due to their highly suggestive nature.[87] A more reasonable measure, however, would be to allow show-ups "only when necessitated by exigency and only in close temporal proximity to the witnessing

80. Furman, *supra* note 63, at 12.
81. Feige, *supra* note 43, at 30.
82. Garrett, *supra* note 4, at 100–01; *see also* Risinger, *supra* note 63, at 796–98 (stating that reforms are cost-free).
83. Koosed, *supra* note 12, at 309.
84. Garrett, *supra* note 4, at 101.
85. *See supra* Part II.A.2.
86. *See* Kirchmeier, *supra* note 8, at 420; Thompson, *supra* note 1, at 1504; Gambell, *supra* note 1, at 193.
87. Fradella, *supra* note 1, at 15–16.

event."[88] Exigent circumstances may exist, for example, when an eyewitness is in a hospital and cannot observe a lineup or if the police lack probable cause to detain a suspect long enough to conduct a lineup.[89] Even in exigent circumstances, however, a show-up should only be conducted shortly after the witness observed the perpetrator.[90] Due to the highly suggestive nature of show-ups, the risk of misidentification is high, particularly after a victim's memory of the event begins to deteriorate, which can happen in as little as a few hours.[91]

2. Lineup Administration Improvements

a. Sequential Viewing

Another proscriptive measure that would reduce misidentification is presenting subjects to a witness sequentially, rather than simultaneously.[92] A witness' tendency to make a relative judgment during a simultaneous lineup has been well-documented.[93] Sequential viewing, in which a witness views only one photograph or person at a time, has been shown to reduce misidentifications.[94] Sequential viewing of a lineup or photograph array significantly increases the chances for a correct identification and is "not more burdensome on law enforcement personnel."[95]

b. Double-Blind Administration

To be administered correctly, a sequential lineup requires a double-blind procedure.[96] In a double-blind lineup, neither the witness nor the

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88. Luria, *supra* note 34, at 532; *see also* Jessica Lee, Note, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RTS. L. REV. 755, 755–56 (2005).

89. *See* Luria, *supra* note 34, at 528.

90. *See id.* at 529.

91. *See id.*

92. *See* Fradella, *supra* note 1, at 17; Garrett, *supra* note 4, at 104; Scheck, *supra* note 1, at 607; Sussman, *supra* note 22, at 518; Gambell, *supra* note 1, at 194–95; The Innocence Project, Fix the System: Eyewitness Identification, http://www.innocenceproject.org/fix/Eyewitness-Identification.php (last visited Nov. 25, 2008) [hereinafter The Innocence Project, Eyewitness Identification]; The Innocence Project, Sequential Presentation of Lineups, http://www.innocenceproject.org/Content/1151.php (last visited Nov. 25, 2008) [hereinafter The Innocence Project, Sequential Presentation].

93. *See* Fradella, *supra* note 1, at 17–19; Gambell, *supra* note 1, at 194; The Innocence Project, Eyewitness Identification, *supra* note 92.

94. *See* Fradella, *supra* note 1, at 17–18; Garrett, *supra* note 4, at 104; Gambell, *supra* note 1, at 194–95; The Innocence Project, Eyewitness Identification, *supra* note 94; The Innocence Project, Sequential Presentation of Lineups, *supra* note 92.

95. Sussman, *supra* note 22, at 518.

96. *See* Fradella, *supra* note 1, at 16–19; Garrett, *supra* note 4, at 104; Scheck, *supra* note 1, at 606;

administrator knows who the suspect is among the subjects presented.[97] Ideally, the person arranging the lineup also should not know who the suspect's identity.[98] Double-blind administration would decrease administrator suggestiveness, whether conscious or unconscious, overt or subtle.[99]

c. Composition of Lineups

Another proscriptive measure to curb false identifications is the presentation of an appropriate number of carefully selected foils during lineups and photograph arrays.[100] A foil is a participant other than the suspect.[101] Selecting foils that match the witness' description of the perpetrator defines the fairness of a lineup or photograph array.[102] Law enforcement officers must select foils who are of the same race and similar age, height and weight.[103] There are fewer mistaken identifications when the foils all wear similar clothing, their clothing does not match what was worn by the perpetrator at the time of the crime, and the foils do not have extremely differing features.[104] In other words, lineups should be fairly uniform and should not include a mixture of people with and without facial hair or an array of suspects with visible tattoos or piercings next to those who do not have such distinctive characteristics.[105] Additionally, a greater number of foils presented to an eyewitness reduces the probability a suspect will be identified only by chance.[106] At the least, experts recommend that lineups and photograph arrays include at least six people.[107]

Wise et al., *Survey*, *supra* note 1.

97. Fradella, *supra* note 1, at 17–20; *see also* Garrett, *supra* note 4, at 81, 104; Scheck, *supra* note 1, at 606; Sussman, *supra* note 22, at 518.

98. *See* Wells, *supra* note 59, at 8.

99. Garrett, *supra* note 4, at 81; *cf.* Scheck, *supra* note 1, at 606–07; Sussman, *supra* note 22, at 518.

100. Fradella, *supra* note 1, at 16; *see* Scheck, *supra* note 1, at 607; Gambell, *supra* note 1, at 195–96; The Innocence Project, Eyewitness Identification, *supra* note 92.

101. Fradella, *supra* note 1, at 16.

102. Gross, *supra* note 4, at 318.

103. *See* Fradella, *supra* note 1, at 16; Gambell, *supra* note 1, at 196; The Innocence Project, Eyewitness Identification, *supra* note 92.

104. *See* Fradella, *supra* note 1, at 16; Gambell, *supra* note 1, at 196; The Innocence Project, Eyewitness Identification, *supra* note 92.

105. *See* Fradella, *supra* note 1, at 16; Gambell, *supra* note 1, at 196; The Innocence Project, Eyewitness Identification, *supra* note 92.

106. Fradella, *supra* note 1, at 16; Furman, *supra* note 63, at 16.

107. Fradella, *supra* note 1, at 16; Roy S. Malpass, *A Policy Evaluation of Simultaneous and Sequential Lineups*, 12 PSYCHOL. PUB. POL'Y & L. 394, 396 (2006). Some countries use between ten and twelve people in lineups and photograph arrays. Fradella, *supra* note 1, at 16–17.

d. Instructions to Witnesses

An eyewitness viewing a lineup or photograph array should be informed that the suspect may or may not be present.[108] Additionally, the witness should be told the investigation will continue regardless of the lineup result.[109] Some states have implemented procedures in which eyewitnesses sign consent forms indicating they have received such information.[110] With this information, the chances will decrease that a witness will make an identification because she feels pressured to bring the investigation to a successful conclusion.[111]

Additionally, witnesses should provide confidence statements and law enforcement should videotape identification procedures in order to further decrease the number of misidentifications.[112] Confidence statements are additional safeguards that involve having a witness provide a statement articulating a level of confidence in the identification.[113] These statements can then be used at trial to impeach a witness, if a witness insists on the accuracy of her identification at trial when she was not very confident of her identification when it was made. Videotaping identification procedures serves as another level of protection because attorneys can ensure law enforcement officers followed proper procedures.[114] The videotape can also help an attorney articulate to a judge or a jury whether an identification was made under highly suggestive circumstances.[115]

B. Trial: Admitting Expert Testimony and Jury Instructions

While the reforms to the pretrial phase of the legal process will reduce the number of mistaken identifications, the limitations of human memory and perception indicate that misidentifications will still occur.[116] Thus, while reforms at the pretrial phase will address

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108. Fradella, *supra* note 1, at 17, 19; Garrett, *supra* note 4, at 104; Scheck, *supra* note 1, at 607.

109. Scheck, *supra* note 1, at 607; The Innocence Project, Eyewitness Identification, *supra* note 92.

110. Fradella, *supra* note 1, at 19.

111. Scheck, *supra* note 1, at 607.

112. *See* Fradella, *supra* note 1, at 19–20; Garrett, *supra* note 4, at 103–04, 104 n.329; The Innocence Project, Eyewitness Identification, *supra* note 92.

113. Fradella, *supra* note 1, at 18; Garrett, *supra* note 4, at 104; Scheck, *supra* note 1, at 607; The Innocence Project, Eyewitness Identification, *supra* note 92.

114. Wise et al., *Survey*, *supra* note 1, at 23–24; *see* The Innocence Project, Eyewitness Identification, *supra* note 92. *See generally* Leipold, *supra* note 63, at 1126–27 (stating that if juries are not instructed on the proper use of evidence or reliance on evidence, they will not weigh evidence appropriately).

115. The Innocence Project, Eyewitness Identification, *supra* note 92.

116. *See* Fradella, *supra* note 1, at 20.

weaknesses in the system, reforms are needed at trial to address the weaknesses of memory and perception.[117] Jurors should hear testimony from experts on the accuracy of eyewitness identification and should receive jury instructions about how to properly weigh eyewitness identification among other evidentiary factors.[118]

Although these measures will require longer trials and the expense of expert testimony, fundamental fairness and the importance of decreasing the incidence of wrongful convictions outweigh these concerns.[119] Moreover, some have argued that over time, widespread use of expert testimony "will encourage more scholars to develop the skills to supply the need [and] [n]atural competition in the marketplace will reduce the cost."[120] Again, the cost of these measures should not be prohibitive because the value of fact-finding and truth should not come with a price tag and society should not be "so miserly to exchange [justice] for thrift."[121]

1. Expert Testimony

Most jurors are unaware of the factors that cause eyewitnesses to incorrectly identify perpetrators.[122] As previously discussed, jurors are unduly persuaded by eyewitness testimony and rely on eyewitness identification sometimes even in the presence of contrary or exculpatory evidence.[123] Admitting expert testimony regarding factors affecting perception and memory would balance the undue faith jurors place in eyewitnesses—particularly witnesses who are confident they identified the true perpetrator.[124]

Expert testimony should be admitted to illuminate the factors that can influence identifications. However, at trial, a determination of "the correctness of the identification at issue" should be left to the jury.[125] Particularly in the case of cross-racial identification, an expert will not be able to accurately assess an eyewitness' individual ability to make cross-racial identifications as this would vary among individuals.[126] To

117. *See id.*

118. *See id.* at 20, 25; Gee, *supra* note 29, at 125; Rutledge, *supra* note 49, at 219–22, 227; Thompson, *supra* note 1, at 1517.

119. Fradella, *supra* note 1, at 25.

120. Gross, *supra* note 4, at 326.

121. *Id.*

122. *See* Fradella, *supra* note 1, at 20.

123. *See id.*

124. *See id.*; Gee, *supra* note 29, at 125; Wise et al., *Solution*, *supra* note 21, at 817.

125. Johnson, *supra* note 19, at 959.

126. *See id.* at 960.

avoid so-called battling experts, however, experts in all cases should confine their testimony to evidence of factors that can affect accurate identifications and the likelihood of error when such factors are present, rather than speculating as to a particular witness' perceptual abilities.[127] The eyewitness can be cross-examined as to the circumstances under which he observed the perpetrator and the jury can determine if the factors to which the expert testified were present and to what extent they affected the witness' ability to make a correct identification.[128] Even in the event that both the prosecution and defense admit expert testimony and a battling experts scenario develops, "two experts giving pertinent, if opposing, data is preferable to ignorance."[129] A jury armed with the facts about the fallibility of human perception has a greater chance of rendering a correct verdict than an uninformed one.[130]

2. Jury Instructions

Jury instructions provide another measure during the trial phase to mitigate the possibility of wrongful conviction due to eyewitness misidentification.[131] Special jury instructions regarding the fallibility of eyewitnesses involve minimal cost and effort on the part of courts,[132] which routinely provide juries with instructions on the elements of crimes. Jury instructions are most effective when utilized in concert with expert testimony, because "[j]ury instructions do not explain the complexities about perception and memory in a way a properly qualified person can."[133]

IV. SHIFTING FOCUS AWAY FROM ABOLITION TOWARDS THE PRE-CONVICTION PHASE OF TRIAL

It will be more constructive for the innocence movement to shift its focus to pre-conviction matters that, if effectuated properly, will decrease the number of wrongful convictions. The proscriptive measures proposed in this Comment will in turn decrease the number of executions carried out on those wrongfully convicted.[134] In fact,

127. *See id.*

128. *See id.*

129. Gross, *supra* note 4, at 326.

130. *See id.*

131. *See* Fradella, *supra* note 1, at 25. *But see* Hoffheimer, *supra* note 5, at 596 (arguing jury instructions may have little to no effect on conviction rates and could benefit the innocent as well as the guilty); Wise et al., *Solution*, *supra* note 21, at 817.

132. *See* Hoffheimer, *supra* note 5, at 596.

133. Fradella, *supra* note 1, at 25.

134. *See* Furman, *supra* note 63, at 14.

decreasing the number of misidentifications is "the single most important improvement the justice system could make to address the overall problem of wrongful convictions."[135] The innocence movement should focus on these pre-conviction measures first because they will be easier to achieve than continuing to champion the politically inflammatory cause of abolition.[136] Second, a focus on pre-conviction measures will greatly benefit a larger number of people than abolition because these pretrial improvements will affect anyone involved as a suspect within the criminal justice system, not just the relatively small number of cases in which the death penalty is at issue.[137] Third, it is crucial to focus on pre-conviction matters to prevent wrongful conviction because once a person is wrongfully convicted it is extremely difficult to obtain post-conviction relief.[138] Even if a person is able to attain exoneration, he can never truly be compensated for time spent in prison, nor can the government remedy a wrongful execution.

A. Pre-conviction Improvements Will Be Easier to Achieve Because They Are Less Political Than Abolition

The innocence movement should shift focus away from abolition of the death penalty and towards pre-conviction improvements because pretrial and trial changes will not be as politically controversial as abolition. The controversial, emotionally charged nature of the death penalty has made it difficult to enact change—"[o]pposing or questioning the death penalty is perceived to be... too controversial . . . ."[139] Thus, it will be easier to affect pre-conviction change because these reform measures are not as likely to incite bitter, polarizing debate. "[S]truggle and dissent" have marred the abolitionist movement.[140] It appears that the debate over capital punishment is at a standstill, employing "wearily familiar" arguments on both sides and making little progress.[141] The innocence movement will benefit greatly by returning to its status as a revolution "born of science and fact, as opposed to choices among a competing set of controversial values."[142]

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135. *See id.*

136. *See infra* Part IV.A.

137. *See infra* Part IV.B.

138. *See infra* Part IV.C.

139. John R. MacArthur, *The Death Penalty and the Decline of Liberalism*, 30 J. MARSHALL L. REV. 321, 327 (1997).

140. Joan Fitzpatrick & Alice Miller, *International Standards on the Death Penalty: Shifting Discourse*, 19 BROOK. J. INT'L L. 273, 274 (1993).

141. *Id.*

142. Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 574 (2004).

In addition to the polarizing political nature of the death penalty itself, other "societal circumstances beyond the control of activists may have substantial effects on the popularity of the death penalty."[143] The greatest periods of death penalty reform have occurred during times of economic prosperity and strong social activism.[144] Specifically, the continued growth of the abolitionist movement "depends, in large part, on whether or not a major long-term national event, such as a war or economic crisis, distracts the population from death penalty issues."[145] As one scholar observed in 2002, an examination of the historical trends of abolition indicates "there is not a strong likelihood of permanent success in the near future" given the potential repercussions of the September 11, 2001 terrorist attacks.[146] In fact, some legislatures responded to the attacks by promptly expanding their states' death penalty statutes, anticipating the possibility of criminal prosecution for acts of terrorism.[147]

Given that in 2008 the United States economy is experiencing what many have deemed the worst economic situation since the Great Depression,[148] the chances are even slimmer that abolition will be achieved. Additional factors supporting this conclusion include the ongoing wars in Iraq and Afghanistan and the 2008 United States presidential election and accompanying transition, which lacks the stability and predictability of an incumbent president. Arguably, the greatest impact on the abolition movement is the Supreme Court's April 2008 decision to uphold the constitutionality of the death penalty by lethal injection.[149] Moreover, it is anticipated that President Obama will appoint at least one Supreme Court Justice,[150] which could affect the balance of power on the Court. As presidents invariably appoint Justices with similar ideologies, this kind of political influence continues to sway the Court's rulings on polarizing issues such as the death penalty.

In contrast to political and social factors that can influence the success of the abolitionist movement, pre-conviction measures are largely immune to these concerns. Implementing sequential rather than

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143. Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 65 (2002).

144. *Id.* at 81.

145. *Id.* at 102.

146. *Id.* at 79.

147. *See id.* at 113–14.

148. Anthony Faiola, *The End of American Capitalism?*, WASH. POST, Oct. 10, 2008, at A1.

149. Baze v. Rees, 553 U.S. ___, 128 S. Ct. 1520, 1525 (2008) (upholding the constitutionality of lethal injection by a seven to two vote).

150. Amy Dominello, *Next President Will Have Major Impact on Supreme Court*, STATESVILLE REC. & LANDMARK, Sept. 17, 2008.

simultaneous lineups, for example, is not as inflammatory an idea as capital punishment. Although global turmoil may distract the world, smaller changes to the pre-conviction process can still be effectuated.

B. A Broader Scope of Reform Will Affect Greater Change Than Abolition

Even if the death penalty were abolished, the problem of wrongful conviction would still exist. With abolition, innocent people would no longer be executed, but it is not a solution to the problem of wrongful conviction because innocent people could still be convicted and sent to prison. Although they would be spared the final, irreversible form of punishment by execution,[151] the wrongfully convicted would still suffer the indignity of imprisonment for crimes they did not commit.[152] It has been argued that the wrongfully convicted can be released from prison if exonerated and then compensated in some way,[153] but the more pressing question is why prophylactic measures are considered sufficient if the number of wrongful convictions can be reduced. The innocence movement should shift its focus to the pretrial and trial phases of the legal system because only reforms in these areas can prevent the innocent from conviction and incarceration in the first place.

An additional reason why focusing on pre-conviction measures will affect greater change is because it will impact a greater number of people. Wrongful convictions can occur for crimes ranging from misdemeanors to serious crimes and capital cases.[154] Focusing exclusively on death penalty cases comes at the expense of concern about other wrongful convictions because wrongful convictions for less serious crimes receive little to no attention although they happen more frequently.[155]

The innocence movement should shift focus away from the death penalty because "inappropriate concentration" on abolition results in

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151. David Dolinko, *Foreward: How to Criticize the Death Penalty*, 77 J. CRIM. L. & CRIMINOLOGY 546, 585–86 (1986); Risinger, *supra* note 63, at 790; 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, 605 (2005).

152. Steiker & Steiker, *supra* note 151, at 605 (stating that the time a wrongfully convicted person spends in prison is unrecoverable, and "it is impossible to turn back the clock on any punishment that has been endured, and the irretrievable loss in the death penalty context exceeds the loss of wrongful imprisonment").

153. Dolinko, *supra* note 151, at 585–86.

154. *See* Steiker & Steiker, *supra* note 151, at 597.

155. *See id.*

"the exclusion of efforts to reform the criminal justice system . . . ."[156] Changes to the pre-conviction phase of justice will positively affect all trials. Abolishing the death penalty, however, would impact only a small number of people,[157] and the only change would be that the wrongfully convicted would not face execution. Research indicates that death sentences only arise in three-hundredths of one percent of all criminal convictions.[158] Although murder trials typically receive significant media coverage, only approximately two percent of all murder convictions include death sentences.[159] Additionally, there is evidence that fewer defendants currently receive death penalty sentences as prosecutors, judges, and juries become increasingly uncomfortable with giving death sentences, particularly in the wake of the publicity surrounding DNA exonerations.[160] The number of death sentences given dropped from 300 in 1998 to 106 in 2005.[161] While this may serve as good news for abolitionists, abolition still does not address the fundamental problem that our justice system convicts innocent people. Changes to the pre-conviction phase of trial would have a great impact on capital cases in addition to other prosecutions.

C. Preventing Wrongful Conviction is Easier than Seeking Post-Conviction Relief

An additional reason to shift focus away from abolition of the death penalty and towards pre-conviction solutions is because post-conviction relief is difficult, and sometimes impossible, for the wrongfully convicted to obtain. After conviction, the presumption of innocence ceases to exist, "and the burden of proving innocence after conviction is therefore tremendous."[162] Unfortunately, due to a criminally underfunded public defense system, defendants who had court-appointed attorneys may have had poor legal representation, leading to their initial conviction and subsequent uphill battles to have their cases

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156. Risinger, *supra* note 63, at 790.

157. Fitzpatrick & Miller, *supra* note 140, at 276 (remarking on the tremendous attention the death penalty receives despite the fact that it affects "an extremely small percentage of even the convicted population in any part of the world").

158. Jean Coleman Blackerby, *Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration*, 56 VAND. L. REV. 1179, 1185 (2003).

159. *Id.*

160. *See* Liz Halloran, *Pulling Back from the Brink: Why are Death Sentences and Executions Dropping?*, U.S. NEWS & WORLD REP., May 8, 2006, *available at* http://www.usnews.com/usnews/articles/060508/8death.htm.

161. *Id.*

162. Armbrust, *supra* note 60, at 80.

reexamined.[163]

Additionally, indigent defendants seeking relief after a first appeal of right may no longer be entitled to a publicly funded attorney.[164] Even if new evidence comes to light or new technology can retest old evidence, an incarcerated defendant has little chance of investigating these developments without an attorney.[165] If a defendant has access to an attorney, it can still be difficult to file for a new trial within most states' restrictive time frames.[166] If the defendant seeks to file a motion for a new trial based on newly discovered biological evidence, the defendant may only have a few months to file the appeal.[167] If a defendant exhausts his appeals at the state level and then seeks relief with a federal habeas petition, the defendant must be able to show "'that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt.' Thus, after trial, the innocent, albeit convicted, defendant's vindication becomes almost impossible . . . ."[168]

One reason attaining post-conviction relief is so difficult is because this kind of relief runs counter to the justice system's aims of finality and judicial economy.[169] New trials or publicized exonerations are perceived as damaging to victims who have attained closure after a trial or execution.[170] Additionally, the realization that the true perpetrator was not apprehended causes social anxiety because the real criminal might still be free and committing other crimes.[171] Judicial economy concerns also act as a bar against post-conviction relief because an already overburdened judiciary is reluctant to add new trials to a crowded docket.[172]

Another reason it is difficult to overturn a conviction is that relatively few cases have the benefit of DNA evidence that can exonerate a wrongfully convicted individual.[173] Although it is not

163. Jill Smolowe, *Must this Man Die?*, TIME, May 18, 1992, *available at* http://www.time.com/time/printout/0,8816,975542,00.html.

164. Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547, 557–58 (2008).

165. *See id.*; Blackerby, *supra* note 158, at 1197.

166. *See* Blackerby, *supra* note 158, at 1198.

167. *See id.*

168. Bakken, *supra* note 164, at 561 (quoting House v. Bell, 547 U.S. 518, 537 (2006)).

169. Armbrust, *supra* note 60, at 86.

170. *See id.*

171. *Cf. id.*

172. *See id.*

173. *See* Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our "Evolving Standards of Decency" in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265, 267 (2004); Koosed, *supra*

necessarily easy for someone to be exonerated based on newly discovered or newly tested DNA evidence, DNA testing can provide a definitive answer.[174] A DNA result that clearly exonerates someone stands up against all human argument. In the majority of cases, however, there is no DNA evidence.[175] DNA is usually only present in rape or murder cases, so people wrongfully convicted for other crimes have little hope of having their convictions overturned.[176] The justice system, largely because of finality concerns, is highly suspicious of other evidence that, unlike DNA testing, calls a conviction into question.[177]

In a particularly poignant example of the difficulty of obtaining exoneration without DNA evidence, Troy Davis was sentenced to death in 1991 after his conviction for killing a police officer that was based largely on the testimony of nine eyewitnesses.[178] In fact, the prosecution had little evidence other than eyewitnesses—"[t]he murder weapon was never found, and there was no DNA evidence or a confession."[179] Since his conviction, however, while Davis has been waiting on death row, seven of the nine eyewitnesses have recanted their testimony, prompting the Supreme Court to issue a stay of execution in September 2008, less than two hours before Davis's scheduled execution.[180] In contrast to DNA evidence, which could have conclusively exonerated Davis, the changing eyewitness testimony faced extreme suspicion.[181] The prosecutor involved in the case believed that the high proportion of recantations was indicative of guilt, not innocence—that it "invite[d] a suggestion of manipulation, making it very difficult to believe."[182] Ultimately, the Supreme Court allowed Davis's execution to go forward despite the arguably suspect conviction.[183] Unfortunately, no DNA evidence exists that can exonerate Davis.[184] The only evidence is the notoriously error-prone testimony of eyewitnesses who helped convict him.[185] As of January

note 12, at 269–72; Blackerby, *supra* note 158, at 1193–94; Furman, *supra* note 63, at 13.

174. *See* Koosed, *supra* note 12, at 269–70 (stating that DNA testing is a "forensic 'magic bullet,' but to work its magic, testable material must be conjured up, and it is often lacking in capital cases").

175. Godsey & Pulley, *supra* note 173, at 267; Furman, *supra* note 63, at 13.

176. *See* Koosed, *supra* note 12, at 263–64; Furman, *supra* note 63, at 13.

177. *See* Garrett, *supra* note 4, at 101.

178. Bill Rankin & Rhonda Cook, *Rejected by High Court, Davis Faces Execution*, ATLANTA J.-CONST., Oct. 15, 2008, at 1A.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *See id.*

185. *See id.*

2009, Davis is still awaiting execution, after the Eleventh Circuit Court of Appeals granted Davis another temporary stay of execution.[186]

Davis's case highlights the perils of conviction based solely on eyewitness testimony. The executive director of Amnesty International, Larry Cox, expressed outrage that "the highest court in the land could sink so low when doubts surrounding Davis'[s] guilt are so high" and said, "[f]aulty eyewitness identification is the leading cause of wrongful convictions and the hallmark of Davis'[s] case."[187] Unfortunately, without the presence of DNA evidence, there is little hope for people like Davis. As there are so many cases like Davis's, where there is no potentially exculpatory DNA evidence,[188] the only workable solution is to expend efforts to prevent wrongful convictions from occurring.

Preventing wrongful convictions will also address another tremendously unjust aspect of the criminal justice system—the lack of a coherent, compassionate system for compensating the exonerated. No one exonerated and released from prison can ever regain the time that he lost while incarcerated.[189] By this fact alone, the justice system should prevent innocent people from facing incarceration. Moreover, the exonerated rarely receive any significant monetary compensation.[190] At one extreme, compensation consists of merely "ten dollars and a denim jacket," which is what anyone released from prison in Louisiana receives, regardless of guilt or innocence.[191] Only thirty-four percent of those exonerated have received any compensation at all, and it is usually negligible.[192] Those who do receive compensation are "grossly undercompensate[d]."[193] Although James Newsome received fifteen million dollars for his fifteen-year imprisonment, his case is an exception to the norm.[194]

Additionally, compensation statutes vary drastically at the state level.[195] An exonerated man in Virginia received $500,000 for ten years in prison for a rape he did not commit, while an Ohio man received

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186. Amnesty International, Troy Davis: Finality Over Fairness, http://www.amnestyusa.org/death-penalty/troy-davis-finality-over-fairness/page.do?id=1011343 (last visited Jan. 17, 2009).

187. *See* Rankin & Cook, *supra* note 178.

188. *See id.*

189. *See* Garrett, *supra* note 4, at 48–49.

190. *See id.*

191. *Id.* at 48; Lopez, *supra* note 1, at 669.

192. Garrett, *supra* note 4, at 49.

193. Lopez, *supra* note 1, at 673.

194. *See* Garrett, *supra* note 4, at 43–48.

195. *See* Lopez, *supra* note 1, at 703.

$720,000 for five years in prison for rapes he did not commit, and a New Jersey man was unable to acquire any compensation for spending twelve years in prison after a wrongful conviction for rape.[196] In addition to taking away someone's life or years of his life that he cannot regain, states rarely compensate the wrongfully convicted for lost wages or punitive damages, which are often capped at a low dollar amount.[197] The lack of adequate compensation for the wrongfully convicted provides yet another argument for preventing wrongful convictions from occurring, as prevention will save the wrongfully convicted from suffering "yet another wound" due to gross under-compensation for the time they have spent in prison.[198]

Examples of the difficulty of obtaining post-conviction relief indicate the pressing need to address pre-conviction matters.[199] For some, especially those with no hope for DNA exoneration, the only chance of achieving innocence may be at the first trial.[200] Beyond the first verdict, chances are slim that a conviction based on erroneous eyewitness identification will be overturned.[201] The hurdles are simply too high in a system where it is difficult to retain an attorney beyond a first appeal of right and one that values finality so highly that it views recanting witnesses as highly suspect.[202]

Although finality is a cherished value of the criminal justice system, "accuracy is a goal that is shared by everyone."[203] Even if one takes the view that wrongful conviction is an acceptable part of the administration of justice, everyone can agree that increased accuracy best serves the interests of justice.[204] Specifically, accuracy will create a safer society because with fewer wrongful convictions, innocent people will not be imprisoned while actual perpetrators are free to commit crimes.[205] The proscriptive measures proposed in this Comment are reasonable, affordable, and easily implemented steps that would serve the goal of accuracy, and, ultimately, the goal of finality.[206]

196. *Id.* at 698–99.

197. *See id.* at 703–04 (describing statutory caps on compensation such as twenty-five thousand dollars per year in Ohio, which is one of the more generous statutes in existence).

198. *Id.* at 722.

199. *See* Koosed, *supra* note 12, at 264.

200. *See* discussion *supra* Part IV.C.

201. *See* discussion *supra* Part IV.C.

202. *See* discussion *supra* Part IV.C.

203. Furman, *supra* note 63, at 11.

204. *Id.* at 12.

205. *Cf.* at 11.

206. *See id.*

V. CONCLUSION

Mistaken eyewitness identification leads to wrongful convictions in an alarming number of cases.[207] Sometimes, these wrongful convictions result in the execution of an innocent person.[208] Most of the time, however, wrongful convictions occur for crimes that are not subject to the death

penalty, resulting in innocent people spending years in prison for which they can never truly be compensated.[209]

Numerous factors during the pretrial phase lead to the incidence of mistaken eyewitness identification, particularly the perceptual problems which occur at the time of the crime and suggestive police procedures during the investigation.[210] After the eyewitness makes the identification and a case goes to trial, jurors are almost always convinced by eyewitness testimony.[211] Although eyewitnesses are frequently wrong, jurors place undue faith in a witness' ability to perceive accurately, and they often render convictions without other corroborating evidence, or worse, in the face of exonerating evidence.[212]

Although the innocence movement has largely been concerned with abolition of the death penalty,[213] this focus has been misguided. Instead of making abolition its primary objective, the innocence movement should focus on proscriptive measures, which would prevent wrongful convictions from occurring based on eyewitness testimony. In contrast to the controversial goal of abolition, pre-conviction reforms would not encounter as much resistance because the reforms would serve the justice system's goals of reliability, accuracy, and ultimately, finality.[214]

Proscriptive measures are a better focus for the innocence movement than abolition because in addition to being politically controversial and polarizing, other societal circumstances affect the ability to make progress toward abolition. The facts of war, economic crisis, and political instability mean that abolition will be difficult to achieve for

207. *See supra* note 2 and accompanying text.
208. *See* discussion *supra* Part IV.B.
209. *See* discussion *supra* Part IV.B.
210. *See* discussion *supra* Part II.A.1.
211. *See* discussion *supra* Part II.A.2.
212. *See* discussion *supra* Part II.B.
213. *See* Kirchmeier, *supra* note 8, at 410.
214. *See* Armbrust, *supra* note 60, at 86; Furman, *supra* note 63, at 11.

the foreseeable future. On the other hand, these outside factors will not affect proscriptive measures.

Additionally, a scope of reform that focuses on pre-conviction measures will affect greater change than abolition. Pre-conviction measures will help prevent the incarceration of anyone who is innocent. Abolition, by contrast, would only serve to prevent the wrongfully convicted from being executed, but it would not address the underlying problem of their initial wrongful conviction.

Another reason a pre-conviction focus is preferable to abolition is because, unfortunately, it is extremely difficult to attain post-conviction relief in the current justice system. The wrongfully convicted face a number of nearly insurmountable hurdles, and even if they are exonerated, they are under-compensated for their wrongful convictions.[215] Unfortunately, it is unlikely that states can be successfully compelled to increase caps on damages statutes or to routinely award more significant compensation to the victims of wrongful conviction. However, the inexpensive reforms of sequential lineups and jury instructions would be palatable to most jurisdictions.[216]

After reexamining the innocence movement's focus on the death penalty, it is clear that a focus on pre-conviction improvements would be the most productive use of the movement's energy. The problem of wrongful conviction plagues our justice system. Implementing procedures to reduce wrongful convictions would be relatively easy, and proscriptive measures would benefit a greater number of people than abolition.

215. *See* discussion *supra* Part IV.C.
216. *See* discussion *supra* Part III.