

ARTICLES

THE MAYHEM OF WRONGFUL LIBERTY: DOCUMENTING THE CRIMES OF TRUE PERPETRATORS IN CASES OF WRONGFUL INCARCERATION

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Abstract: The Innocence Movement has had a profound impact on criminal law and criminal justice policy. We believe it can also contribute to ongoing reexaminations of legal and ethical theory – namely in discussions of the Blackstone Principle. As this paper shows, any discussion of this venerable principle requires attention be paid to relationship between wrongful conviction and violent crime. When the state arrests and incarcerates the wrong person, the true perpetrator remains at liberty. In many cases these individuals commit a series of crimes during this period of “wrongful liberty” (which we define as the period between the original crime and when the true perpetrator is arrested). This paper presents an account of wrongful liberty, and its relationship to legal and ethical theory, as well as a first-of-its-kind documentation of all known crimes of wrongful liberty in a single state, North Carolina. Our experience in North Carolina suggests that law students working with undergraduate students and the supervision of attorneys experienced with state criminal records databases can gather such information easily. We believe this method can and should be replicated in other jurisdictions so legal scholars can develop a more

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complete understanding of how wrongful liberty informs the Blackstone Principle in the context of the American criminal justice system.

When the wrong individual is incarcerated for a crime they did not commit, they suffer a terrible injustice. But they are not alone. The victims of the crime suffer in multiple ways: from a false assurance that the crime has been solved, possibly from participating as a witness leading to a wrongful conviction, and later from the consequences of exoneration. These events may leave the original crime victim doubly victimized; once by the criminal and then by the criminal justice system. But the wrongs may also include a third category of innocent victims. When the state arrests and incarcerates the wrong person, the true perpetrator remains at liberty. In many cases these individuals commit a series of crimes during this period of “wrongful liberty.” We define this period as the time between the original crime and when the true perpetrator is arrested. In some cases, this is a period of decades, as the criminal justice system is wrongly assured that the perpetrator is in custody, when in fact they are on the street. Most studies have focused on wrongful conviction or wrongful incarceration, but we focus here on the reciprocal: when the wrong person is in custody, the true perpetrator remains, wrongfully, at liberty and therefore free to commit more crimes. Efforts to document crimes of wrongful liberty can advance public and scholarly debates over how best to balance the harms and goods at stake in our criminal justice system, in addition to expanding the scope of injustices associated with wrongful convictions.

In recent years, North Carolina has seen thirty-six exonerations.¹ Of these cases, we have identified nine cases where the true perpetrator of the original crime was later convicted. Looking at the period between the crime and the later arrest of the true perpetrator, we review legal and media sources to document the crimes committed during this period. In the well-known “Picking Cotton” case, for example, the true perpetrator not only committed the two brutal rapes for which Ronald Cotton was incarcerated, but he committed six more before he was eventually arrested.² Thus, there were six additional victims of the *wrongful liberty* of a guilty criminal. Our goal is to document, for one state, the number of crimes associated with such situations and thereby to expand our understanding of the

¹ See *infra* Appendix.

² See Helen O’Neill, *The Perfect Witness*, WASH. POST (Mar. 4, 2001), https://www.washingtonpost.com/archive/lifestyle/2001/03/04/the-perfect-witness/a7fa0461-c15c-4237-86db-52ab5069fba/?utm_term=.f718c6383d3c.

social costs of wrongful incarceration. Those most directly affected include: a) the victims of the original crime; b) the person wrongfully imprisoned; c) the subsequent victims of the criminal who was wrongfully left at liberty. Advocates for victim services are natural allies of the innocence movement but they are rarely part of the conversation—partly, we think, because the crimes of wrongful liberty have never been fully recognized. We focus on North Carolina as a first step to document the feasibility of such a project, but we hope that our project will form the basis for studies in other states as well.

This article proceeds in five parts. Part I provides a brief history of Blackstone's principle, recent debates, and introduces the concept of wrongful liberty. Part II offers two prominent examples of individuals who committed crimes during their period of wrongful liberty. Part III Provides a review of the somewhat limited scholarship on the harms associated with wrongful liberty. Part IV presents findings from an original survey of crimes of wrongful liberty in North Carolina, including detailed case information for one particularly tragic set of crimes of wrongful liberty. Finally, Part V offers recommendations for incorporating attention to crimes of wrongful liberty into both legal scholarship and wrongful liberty activism and research.

I. BLACKSTONE'S PRINCIPLE AND WRONGFUL LIBERTY

Writing in the Eighteenth century, English jurist William Blackstone argued that "it is better that ten guilty persons escape, than that one innocent suffer."³ The Blackstone principle went on to become the basis for many of our criminal justice system's strict procedural rules including the beyond-a-reasonable-doubt standard required to secure a criminal conviction.⁴ For many years its benefits were assumed. However, in recent years there have been renewed debates about the value of Blackstone's principle.⁵ Many defenders

³ 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA 358 (William Young Birch & Abraham Small eds., 1803). He was not the first or last to make such a claim, but the notion that a society should err on the side of false acquittals is now known as the Blackstone principle. See Joel S. Johnson, *Benefits of Error: A Dynamic Defense of the Blackstone Principle in Criminal Law*, 102 VA. L. REV. 237, 238 (2016).

⁴ See Johnson, *supra* note 3, at 238.

⁵ See e.g., Laura I. Appleman, *A Tragedy of Errors: Blackstone, Procedural Asymmetry, and Criminal Justice*, 128 HARV. L. REV. F. 91, 91, 92 (2015); Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1069 (2015); Johnson, *supra* note 3, at 239.

of the principle have emphasized the harms that wrongful convictions inflict on the wrongfully convicted.⁶ Debates over Blackstone would benefit from a consideration of less well-documented harms associated with wrongful liberty. Evidence of crimes of wrongful liberty thus demonstrates that the harms of wrongful conviction are greater than previously thought.

Many arguments in favor of the Blackstone principle posit that the costs associated with false convictions are much higher than those associated with false acquittals, thus encouraging us to err on the side of acquittals.⁷ Ronald Dworkin has argued that false convictions constitute a unique moral harm and criticized utilitarian perspectives on Blackstone for failing to attend to this harm.⁸ Similarly, Harvard Law Professor Richard Fallon has argued that false convictions are more morally disturbing than false acquittals because the former involve the violation of fundamental rights.⁹ Utilitarian defenders of Blackstone focus on the balance of harms, arguing that convicting an innocent person involves more harms than falsely acquitting a guilty person.¹⁰ In these accounts, harms of wrongful conviction include the loss of liberty, stigma, and long-term psychological harms, all echoed by the innocence movement and increasingly well-documented by scholars.¹¹

⁶ See Appleman, *supra* note 5, at 96, 97.

⁷ These arguments fall into two main camps: deontological arguments focused on the morality of false convictions, and consequentialist arguments that weigh the costs and benefits of erring on the side of false convictions or acquittals. See Epps, *supra* note 5, at 1125, 1131. Supreme Court Justice Harlan espoused the latter, utilitarian argument for Blackstone while writing for the majority in *In re Winship*: “Because the standard of proof affects the comparative frequency of [false positives and false negatives], the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each. . . . In a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.” 397 U.S. 358, 371, 372 (1970). See Lawrence B. Solum, *Presumptions and Transcendentalism—You Prove It! Why Should I?*, 17 HARV. J.L. & PUB. POL’Y 691, 701 (1994). See also LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 144 (2006); Larry Laudan, *The Rules of Trial, Political Morality and the Costs of Error: Or, Is Proof Beyond a Reasonable Doubt Doing More Harm Than Good?*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 196–97, 198 (Leslie Green & Brian Leiter eds., 2011) [hereinafter *The Rules of Trial, Political Morality and the Costs of Error*] (asserting that mistaken convictions are morally worse than mistaken acquittals).

⁸ See Ronald Dworkin, *Principle, Policy, Procedure*, in CRIME, PROOF AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS 193–201 (Colin Tapper ed., 1981).

⁹ See, e.g., Richard H. Fallon Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1706 (2008).

¹⁰ See Solum, *supra* note 7, at 701.

¹¹ Marvin Zalman defines the innocence movement as “a related set of activities by lawyers, cognitive and social psychologists, other social scientists, legal scholars, government personnel, journalists, documentarians, freelance writers, and citizen activists who, since the mid-1990s, have worked to free innocent prisoners and rectify perceived causes of miscarriages of justice

The most common critique of the Blackstone principle is that the theory is “insufficiently sensitive to the cost of false *acquittals*.”¹² Some critics highlight the damage false acquittals cause to victims of crimes, comparing the harms of criminal victimization to the harm experienced by someone wrongfully convicted. For example, in their paper titled “Deadly Dilemmas,” Larry Laudan and Ronald Allen ask:

In what sense can it be worse to be wrongfully convicted of murder than to be murdered? . . . We doubt many would share these apparent implications of the position that wrongful conviction is a worse harm than criminal victimization, at least where serious violent crimes are concerned.¹³

Laudan and Allen go on to explain, “when balancing, one must decide to what extent he or she prefers false convictions to victimization.”¹⁴ These arguments present the risk of increased victimization as independent of the risk of increased false convictions. Under this view, victimization and acquittals are linked, but victimization and false convictions are discrete and in conflict. Similarly, many other critics of the Blackstone principle highlight its potential to minimize deterrence and create more crime victims.¹⁵

in the United States.” Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV., 1465, 1468 (2010); see also Michael D. Pepson & John N. Sharifi, *Lego v. Twomey: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 AM. CRIM. L. REV. 1185, 1186–87 (2010) (providing scholarly accounts of the harms of wrongful conviction). There is much additional scholarship on the harms of wrongful convictions. See, e.g., Saundra D. Westervelt & Kimberly J. Cook, *Life After Exoneration: Examining the Aftermath of a Wrongful Capital Conviction*, in WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS 261–62 (C. Ronald Huff & Martin Killias eds., 2013) [hereinafter *Life After Exoneration*]; Adrian T. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME AND JUST. 1, 2 (2005); Sion Jenkins, *Secondary Victims and the Trauma of Wrongful Conviction: Families and Children’s Perspectives on Imprisonment, Release and Adjustment*, 46 AUSTL. & N.Z. J. OF CRIMINOLOGY 119, 127, 128 (2013); Zieva Dauber Konvisser, *Psychological Consequences of Wrongful Conviction in Women and the Possibility of Positive Change*, 5 DEPAUL J. SOC. JUST. 221, 251–52 (2011); Saundra D. Westervelt & Kimberly J. Cook, *Coping with Innocence After Death Row*, 7 CONTEXTS 32, 36 (2008) [hereinafter *Coping*]; Jennifer Wildeman, et al., *Experiencing Wrongful and Unlawful Conviction*, 50 J. OF OFFENDER REHABILITATION 411, 415, 416 (2011).

¹² See Epps, *supra* note 5, at 1089.

¹³ Ronald J. Allen & Larry Laudan, *Why Do We Convict As Many Innocent People As We Do?: Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 83 (2008).

¹⁴ *Id.*

¹⁵ See *id.* at 72–73, 75 (discussing the Blackstone principles’ potential to undermine deterrence); see, e.g., *The Rules of Trial, Political Morality and the Costs of Error*, *supra* note 7, at 198; Jeffrey Reiman & Ernest Van Den Haag, *On the Common Saying That It Is Better That Ten Guilty Persons Escape Than That One Innocent Suffer: Pro and Con*, in 7 SOCIAL PHILOSOPHY AND POLICY 226–38 (1990). Allen and Laudan argue that the falsely acquitted will go on to “visit unearned, grievous harm on vast numbers of innocent citizens.” Allen & Laudan, *supra* note 13, at 75. Similarly, Epps argues that by making convictions harder to obtain,

Another line of Blackstone critique focuses on the harms false acquittals inflict on victims of crime. Considering the Blackstone principle, R.L. Lippke argues that we must also factor into our evaluation the “additional anguish experienced by crime victims whose victimizers escape all punishment.”¹⁶ As he argues, victims and loved ones who must cope with a false acquittal experience “profound disappointment and despair.”¹⁷ In the aforementioned work by Laudan and Allen, they note that acquittals result in a “failure to satisfy victims’ retributive feelings [and] lack of closure.”¹⁸

What much of this conversation misses is that false convictions and false acquittals often have similar consequences in terms of future victimization and harms to original victims.¹⁹ Specifically, false convictions resulting in wrongful liberty constitute a form of false acquittal. In both cases, a guilty person is allowed to go free through failures of the criminal justice system. In wrongful liberty cases, the failure is not an unsuccessful attempt to convict a true perpetrator, but the wrongful conviction of an innocent person in the true perpetrator’s place. Particularly relevant to debates over the Blackstone principle, this means that when a false conviction results in a period of wrongful liberty for a true perpetrator, the harms of false conviction include many of the harms of false acquittal.

As has been well-documented by victims themselves, wrongful conviction also harms original crime victims. Many victims face guilt and shaming for their involvement in a wrongful conviction, and those whose true perpetrators are identified can face a second,

Blackstone results in more incapacitated criminals and provides less deterrence than a non-Blackstone world. See Epps, *supra* note 5, at 1105.

¹⁶ Richard L. Lippke, *Punishing the Guilty Not the Innocent*, in *LAW AND LEGAL THEORY* 257, 262 (Thom Brooks ed., 2013).

¹⁷ Richard L. Lippke, *Adjudication Error, Finality, and Asymmetry in the Criminal Law*, 26 *CAN. J. L. & JURIS.* 377, 383–84 (2013).

¹⁸ Allen & Laudan, *supra* note 13, at 73.

¹⁹ There has been some limited attention to concerns about wrongful liberty among those debating the Blackstone principle. See LAUDAN, *supra* note 7, at 69; Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 *J. CRIM. L. & CRIMINOLOGY* 943, 980 (2007). In Daniel Epp’s “dynamic critique” of the Blackstone Principle he rejects what he calls the “double-tragedy” argument. Epps, *supra* note 5, at 1070, 1125. As Epps explains, the double tragedy argument “merely posits that, as a logical matter, these costs are a superset that includes all the costs of false acquittals—plus more.” *Id.* at 1125. Epps cites Richard Lippke who notes that punishment of the innocent does “two bad things,” it harms an innocent individual and fails to punish a guilty individual. *Id.* Lippke continues, “[b]y contrast, when we fail to punish the guilty, we do (or, perhaps, allow) only the one bad thing of failing to punish the guilty for their crimes.” *Id.* Though the overlapping harms inherent in wrongful liberty are noted, they are rarely the focus of arguments for or against the Blackstone principle.

emotionally draining trial.²⁰ Original crime survivors are often asked to serve as key eyewitnesses in police line-up and identification procedures that are later seen to be leading and inaccurate, making them participants in a process they do not control, but which leads to a miscarriage of justice.²¹ This compounds the harm of their original crime victimization, extends the harm to an innocent defendant, and leaves the true perpetrator free to commit more crimes. Original crime victims suffer re-traumatization of the original crime and trial during litigation of the innocent prisoner's post-conviction claim of innocence and exoneration process. Even without finding the true perpetrator, the process leading to possible legal recognition of error presents a severely traumatic event for the original crime survivor.²² They are forced to confront the fact that an innocent may have paid the price for their crime. All too often, they find that the true perpetrator was never apprehended or brought to justice.²³ As documented here for the first time, criminalization of additional victims is a meaningful consequence of false convictions.

²⁰ JENNIFER THOMPSON-CANNINO ET AL., PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION 214–15, 270 (2009); Dan S. Levey, *Wrongfully Convicted: A No-Win Situation for the Victim*, 52 DRAKE L. REV. 695, 698–99 (2004); Erin J. Williamson et al., *Wrongful Convictions: Understanding the Experiences of the Original Crime Victims*, 31 VIOLENCE & VICTIMS 155, 160–61 (2016); Chris Jenkins, *Helping Victims in DNA Exoneration Cases*, TEX. DIST. & COUNTY ATTYS ASS'N (2009), <http://www.tdcaa.com/node/4200>.

²¹ Cf. Levey, *supra* note 20, at 701 (discussing the fact that victim-related evidence, such as DNA, does not prevent miscarriages of justice); see also Tasha A. Menakar & Robert J. Cramer, *The Victim as Witness: Strategies for Increasing Credibility Among Rape Victim-Witnesses in Court*, 12 J. OF FORENSIC PSYCHOL. PRAC. 424, 426–27 (2014) (discussing the likelihood of victim testimony and involvement).

²² See *id.* at 699, 701.

²³ For example, the heart-wrenching stories brought together by the National Institute of Justice (“NIJ”) for the first time in holding “listening session[s]” in February 2016. Conference Minutes, Nat’l Inst. of Justice, *Exonerees and Original Victims of Wrongful Conviction: Listening Sessions to Inform Programs and Research* 1 (Feb. 22–24, 2016) (on file at <https://www.ncjrs.gov/pdffiles1/nij/249931.pdf>). These events, bringing together exonerees as well as survivors of crimes for which the wrong person was incarcerated, included numerous expressions of grief and suffering at the various events in the legal system that compounded the harm committed in the original crime itself. *Id.* These issues are only now gaining greater attention, as evidenced by the fact that the NIJ had never previously held such an event before 2016, and by the creation in 2015 of a new organization, the Healing Justice Project by crime survivor and author Jennifer Thompson. See *id.* at 2; *Restoration After Wrongful Conviction*, HEALING JUST. PROJECT, <http://www.healingjusticeproject.org/> (last visited Feb. 19, 2018). These events are not unrelated as the Healing Justice Project was one of the key organizers of the NIJ listening session. Conference Minutes, Nat’l Inst. of Justice, *supra*. Healing Justice is the only organization with an exclusive mission of seeking to address the harms created by wrongful convictions. See *Restoration After Wrongful Conviction*, *supra*. These harms of wrongful incarceration also involve wrongful liberty; crime survivors, those wrongfully convicted, those associated with either, and all those involved as judges, attorneys, jurors, or in other capacities can be traumatized by the knowledge that they participated not only in putting an innocent in prison, but that they allowed a guilty perpetrator to go free.

II. PROMINENT EXAMPLES OF WRONGFUL LIBERTY

A. *David Harris*

Many are familiar with the case of David Harris, whose killing of a Dallas police officer and framing of Randall Dale Adams were documented in the film *The Thin Blue Line*.²⁴ In November of 1976, at just sixteen years old, Harris stole his neighbor's car and his father's gun and drove from his small home town of Vidor, Texas, to Dallas.²⁵ While there, Harris offered a ride to a man he saw walking along the side of the road.²⁶ The man, Randall Dale Adams, had just arrived in Dallas in search of work.²⁷ After dropping Adams off at his hotel, Harris was stopped by police for a routine traffic violation.²⁸ During the stop he shot Dallas police officer Robert Wood six times with the stolen, .22 caliber pistol, continuing to shoot after the officer had fallen to the ground.²⁹ Harris was eventually arrested in his hometown of Vidor for driving the vehicle involved in the murder.³⁰ Harris framed Randall Dale Adams for the crime.³¹ Though the evidence pointed overwhelmingly to Harris, he made a far less appealing defendant than the twenty-eight-year-old Adams, particularly because Harris was too young to be eligible for the death penalty.³²

Adams was convicted and sentenced to death.³³ He spent twelve years in prison before being released in 1989, in large part due to the publicity garnered by the now-famous documentary film about the case.³⁴ Though Harris admitted to the murder during the filming of the documentary, he never formally confessed to it and was never charged.³⁵ After this early brush with police, Harris went on to commit a number of crimes before joining the army.³⁶ In 1978, while

²⁴ THE THIN BLUE LINE (American Playhouse 1998).

²⁵ See Douglas Martin, *Randall Adams, 61, Dies; Freed with Help of Film*, N.Y. TIMES (June 25, 2011), <http://www.nytimes.com/2011/06/26/us/26adams.html>.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 34 (1996).

²⁹ See *id.* at 34, 35.

³⁰ See MARTIN YANT, PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED 20, 21 (1991).

³¹ See *id.* at 21.

³² See *id.* at 23.

³³ See HUFF ET AL., *supra* note 28, at 39.

³⁴ See *id.* at 40.

³⁵ See *id.* at 41; THE THIN BLUE LINE, *supra* note 24.

³⁶ See HUFF ET AL., *supra* note 28, at 41; YANT, *supra* note 30, at 30.

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stationed in Germany, Harris committed a series of burglaries, an armed robbery, and violently assaulted his commanding officer.³⁷ He was court-martialed and served eight months in Ft. Leavenworth Military Prison.³⁸ Following his release on June 29, 1979, Harris stole a car and drove to California.³⁹ Harris and an accomplice picked up a hitchhiker named James Filaan in San Bernardino County.⁴⁰ In the ensuing “twenty-four hours, Harris and his accomplice forced Filaan to [take part] in a series of thefts and robberies.”⁴¹ When police confronted the three during a robbery, Harris aimed his gun at one of the police officers and pulled the trigger, which misfired.⁴² The three men were taken into custody and Harris was charged with armed robbery and kidnapping.⁴³ He was sentenced to six years in San Quentin prison.⁴⁴ While incarcerated, “[Harris] was convicted of possession of a deadly weapon by a prisoner . . . and was sentenced to an additional two years.”⁴⁵

Harris was released from San Quentin in 1984 and was permitted to return to Vidor through a special arrangement.⁴⁶ In the early morning hours of September 1, 1985, armed with a .38 caliber revolver, Harris broke into the apartment of Mark Mays and his girlfriend, Roxanne Lockhard.⁴⁷ While entering their bedroom, Harris woke the couple up and ordered Mays to lock himself in the bathroom.⁴⁸ He led Lockhard out of the home at gunpoint and told her to get into his pickup truck.⁴⁹ Mays freed himself, and followed Harris and Lockhard with a 9 mm pistol.⁵⁰ At trial, Lockhard testified that after hearing gunfire, she got out of the truck to find Mays bent over, wounded.⁵¹ She ran back into the house to call the

³⁷ YANT, *supra* note 30, at 30.

³⁸ *See id.*

³⁹ *See id.* at 30–31.

⁴⁰ *See id.* at 31.

⁴¹ *Id.*

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ Media Advisory, Greg Abbott, Tex. Attorney Gen., David Ray Harris Scheduled For Execution (June 22, 2004) (on file at <https://texasattorneygeneral.gov/oagnews/release.php?id=502>).

⁴⁶ *See* YANT, *supra* note 30, at 31.

⁴⁷ *See id.*; *Death Row Information: Executed Offenders*, TEX. DEP’T OF CRIM. JUST., https://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html (last visited Feb. 18, 2018) (follow “Offender Information” hyperlink in row 323).

⁴⁸ *See Death Row Information: Executed Offenders*, *supra* note 47.

⁴⁹ *See* Media Advisory, Greg Abbott, *supra* note 45.

⁵⁰ *See Death Row Information: Executed Offenders*, *supra* note 47.

⁵¹ *See* Media Advisory, Greg Abbott, *supra* note 45.

police, and a shootout ensued.⁵² Harris was hit twice before killing Mays and fleeing the scene.⁵³ Forensic pathologists testified at trial that the muzzle of Harris' gun was within two feet of Mays' body when the fatal shot was fired.⁵⁴ Some accounts suggest that Harris shot Mays three times at close range while he lay on the ground wounded.⁵⁵ Four days later, Harris was arrested after being pulled over on suspicion of drunk driving.⁵⁶ During interrogation, Harris attempted to blame Mays for the gunfight, telling police that nothing would have happened if Mays had stayed in the apartment: "That man was crazy,' he said. 'He tried to kill me.'"⁵⁷

We will never know how many crimes David Harris committed. But the summary above suggests that, after evading charges for the killing of a Dallas police officer, he was guilty at least of:

1. A series of burglaries in Germany while in the U.S. Army
2. Armed robbery
3. Assault on a commanding officer
4. Car theft
5. Kidnapping of James Filaan
6. A series of burglaries and thefts in California
7. Attempted killing of a police officer
8. Armed robbery
9. Kidnapping of Roxanne Lockhard
10. Murder of Mark Mays

David Harris is far from alone in engaging in an extended crime spree during a period when, if he had been arrested and convicted for his earlier crime, he would have been incarcerated. Thinking back to Blackstone's principle, Harris' case of wrongful liberty encompasses the harms of wrongful conviction as well as the kinds of substantial harms to further victims that are typically associated with wrongful acquittal. We have little information on how many crimes are associated with such periods of *wrongful liberty*. In this paper, we propose that documenting these crimes on a larger scale is entirely feasible, and that doing so could shift public opinion and elicit debate on how our criminal justice system should balance the risks of false

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See, e.g., YANT, *supra* note 30, at 31.

⁵⁶ See *Death Row Information: Executed Offenders*, *supra* note 47.

⁵⁷ See YANT, *supra* note 30, at 31.

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acquittals and false convictions. To do this properly, we must recognize that a false conviction often also creates a false liberty.⁵⁸

B. Albert Turner

On October 27, 1987, Willie Grimes learned that there was a warrant out for his arrest and turned himself in to the police.⁵⁹ He maintained his innocence, offered the names of witnesses who could vouch for his whereabouts, and asked to take a polygraph test but was refused, then arrested and charged with rape and kidnapping.⁶⁰ Though police initially suspected Albert Turner, he was never arrested.⁶¹ Instead, they focused on Grimes after an informant suggested that he fit the victim's assailant's description.⁶² Grimes was arrested, charged, and convicted of two counts of rape and one count of kidnapping.⁶³ He was exonerated in 2012 after having served twenty-four years of a life sentence.⁶⁴ During the period when Mr. Grimes was serving time for Mr. Turner's 1987 crime, Mr. Turner did not stop committing crimes.⁶⁵ In fact, during his period of wrongful liberty, he was convicted of the violent crimes shown in the table below (we do not list drug possession or other nonviolent crimes here). During this period alone, Mr. Turner's habitually assaultive behavior would have made him eligible in 1989 for prosecution under the current Habitual Misdemeanor Assault statute, N.C.G.S. § 14-33.2, and he could have faced enhanced Class H felonies as a result of his habitual status for every misdemeanor assault charge from 1989 onwards.⁶⁶ Having evaded justice in 1987, Turner continued to assault women over the next thirty years, finally going to prison in his fifties after a life of violence.⁶⁷

⁵⁸ They do not always do so, since some false convictions involve convictions where no crime had occurred, as for example when a false murder conviction follows a suicide or an accident. Exoneree Beverly Monroe represents the former, and Sabrina Butler the latter; see the National Registry of Exonerations for information on these two cases.

⁵⁹ See Maurice Possley, *Willie Grimes*, NAT'L REGISTRY OF EXONERATIONS, (Oct. 8, 2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4014>.

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *See id.*

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ See BENJAMIN RACHLIN, *GHOST OF THE INNOCENT MAN: A TRUE STORY OF TRIAL AND REDEMPTION* 286 (2017).

⁶⁶ See N.C. GEN. STAT. § 14-33.2 (2018).

⁶⁷ See RACHLIN, *supra* note 65, at 286.

Table 1: Violent Crimes Committed by Albert Turner During the Period Willie Grimes was Imprisoned for Turner's Earlier Crime.

Crime	Date	Conviction
1	9/26/1988	Simple Assault
2	12/20/1988	Assault on a Female
3	3/26/1990	Simple Assault
4	1/5/1994	Simple Assault
5	12/20/1998	Communicating Threats
6	12/20/1998	Communicating Threats
7	3/28/1989	Simple Assault
8	5/13/1995	Assault on a Female
9	6/13/1995	Assault with a Deadly Weapon
10	2/2/1997	Assault on a Female
11	1/10/1999	Assault on a Female
12	4/9/2006	Assault on a Female
13	4/9/2006	Assault with a Deadly Weapon
14	4/4/2008	Assault on a Female
15	9/6/2008	Assault on a Female

III. REVIEW OF SCHOLARSHIP ON WRONGFUL LIBERTY

Much has been written about the aftermath of wrongful incarceration. Particular emphasis has been placed on the experiences of the exonerated in the aftermath of their exoneration. Sandra Westervelt and Kimberly Cook's efforts to interview death row exonerees about their post-exoneration lives, have addressed a number of the issues central to aftermath scholarship including the challenges facing exonerees as they cope with the trauma and stigma of wrongful conviction and the practical hurdles of reintegration.⁶⁸ Research on the psychological aftermath of exoneration suggests that the exonerated experience both immediate and long-term psychological harms as a result of wrongful conviction including

⁶⁸ See *Coping*, *supra* note 11, at 268; *Life After Exoneration*, *supra* note 11, at 268.

clinical anxiety, depression, and PTSD.⁶⁹ Clinical work with individuals exonerated after long-term imprisonment has found that they experienced “severe” psychiatric morbidity and that they and their families faced difficulties similar to those of war veterans who had been exposed to chronic psychological traumas.⁷⁰ Still others compare the experiences of exonerates to those of refugees.⁷¹ More recent work has begun to examine the cultural aftermath of miscarriages of justice, suggesting that wrongful convictions can result in the widespread adoption of false beliefs about the nature of crime.⁷²

Estimates of the rate of wrongful convictions range widely, from Justice Scalia’s 0.027 percent⁷³ to as high as 37.7 percent, when accounting for denials of guilt.⁷⁴ Samuel Gross and colleagues reviewed death-sentenced cases and came to an estimate of four percent.⁷⁵ Kelly Walsh and colleagues reviewed Virginia sexual assault cases with DNA evidence from the 1970s and 1980s, estimate that 11.6 percent of such convictions were wrongful.⁷⁶ Their estimate is based on a random sample of all cases across fifty-six circuit courts in Virginia, with a total of over 400 cases reviewed.⁷⁷ Researchers went to state courts to gather records on this sample of cases and classified each into four categories: indeterminate; inculpatory; exculpatory but insufficient for exoneration; and exculpatory and

⁶⁹ See Grounds, *supra* note 11, at 2; Robert I. Simon, *The Psychological and Legal Aftermath of False Arrest and Imprisonment*, 21 BULL. AM. ACAD. OF PSYCHIATRY L. 523, 523 (1993); Wildeman, et al., *supra* note 11, at 411. The vast majority of this research focuses on male exonerates, though there is emerging research on female exonerates. See, e.g., Konvisser, *supra* note 11, at 222.

⁷⁰ See Grounds, *supra* note 11, at 15; Jenkins, *supra* note 11, at 128.

⁷¹ Jeffrey Chinn & Ashley Ratliff, “*I Was Put out the Door with Nothing*” – Addressing the Needs of the Exonerated Under a Refugee Model, 45 CAL. W. L. REV. 405, 408–09 (2009).

⁷² Simon A. Cole, *Cultural Consequences of Miscarriages of Justice*, 27 BEHAV. SCI. & L. 431, 434 (2009).

⁷³ In his concurrence in *Kansas v. Marsh*, Scalia quotes Joshua Marquis, suggesting that if there were as many as 4,000 wrongful convictions over fifteen years, higher than the 340 mentioned by Gross (see immediately below), this would only be a tiny share, 0.027 percent of the fifteen million felony convictions across the nation in that period. See *Kansas v. Marsh*, 548 U.S. 163, 197, 198 (2006) (Scalia, J., concurring) (quoting Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES (Jan. 26, 2006), <http://www.nytimes.com/2006/01/26/opinion/the-innocent-and-the-shammed.html>).

⁷⁴ Tony G. Poveda, *Estimating Wrongful Convictions*, 18 JUST. Q. 689, 701 (2001).

⁷⁵ Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. OF THE NAT’L ACAD. OF SCI. 7230, 7234 (2014).

⁷⁶ Kelly Walsh et al., *Estimating the Prevalence of Wrongful Convictions*, NAT’L CRIM. JUST. REFERENCE SERV. 10 (Sept., 2017) (available at <https://www.ncjrs.gov/pdffiles1/nij/grants/251115.pdf>).

⁷⁷ See *id.* at 5.

supportive of exoneration.⁷⁸ Note that they review not actual exonerations, but make their own judgments based on the forensic evidence and a review of the case file.⁷⁹ Such a difference may explain why Gross et al., estimated approximately four percent wrongful convictions⁸⁰ and they estimated nearly three times that amount.⁸¹ Most estimates have been in the one to five percent range,⁸² consistent with Gross' estimate. There is little reason to believe that a factually inaccurate judicial result would be overturned, suggesting that more wrongfully convicted remain in jail than have been released. Of course, the vast majority of these errors are associated with not only a person wrongfully incarcerated, but one wrongfully left at liberty.

An expansive body of scholarship focuses on monetary compensation, documenting existing policies and practices, and advocating for improvements to or expansion of these policies.⁸³ Others argue that monetary compensation is insufficient, urging the adoption of holistic compensation practices, comprehensive support services tailored to the needs of exonerees, and asserting the importance of appropriate post-conviction responses by the media and state officials.⁸⁴ Related work on public apologies to exonerees suggests that state apologies help exonerees begin to heal following the trauma of wrongful conviction and to begin to rebuild their

⁷⁸ See *id.* at 4.

⁷⁹ See *id.* at 1.

⁸⁰ See Gross et. al., *supra* note 75, at 7234.

⁸¹ See Walsh et al., *supra* note 76, at 11.

⁸² See *id.* at 3.

⁸³ See, e.g., Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 711–12 (2004); Lauren C. Boucher, *Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated*, 56 CATH. U.L. REV. 1069, 1072–73 (2007); Donna McKneelen, “Oh Lord Won’t You Buy Me a Mercedes Benz?”: A Comparison of State Wrongful Conviction Compensation Statutes, 15 SCHOLAR 185, 194 (2013); Deborah Mostaghel, *Wrongfully Incarcerated, Randomly Compensated—How to Fund Wrongful-Conviction Compensation Statutes*, 44 IND. L. REV. 503, 537 (2011); Robert J. Norris, *Assessing Compensation Statutes for the Wrongly Convicted*, CRIM. JUST. POL’Y REV. 352, 367 (2012); Michael Leo Owens & Elizabeth Griffiths, *Uneven Reparations for Wrongful Convictions: Examining the State Politics of Statutory Compensation Legislation*, 75 ALB. L. REV. 1283, 1286–87 (2012).

⁸⁴ See Shawn Armbrust, *When Money Isn’t Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 170 (2004); Jennifer L. Chunias & Yael D. Aufgang, *Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105, 108–09 (2008); Elizabeth S. Vartkessian & Jared P. Tyler, *Legal and Social Exoneration: The Consequences of Michael Toney’s Wrongful Conviction*, 75 ALB. L. REV. 1467, 1493–94 (2012); Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427, 431 (2009).

personal reputation.⁸⁵ Another key concern is that of the public stigma facing exonerees even after they have been proven innocent.⁸⁶

Far less has been written about the harms of wrongful liberty, though the field and movement seem open to expansion. For example, the *Albany Law Review's* 2012 edition of *Miscarriages of Justice* focused on aftermath.⁸⁷ The work went beyond addressing the aftermath facing those exonerated to address the effects of wrongful incarceration on others: family members and loved ones of the exoneree; family members and loved ones of the crime survivor/victim; individuals involved with the case as investigators, judicial officials or jurors, or defense team members; and those in the community who are affected by the many barriers to successful reintegration when exonerees return home.⁸⁸ This more expansive definition of the effect of wrongful convictions provides a much more accurate sense of the harm done when justice goes wrong. Brian Forst and C. Ronald Huff provide an early review of some relevant literature in a recent analysis.⁸⁹

We turn now to these concentric circles of harm. As the innocence movement has done well to note, the victims of crimes for which someone is falsely imprisoned are also harmed by miscarriages of justice.⁹⁰ In addition, miscarriages of justice can result in preventable crimes, crimes of “wrongful liberty” which could not have occurred had the true perpetrator of a crime been correctly identified. Once we acknowledge the breadth of the harms of wrongful incarceration, the *iceberg*, we can begin to recognize wrongful incarceration as an issue that should concern everyone, not merely

⁸⁵ See Frederick Lawrence, *Declaring Innocence: Use of Declaratory Judgments to Vindicate the Wrongly Convicted*, 18 B.U. PUB. INT. L.J. 391, 397 (2009); Abigail Penzell, *Apology in the Context of Wrongful Conviction: Why the System Should Say It's Sorry*, 9 CARDOZO J. CONFLICT RESOL. 145, 145 (2007).

⁸⁶ See Kimberley A. Clow et al., *Public Perception of Wrongful Conviction: Support for Compensation and Apologies*, 75 ALB. L. REV. 1415, 1422 (2012); Adina M. Thompson et al., *After Exoneration: An Investigation of Stigma and Wrongfully Convicted Persons*, 75 ALB. L. REV. 1373, 1374 (2011).

⁸⁷ See, e.g., Sandra D. Westervelt & Kimberly J. Cook, *Foreword*, 75 ALB. L. REV. 1223, 1223, 1224 (2012).

⁸⁸ See *id.*

⁸⁹ See generally Brian Forst & C. Ronald Huff, *Preventing Violent Crimes by Reducing Wrongful Convictions*, in CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION 438–52 (Alexander T. Vazsonyi, Daniel J. Flannery, & Matt DeLisi eds., 2nd ed. 2018).

⁹⁰ See *id.* at 25. Notably, there is at least one forthcoming piece of scholarship aimed at exploring the broader harms of wrongful conviction that includes an attempt to estimate the number of subsequent crimes made possible by false convictions. Drawing on data from the Innocence Project and the National Registry of Exonerations (“NRE”), the authors suggest that true perpetrators of violent crimes could account for more than 1,000 additional violent crimes. See *id.* at 9.

those falsely accused, but those victimized by crime and the public generally, who are more likely to be victims of crime as long as guilty parties experience wrongful liberty.⁹¹ In the same vein, the documentation of harms of wrongful liberty can provide legal scholars with a more complete picture of exactly what is at risk in debates over the continued relevance of the Blackstone principle.

In his work on wrongful liberty, James Acker suggests that data on crimes committed when the guilty remain at large are “no match for the raw intensity of the underlying case narratives.”⁹² Accordingly, Acker illustrates the harsh consequences of wrongful liberty with summaries of twenty cases.⁹³ Perhaps most shocking of these is the case of Clifton Hall. In 1985, Hall sexually assaulted and brutally murdered the eight-year-old son and seven-year-old daughter of an acquaintance.⁹⁴ In 1988 Bryon Halsey, the live-in boyfriend of the children’s mother—who had serious learning disabilities and had dropped out of middle school—was convicted of the crime.⁹⁵ As Acker recounts, Hall’s wrongful liberty crime spree began in June of 1991:

[Hall] grabbed an 18-year-old woman from behind on a street and, holding a knife to her throat, orally, vaginally, and anally raped her for up to three hours. Three months later, he abducted a 19-year-old woman and took her to a building where he repeatedly and violently raped her vaginally and anally for two hours. Several months after that, he punched and attempted to rape a 26-year-old woman as she walked toward a train station.⁹⁶

In 2007, DNA testing excluded Halsey as the source of DNA at the scene, which instead matched Hall’s DNA on file as a result of his conviction for three sexual assaults.⁹⁷

In the next section, we bring these two approaches to wrongful liberty together. We collect data on the number of crimes of wrongful liberty in North Carolina exoneration cases and provide firsthand accounts of the intensity and effect of individual crimes of wrongful liberty. We begin below with preliminary efforts to identify crimes of wrongful liberty.

⁹¹ See *id.* at 4.

⁹² See James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1635 (2013).

⁹³ See *id.* at 1635–36.

⁹⁴ See *id.* at 1656–57.

⁹⁵ See *id.* at 1657.

⁹⁶ *Id.* at 1658.

⁹⁷ See *id.* at 1657–58.

IV. WRONGFUL LIBERTY IN NORTH CAROLINA

A. Documenting Crimes of Wrongful Liberty

We began our work with a list of North Carolina exonerees. Here we began with the National Registry and supplemented it to include other cases including some that occurred before the Registry's list in 1989. (The Appendix lists our thirty-six cases and the dates of their crime, arrest, and release). We then associated each exoneree with the true perpetrators of the crimes for which they were falsely imprisoned. In our case, this involved thirty-six exonerees and nine perpetrators, as we explain in more detail below. We then collected information about the criminal history of the true perpetrator, through methods discussed in greater detail below. Data collected included the individual offense, case file number, date of offense, date of conviction, subsequent crime status, and what classification the offense falls under. Crimes were split into the following categories: infractions, unknown designations, felony drug crimes, felony sex crimes, felony property crimes, felony violent/weapon offenses, misdemeanor drug/alcohol crimes, misdemeanor violent/weapon crimes, misdemeanor property crimes, all other misdemeanors, and all other felonies. There were no misdemeanor sex crimes present in the data. Our experience in North Carolina suggests that law students working with undergraduate students and the supervision of attorneys experienced with state criminal records databases can gather such information easily. A small financial grant or coordinated effort among innocence projects could allow a more comprehensive national approach. Documenting the crimes of wrongful liberty even for one decade's worth of exonerees would potentially allow a dramatic demonstration of another aspect of the cost of wrongful convictions. As we discuss below, this is entirely feasible, especially for the more recent cases where electronic records are more easily available.

Since search methods will likely vary from state to state, we suggest beginning the subsequent crimes search by determining the most legitimate and comprehensive source of criminal records in the jurisdiction at hand. There should be one source in each state that the court system itself uses, which should provide the most accurate information. In the case of North Carolina, this system is called Automated Criminal Infraction System ("ACIS").⁹⁸ Generally, a

⁹⁸ N.C. ADMIN. OFFICE OF THE COURTS., ACIS CITIZEN'S GUIDE: SEARCHING THE AUTOMATED

state's department of corrections is likely to provide accurate information as well. Finding case information for crimes committed before records were digitized and crimes committed outside of the state was more difficult. Here, we again required the help of local attorneys, including those with access to criminal records in other states. Careful attention to terminology that differs across states' criminal records systems, including terms referring to release dates, was also important. Though Westlaw and LexisNexis might be useful for identifying case file numbers, we found them insufficient for identifying subsequent crimes because they are often missing complete data on charges and convictions.

We began by looking at the North Carolina Department of Public Safety website.⁹⁹ Their website allows for relatively easy compiling of a criminal history, which can be downloaded as a PDF file. Unfortunately, this is not the case in many other states. Some states require written requests be sent in by mail, or offer an online portal to acquire the records of defendants. Additionally, we were fortunate to be able to work with the local public defender's office to access ACIS. To better understand the charges originally faced by exonerees, we also searched news articles through LexisNexisAcademic and Google News. For those unfamiliar with the cases, news coverage can provide valuable information about the underlying charges facing exonerees and about codefendants (true perpetrators) who might have been rightfully convicted at the time of the exoneree's conviction.

Finally, it was important to ensure the accuracy of offense dates to ensure that subsequent crimes were in fact subsequent. Many of the true perpetrators had extensive criminal records before the crime associated with the wrongful conviction.¹⁰⁰ While this is pertinent to discussions of why the authorities did not charge them for that crime, these are not crimes of "wrongful liberty" and we were careful to

CRIMINAL/INFRACTIONS SYSTEM 5 (Dec. 2017), http://www.nccourts.org/Training/Documents/ACIS_Inquiry_RG.pdf.

⁹⁹ *Criminal Offender Searches*, N.C. DEP'T OF PUB. SAFETY, <https://www.ncdps.gov/dps-services/crime-data/offender-search> (last visited Feb. 20, 2018).

¹⁰⁰ *See, e.g., Darryl Hunt*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/darryl-hunt/> (last visited Feb. 20, 2018) (noting that the true perpetrator had prior murder conviction); *DNA Evidence Does Double Duty in NC Case: Data Clears One Man of Rape After 21 Years, Leads to Charges for Another*, ASSOCIATED PRESS (Aug. 17, 2005), <http://www.nbcnews.com/id/8989499/#.WmNmiiqinFPZ> (stating that true perpetrator Joel Bill Caulk had three prior sexual assault and one murder conviction); *see also* Helen O'Neill, *How DNA Became a Perfect Witness*, DEATH PENALTY INFO. CTR. (Sept. 21, 2000), <https://deathpenaltyinfo.org/node/589> (noting that the true perpetrator Bobby Poole had convictions for a series of brutal rapes).

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include only those crimes committed during that period between the crime of wrongful conviction and the date when the true perpetrator was finally incarcerated. When there were discrepancies in the offense date, we used caution when determining whether the offense had occurred before or after the offense for which the exonerees were convicted. For example, ACIS provides a date of service of the arrest warrant but not the date of offense. This is often the date the offense occurs, but not always. If someone was caught two weeks after committing breaking and entering, the date served is likely the day they were arrested, rather than the date of the offense. Ultimately, we recommend using caution and common sense when working with the data and erring on the side of underreporting if it is unclear whether a crime is subsequent or not.

B. Some Preliminary Estimates of Crimes of Wrongful Liberty

As of January 2018, the New York-based Innocence Project provides these figures:

- 353 individuals have been exonerated through DNA testing since 1992¹⁰¹
- 179 cases where the true perpetrator was identified¹⁰²
- 152 perpetrators in these cases (some were involved in more than one wrongful conviction)¹⁰³
- These 152 true perpetrators were later convicted of:
 - 150 additional violent crimes, of which there were
 - 80 sexual assaults
 - 35 murders
 - 35 other violent crimes.¹⁰⁴

Because these were all DNA-related cases, a relatively high proportion involve a “match” where the DNA evidence allowed prosecutors not only to release the innocent, but also to identify the guilty party.¹⁰⁵ In North Carolina, we have thirty-six exonerations, only ten of which are DNA-related. Of these thirty-six cases, ten involve the identification of the true perpetrators.¹⁰⁶ In one of these

¹⁰¹ *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Feb. 20, 2018).

¹⁰² *All Cases*, INNOCENCE PROJECT, <https://www.innocenceproject.org/all-cases/#exonerated-by-dna> (last visited Feb. 7, 2018) (click the “Filters” tab; then click the “Real Perpetrator Convicted of Subsequent Crime” filter; then check the box for “Yes”; then click the “view the 179 cases” tab that appears at the bottom of the page to view the case).

¹⁰³ *DNA Exonerations in the United States*, *supra* note 101.

¹⁰⁴ *Id.*

¹⁰⁵ *See id.*

¹⁰⁶ *See id.*

cases (that of Alan Gell), the true perpetrators were arrested at the same time as the exoneree, leaving nine cases with known perpetrators who could have committed subsequent crimes.¹⁰⁷ Subsequent crimes were committed in six of those nine cases.¹⁰⁸ These six individuals collectively were arrested and convicted of ninety-nine subsequent crimes of which thirty-five were felonies and thirteen were violent crimes.¹⁰⁹ These are all crimes that could have, should have, and would have never occurred if these true perpetrators had been in prison for their earlier crimes. The Appendix shows the list of exonerations in our database and the cases where the true perpetrator was arrested.

There are also several cases that mirror that of Randall Adams, in which true perpetrators have been identified but have not been charged or convicted. For example, Erick Daniels served seven years in prison for a robbery he did not commit.¹¹⁰ The true perpetrator, Samuel Strong, admitted to the robbery while in prison on unrelated charges but was never charged with or convicted of the crime.¹¹¹ We do not include such cases in our analysis because we want to be conservative in our estimates and to rely on official judicial findings of guilt. However, expanding the list of perpetrators to include such cases would expand the list of crimes committed.

North Carolina is also home to a prominent case in which police focused their investigation on and charged an innocent individual, later dropping the charges without identifying the true perpetrator, who went on to commit another heinous crime, the robbery and murder of UNC-Chapel Hill senior class president Eve Carson.¹¹² The person convicted of the crime,¹¹³ Laurence Lovette, was arrested just eight days after Carson's killing, at which point he was also arrested for the January 18, 2008 abduction, robbery and execution-style killing of Duke University graduate student Abhijit Mahato.¹¹⁴ Lovette was found guilty of Carson's death in 2011 and was sentenced

¹⁰⁷ *See id.*

¹⁰⁸ Data on file with author.

¹⁰⁹ Data on file with author.

¹¹⁰ *Erick Daniels*, NAT'L REGISTRY OF EXONERATIONS (June 2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3151>.

¹¹¹ *See id.*

¹¹² Julia Sims & Kelly Gardner, *Lovette Again Gets Life Without Parole for Murder of Eve Carson*, WRAL.COM (June 3, 2013), <http://www.wral.com/lovette-again-gets-life-without-parole-for-murder-of-eve-carson/12508263/>.

¹¹³ *See id.*

¹¹⁴ Kelly Gardner, *Judge Allows Eve Carson Evidence in Lovette Murder Trial*, WRAL.COM (July 24, 2014), <http://www.wral.com/judge-allows-eve-carson-evidence-in-lovette-murder-trial/13834052/>.

to life in prison.¹¹⁵ Following the Mahato murder, Durham police had arrested a suspect other than Lovette, dropping those charges against the other suspect in 2013 before bringing Lovette to trial for the crime.¹¹⁶ According to testimony at Lovette's 2014 trial, critical evidence from the Mahato case was not processed for fingerprints or DNA because police were investigating what turned out later to be a false lead.¹¹⁷ Lovette, according to testimony at his trial, laughed when he saw a television report showing another had been arrested for the Mahato crime.¹¹⁸ Because key physical evidence was not gathered, his trial was based purely on circumstantial evidence and the testimony of a witness whose story changed several times.¹¹⁹ He was acquitted on July 30, 2014, leaving the Mahato case open, and suggesting that if the prosecution theory was correct that Lovette had committed this and other crimes, that the March 2008 Carson case would not have occurred if the correct suspect had been quickly apprehended in the January 2008 Mahato murder.¹²⁰ Though there is no exoneree, this does seem to be a case of wrongful liberty. The events certainly motivate a similar concern about the harms of a misguided prosecutorial focus on the innocent resulting in the guilty remaining free to cause further harm.

Thus far we have identified ninety-nine subsequent crimes committed by the true perpetrators after someone else was falsely imprisoned for their crimes.¹²¹ This is certainly an underestimate of the number of crimes committed during these periods of wrongful liberty. Known subsequent crimes range from nonviolent crimes including larceny, trespassing, and breaking and entering, to violent crimes like assault. There were sixteen violent subsequent crimes, fourteen of which were assault convictions.¹²² Thirty-five of the subsequent crimes were felonies.¹²³ Since we lack complete

¹¹⁵ See Sims & Gardner, *supra* note 112.

¹¹⁶ *Murder Charge Dropped in Duke Student Murder*, ABC11 (Feb. 22, 2013), <http://abc11.com/archive/9002743/>.

¹¹⁷ Beth Velliquette, *Jury Finds Lovette not Guilty of Duke Student's Murder*, NEWS & OBSERVER (July 30, 2014), <http://www.newsobserver.com/news/local/community/durham-news/article10029296.html>.

¹¹⁸ Beth Velliquette, *Both Sides Rest in Lovette Murder Trial*, NEWS & OBSERVER (July 25, 2014), <http://www.newsobserver.com/news/local/community/durham-news/article10028315.html>.

¹¹⁹ Beth Velliquette, *Jurors in Lovette Murder Trial Ends Day's Deliberations Without Verdict*, NEWS & OBSERVER (July 29, 2014), <http://www.newsobserver.com/news/local/community/durham-news/article10029002.html>.

¹²⁰ See Velliquette, *supra* note 117.

¹²¹ Data on file with author.

¹²² Data on file with author.

¹²³ Data on file with author.

information for the criminal records of some true perpetrators and about the identities of true perpetrators in several cases, these are very conservative estimates. There are at least this many cases of subsequent crimes and very possibly more. In fact, the thirty-six North Carolina exonerees served a total of approximately 387 years in prison for crimes they did not commit.¹²⁴ During that period, the true perpetrator was typically on the street, and if Albert Turner's case is any indication, they collectively could be guilty of hundreds of violent crimes. Getting it right matters.

C. The Wrongful Liberty of Chris Caviness: "Three Murders, How Many Killers?"

Greensboro, North Carolina was rocked by three violent homicides within six months beginning with the bloody July 1988 killing of North Carolina A&T Professor Ernestine Compton in her home.¹²⁵ LaMonte Armstrong was eventually convicted of the crime, serving seventeen years in prison before being exonerated.¹²⁶ In September 1988, Carolyn Sue Lundy was violently killed, in a crime for which Damen Vega was convicted after refusing to accept plea deals and insisting on his innocence.¹²⁷ Ms. Compton and Ms. Lundy were both middle-aged, African American women well-known in their community for lending money to those in need.¹²⁸ They lived alone.¹²⁹ In early 1989, Chris Caviness, desperate for money to sustain his crack cocaine habit, killed his own father with a butcher knife and a lead pipe.¹³⁰ Caviness pled guilty to the third crime in June 1989 and was sentenced to a long term, later to be freed on parole.¹³¹ Caviness

¹²⁴ See *infra* Appendix.

¹²⁵ Taft Wireback, *LaMonte Armstrong, Wrongfully Convicted in Murder of Ernestine Compton*, GREENSBORO NEWS & REC. (Sept. 3, 2016), http://www.greensboro.com/news/special_reports/lamonte-armstrong-wrongfully-convicted-in-murder-of-ernestine-compton-video/article_d73cadd1-0fee-5fa9-8852-4eaae9174cb3.html [hereinafter *LaMonte Armstrong*]. See a three-part series in the *Greensboro News & Record* for details on this case. See *id.*; Taft Wireback, *Who Was the Real Chris Caviness?*, GREENSBORO NEWS & REC. (Sept. 4, 2016), http://www.greensboro.com/news/special_reports/who-was-the-real-chris-caviness/article_7256db15-7f85-57f7-9a57-f7362926ca94.html [hereinafter *Who Was the Real Chris Caviness?*]; Taft Wireback, *Wrongful Convictions Don't Come Cheap*, GREENSBORO NEWS & RECORD (Sept. 5, 2016), http://www.greensboro.com/news/special_reports/wrongful-convictions-don-t-come-cheap/article_cdfd0593-aeb6-5389-a32d-465cc92b7a0d.html [hereinafter *Wrongful Convictions Don't Come Cheap*].

¹²⁶ See *LaMonte Armstrong*, *supra* note 125.

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See *Who Was the Real Chris Caviness?*, *supra* note 125.

¹³¹ See *id.*; *LaMonte Armstrong*, *supra* note 125.

was an initial suspect in the other two murders as well, but was never prosecuted for them¹³² Single women likely to have money in their homes were logical targets for an addict desperate for drug money.

Vega was sentenced in 1989 to ninety years in prison for a crime he contends Caviness committed.¹³³ Armstrong was sentenced to life in prison for the Compton murder, though it took years to complete the investigation and the conviction did not come until 1995.¹³⁴ After he served seventeen years of his life sentence, Armstrong was granted a full pardon of innocence in 2013 by North Carolina Governor Pat McCrory.¹³⁵ Police re-examined the evidence at the bloody crime scene of the original Compton murder and found a palm print from none other than Chris Caviness on the wall near where the body was discovered.¹³⁶ Caviness lived less than a half-mile from the second of the three victims, but Damen Vega would serve twenty-seven years before gaining parole in 2015; he remains a convicted felon.¹³⁷ According to the Duke Innocence Project, but unproven in the courts since the police investigative file has been discarded or lost, Vega is also innocent.¹³⁸ The guilty party, Caviness, served eighteen years in prison as an admitted patricide, was paroled, and then later died in a crash while racing his car at age forty-one.¹³⁹ Ironically, none other than LaMonte Armstrong had been one of his elementary school teachers.¹⁴⁰ Caviness' short life left, in its wake, a series of tragedies.

There is no question that Caviness committed the Compton murder for which Armstrong was wrongfully convicted.¹⁴¹ There is no question that Caviness later killed his own father,¹⁴² a crime which would not have occurred if he had been promptly arrested for the Compton homicide. And there is a great probability that Caviness committed the Lundy murder for which Vega was convicted.¹⁴³ If so, then we have to attribute two subsequent murders and two wrongful convictions to the wrongful liberty of Chris Caviness. A father would

¹³² See *Who Was the Real Chris Caviness?*, *supra* note 125; *LaMonte Armstrong*, *supra* note 125.

¹³³ See *LaMonte Armstrong*, *supra* note 125.

¹³⁴ See *id.*

¹³⁵ See *Wrongful Convictions Don't Come Cheap*, *supra* note 125.

¹³⁶ See *Who Was the Real Chris Caviness?*, *supra* note 125.

¹³⁷ See *LaMonte Armstrong*, *supra* note 125.

¹³⁸ See *Who Was the Real Chris Caviness?*, *supra* note 125.

¹³⁹ See *id.*

¹⁴⁰ *LaMonte Armstrong*, *supra* note 125.

¹⁴¹ See *Who Was the Real Chris Caviness?*, *supra* note 125.

¹⁴² See *id.*

¹⁴³ See *id.*; *Wrongful Convictions Don't Come Cheap*, *supra* note 125.

likely be alive today if the son had been arrested after his first homicide. Carolyn Sue Lundy would be alive, and LaMonte Armstrong and Damen Vega would have avoided wrongful incarceration.

IV. CONCLUSION

Serial, violent criminals such as Albert Turner, David Harris, or Chris Caviness, victimize us all. Their victims include the original victim, who is doubly victimized by the crime and the fact that the true perpetrator remains free. The list extends to the individual who goes to prison for a crime he or she did not commit, and the friends and family members of the wrongfully convicted as well as the victim. But the list of victims extends far beyond these individuals and their families. In many cases, those not arrested are well-known to the police at the time of the crime, and in some unknown number of cases they go on to long and sustained sprees of crime, sometimes for decades. These violent criminals, left on the street, victimize untold numbers of victims during a period when they should have been incarcerated. Bringing attention to these crimes of wrongful liberty can help us understand another element of the costs of wrongful convictions. It can also aid us in navigating ongoing debates about foundational principles of our criminal justice system, and how it should weigh the risks of false conviction and false acquittals. Our small project documenting the extent of the issue in North Carolina suggests it is feasible to consider a national collaboration to document these facts nationwide.

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APPENDIX: NORTH CAROLINA EXONERATIONS

Name	Crime	Convicted	Exonerated	Years	Arrest?	DNA?
John Wesley Benton	1942	1943	1943	1		
Samuel Poole	1973	1973	1974	2		
Christopher Spicer	1973	1973	1975	3		
Lonnie Sawyer	1975	1975	1977	3		
Sandy Sawyer	1975	1975	1977	3		
Leo Waters	1981	1982	2003	22	Y	Y
Lesly Jean	1982	1982	1991	10		
Ronald Cotton	1984	1985	1995	11	Y	Y
Darryl Hunt	1984	1985	2004	20	Y	Y
Sylvester Smith	1984	1984	2004	21		
Dwayne Allen Dail	1987	1989	2007	19	Y	Y
Willie Grimes	1987	1988	2012	25	Y	
Levon Junior Jones	1987	1993	2008	16	Y	
LaMonte Armstrong	1988	1995	2013	19		Y*
Robert Kelly	1988	1992	1997	6		
Kathryn Dawn Wilson	1988	1993	1997	5		
Joseph Lamont Abbitt	1991	1995	2009	15		
Keith Brown	1991	1993	1999	7	Y	Y
Jonathan Scott Pierpoint	1991	1992	2010	19		
Gregory Taylor	1991	1993	2010	18		Y*
Glen Edward Chapman	1992	1994	2008	15		
Floyd Brown	1993	1993	2007	15		
Charles Munsey	1993	1993	1998	6	Y	
Jerry Lee Hamilton	1994	1994	2003	10	Y	Y
Alan Gell	1995	1998	2004	7	Y	
Jonathon Hoffman	1995	1996	2007	12		
Alfred Rivera	1996	1997	1999	3		
Terence Garner	1997	1998	2002	5		
Derrick Allen	1998	1998	2010	13		
Shawn Giovanni Massey	1998	1999	2010	12		
Steve E. Snipes	1998	1998	2003	6		
Erick Daniels	2000	2001	2008	8		

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Kenneth Kagonyera	2000	2001	2011	11	Y
Robert Wilcoxson	2000	2002	2011	10	Y
Noe Moreno	2006	2007	2012	6	
Donald Edward Sweat	2007	2007	2009	3	
Totals, 36 exonerations				387	

Note: Several additional cases saw the identification of a perpetrator, but not their arrest and conviction for the original crime. We list only those cases where a subsequent conviction confirmed their status as the perpetrator. An asterisk (*) in the column to the right of the “DNA” column means that the case is not included in the Innocence Project’s list of DNA exonerations because post-conviction DNA evidence was not central to establishing innocence, and other non-DNA factors were essential to the exoneration.