

# Miscarriages of Justice

Actual Innocence, Forensic Evidence, and the Law

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# Preface

## IDENTIFYING MISCARRIAGES OF JUSTICE

“...the U.S. indigent defense systems—which provide representation to those who cannot afford it—are in financial crisis, plagued by crushing caseloads and insufficient resources. And this year’s forced budget reductions, due largely to sequestration, are further undermining this critical work.”

**Eric Holder (2013)**

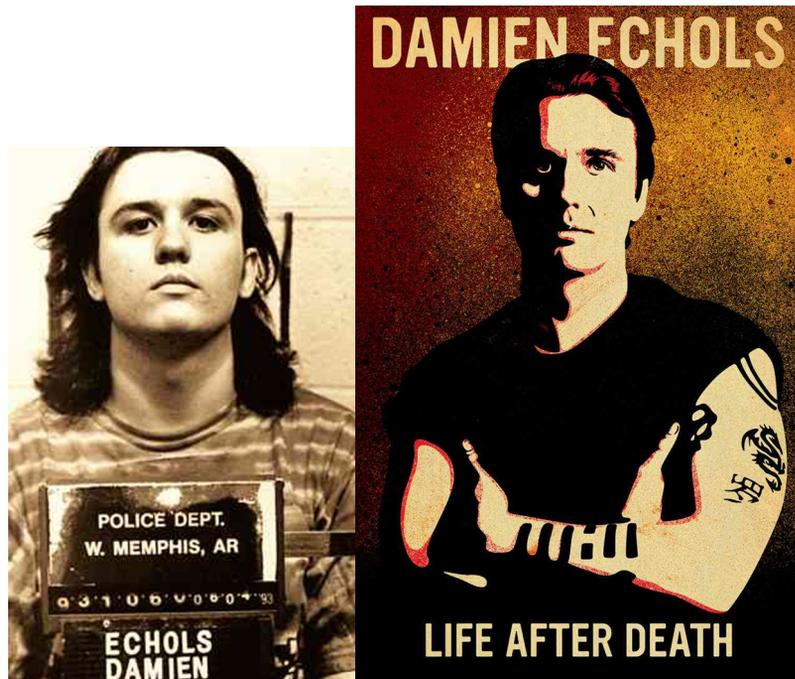
*Attorney General  
United States of America*

Miscarriages of justice are most commonly told as stories through the eyes of defense attorneys and their clients. This is no mistake. The defendant experiences a miscarriage of justice in the most personal, painful, and profound way—as a series of wrecking balls, shattering the foundations of his or her life in successive blows. Very often careers, homes, friends, family, and all other supporting resources are beaten from the defendant until only the most faithful remain. If there is a criminal conviction, things are much worse (see [Figure 1](#)). If the conviction occurs in the context of a capital case, the consequences are not just brutal and isolating; they are enhanced by living with the constant threat of the death penalty.<sup>1</sup>

Defense attorneys witness this obliteration with a front row seat. Sometimes they do all they can and it isn’t enough, sometimes they are deprived of sufficient resources to mount even the most basic defense, sometimes the deck is stacked against them by the police, the prosecution, and the courts, and sometimes they are professionally negligent and even complicit in the miscarriage. Consequently, on one hand, a defense attorney might be competent and experienced enough to know when these things are happening, and on the other hand, he or she might not.

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<sup>1</sup> For a revealing memoir detailing the experiences of a death row inmate who has since been released from prison, see *Life After Death*, by Damien Echols (2013). One of the authors (Turvey) served as a defense expert in that case during postconviction, discussed in Chapter 5, “Police Interrogations and False Confessions.”



**Figure 1**

Damien Echols pictured at the time of his arrest in 1993 (left). Upon his release from death row (along with co-defendants Jason Baldwin and Jesse Misskelley), Echols wrote a compelling memoir of his experiences that he titled *Life After Death* (2013; right). The only one of the so-called West Memphis Three to receive the death penalty, Echols spent much of his time in solitary confinement. One of the authors (Turvey) worked for the West Memphis Three defense during postconviction, testifying about the investigative and forensic shortcomings evident in the prosecution's case. See Chapter 5 for a discussion of the case.

Both the defendant and the defense attorney can become compelled, as a result of their experiences, to tell the story—often through books, films, and interviews with the media. Ultimately, they are uniquely capable of doing so: they have personally observed and felt the impact of the miscarriage, and they also have access to case material. The miscarriage is, inevitably, their story to tell.

However, this also means that the literature currently associated with miscarriages of justice is dominated by the perspectives of criminal defendants and defense attorneys. Their narratives are intended for the general public or specifically for those operating within the legal community.<sup>2</sup> The language is therefore

<sup>2</sup> A well-known example is the groundbreaking work *Actual Innocence* by Scheck, Neufeld, and Dwyer (2000), which details the stories of ten men wrongfully convicted and then exonerated by DNA with the help of the Innocence Project in New York.



**Figure 2**

U.S. Attorney General Eric Holder speaking before the American Bar Association in San Francisco (August, 2013). Mr. Holder has played a high-profile role in identifying and addressing miscarriages of justice during his tenure. In 2009, he dismissed the case against former Senator Ted Stevens due to egregious FBI and prosecutorial misconduct (see discussion in Chapter 11). In 2013, he spoke publicly about the underfunding of indigent defense in relation to government budget reductions and how this has harmed the cause of justice.

almost invariably a mix of true crime and legalese. Although these voices are necessary and valuable, they represent a very specific set of agenda-driven viewpoints. To inform a broader array of criminal justice students and professionals, a more professionally inclusive approach to the subject is called for.

The purpose of this textbook is to move beyond the law review, casebook, and true crime publications that comprise the miscarriage literature. While informative, they are not designed for teaching students in a classroom setting. This text is written specifically for use at the undergraduate level in journalism, sociology, criminology, and criminal justice programs to introduce college students to the miscarriage phenomenon in a structured fashion. The language is more broadly accessible than can be found in legal texts, and the coverage is multidisciplinary.

The reality is that miscarriages of justice are a regular occurrence in the criminal justice system, which is characterized by government agencies that are understaffed, underfunded, and undertrained across the board. This is especially true of the indigent defense system, in what Eric Holder, Attorney General for the United States (see [Figure 2](#)), has referred to as a “shameful state of affairs” (Holder, 2013)—so much so that defendant poverty can conspire to create legal guilt as a foregone conclusion in some regions of the United States—if not also to ensure lengthier prison stays.

Criminal justice students and professionals therefore have a need to be made aware of the miscarriage problem as a threshold issue. They need to know what

a miscarriage of justice looks like, how to recognize its many forms, and what their duty of care might be in terms of prevention. They also need to appreciate that identifying miscarriages, and ensuring legal remedy, is an important function of the system that must be honored by all criminal justice professionals.

This text ultimately presents the issue of miscarriages as a systemic and multidisciplinary criminal justice issue. It provides perspectives from within the professional CJ community, and it serves as warning to future professionals about the dangers and consequences of apathy, incompetence, and neglect. Consequently, it can be used by any CJ educator to introduce any group of CJ students to the problem.

It is our hope that they will do so faithfully in service of justice.

**Brent E. Turvey and Craig M. Cooley**

## **References**

Echols, D., 2013. *Life After Death*. Plume, New York, NY.

Holder, E., 2013. "Defendants' legal rights undermined by budget cuts," *The Washington Post Op-Ed*, August 22. [http://www.washingtonpost.com/opinions/eric-holder-defendants-legal-rights-undermined-by-budget-cuts/2013/08/22/efccbec8-06bc-11e3-9259-e2aaf5a5f84\\_story.html](http://www.washingtonpost.com/opinions/eric-holder-defendants-legal-rights-undermined-by-budget-cuts/2013/08/22/efccbec8-06bc-11e3-9259-e2aaf5a5f84_story.html).

Scheck, B., Neufeld, P., Dwyer, J., 2000. *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted*. Doubleday, New York, NY.

# Foreword

## **WRONGFUL CONVICTIONS: UNDERSTANDING CAUSES AND CONSEQUENCE**

As of this writing, there have been over 1200 exonerations of the wrongfully convicted in the United States. That number climbs every week. These miscarriages of justice are undeniable, and serve as proof of the flaws in our criminal justice system that cannot be ignored. However, as this text demonstrates, they can be identified and corrected.

My first experience with wrongful convictions came when I began working on state postconviction appeals for people on death row in Florida (when someone is convicted of capital murder, most states automatically assign the case to an appellate public defender of some kind for a required appellate review). The idea that any of the convicts sitting on death row could actually be innocent never entered my mind—until some attorneys in my office exonerated one of them. From these early experiences working capital appeals, through my time representing men sentenced to death in federal habeas corpus (the last round of criminal appeals), I came to believe that several of my clients could be innocent.

This was not the result of wishful thinking on my part, but rather it came as the natural result of thorough review. The more I dug into their cases, the more I saw shoddy police work, shoddy defense work with no investigation, inconsistencies in witness statements, dubious work and testimony from prosecution criminalists (forensic scientists), and alleged facts and eventual theories that didn't quite add up. I kept asking myself how this could happen. More importantly, I wondered whether anything could be done to prevent it.

During this time, I also learned that the wrongfully convicted (while actually innocent) come from all walks of life. However, they each share a similar horrific experience. They have been swept up into a broken system where a multitude of factors combined to result in their incarceration. This is difficult to appreciate from the outside looking in. Ultimately, I came to see that it is not only innocent defendants who suffer when a miscarriage of justice occurs, but also their families and friends, to say nothing of the victims of these crimes

who are left without genuine closure. As a result of my experiences, I came to believe that understanding and exposing the many causes and consequences of wrongful convictions is probably the best way to prevent them from happening in the future.

The causes of wrongful convictions are well known within the legal community. They include things like eyewitness misidentification, false confessions, ineffective assistance of counsel, and faulty forensic science. They are not usually isolated to single cases—they are usually systematic, as the professionals within the system who cause or allow the problem will work on many cases throughout a career. In other words, when there is one, there is going to be more than one.

Only by studying the cases and underlying causes can further miscarriages be revealed, along with realistic systemic solutions. What is known is that people make mistakes on a lot of levels. Evidence is not collected which prevents a complete understanding of a crime. Perhaps a witness is not interviewed or investigators dismiss as irrelevant evidence that conflicts with their theory of the case. Defense attorneys fail to conduct their own independent evaluation of the evidence or dismiss pleas from a client claiming innocence. The court system denies requests for additional funds for investigative aids or experts to challenge dubious results from an overworked crime lab. These events combine and conspire on cases every day across the United States, creating a heavy barrier to the truth. As a consequence, it can take years to pull back the layers of bias and error that keep an innocent defendant behind bars.

Fortunately, diligent criminal justice professionals and new technologies continue to shed light on miscarriages of justice. The answers are not only found by the defense attorneys who challenge these cases at trial and throughout various levels of appeals, but also by law enforcement, crime scene analysts, prosecutors, judges, and investigators. As more people are found innocent based on a wide variety of newly discovered evidence or constitutional violations, it shows the vigilance of the professionals that are involved. It also shows that CJ professionals, their efforts, and the evidence must always be in order to help ensure that the innocent are not convicted—because wrongful convictions keep happening.

Vigilance against miscarriages of justice is not only the mandate of those working at innocence projects, but also of a growing number of state and federal organizations interested in preventing them before they occur. Such efforts focus on improving the system. Restructuring how eyewitness identification procedures are done by police officers may curb the high frequency of eyewitness misidentifications. Recording both the entire interrogation and confession of a suspect will decrease the likelihood of a false confession. Placing broad requirements on disclosure of bench notes, interview reports, witness

reports, and similar investigative documents will decrease the occurrence of police and prosecutorial misconduct while also improving the quality of defense provided. These measures and many more discussed within this text can help stem the tide of wrongful convictions and help identify those already suffering such fates.

As the director of an innocence project, I work with students every day at different levels of education. Many undergrad students are fascinated by how the criminal justice system works but see very little practical discussion of what goes on, aside from what they see on television or in movies. Additionally, very few undergraduate courses involve discussions of the rising tide of wrongful convictions, and how there are numerous opportunities to fix the problem. Such discussions are desperately needed.

By reading this text, students will begin to see the complexities of the miscarriage issue. They will also realize that you don't need to be a lawyer to help correct the justice system. They will learn that it is often the work of people who aren't attorneys bringing injustices to light, and helping to fix them as well. This understanding will help guide them as they become criminal justice professionals themselves, and make the criminal justice system all the better for it.

I hope you understand that while mistakes happen, they also can be fixed.

**Tiffany Murphy, J.D.**  
**Director of the Oklahoma Innocence Project**

# About the Authors

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Craig M. Cooley served as a staff attorney with the Innocence Project in New York City for five years, where he represented indigent inmates from across the United States trying to prove their innocence with DNA testing. Mr. Cooley obtained DNA testing for several of his clients that ultimately exonerated ten innocent prisoners. Prior to joining the Innocence Project, Mr. Cooley served as an Assistant Federal Defender in Las Vegas, Nevada, where he represented Nevada death row inmates pursuing federal habeas relief.

Prior to attending law school, Mr. Cooley received his graduate degree in forensic science from the University of New Haven and his undergraduate degree from the University of Pittsburgh. During law school, Mr. Cooley served as an investigator with the Office of the State Appellate Defenders, Death Penalty Trial Assistance Division in Chicago, Illinois, where he provided assistance on several cases affected by Governor George Ryan's 2003 pardons and commutations.

A graduate of Northwestern School of Law, Mr. Cooley has served as an adjunct professor of law at St. John's School of Law, Hofstra School of Law, and Cardozo School of Law. His scholarship includes articles in *Stanford Law & Policy Review*, *Indiana Law Journal*, *George Mason University Civil Rights Law Journal*, *New England Law Review*, and other law journals and reviews.

Mr. Cooley is currently a criminal defense attorney in private practice, with offices in North Carolina and Pennsylvania. He can be reached at [craig.m.cooley@gmail.com](mailto:craig.m.cooley@gmail.com).

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Brent E. Turvey received a B.S. in psychology, with an emphasis on forensic psychology, and an additional B.S. in history from Portland State University. He went on to receive his M.S. in forensic science from the University of New Haven. He also earned his Ph.D. in criminology from Bond University.

Since 1996, as a forensic scientist and criminal profiler, Dr. Turvey has consulted with many organizations, attorneys, and law enforcement agencies in the United States, Australia, Scotland, China, Canada, Barbados, Singapore, Korea, and Mexico on a range of rapes, homicides, and serial/multiple rape death cases. In August of 2002, he was invited by the Chinese People's Police Security University (CPPSU) in Beijing to lecture before groups of detectives at the Beijing, Wuhan, Hanzou, and Shanghai police bureaus. In 2005, he was invited back to China to lecture at the CPPSU and to the police in Beijing and Xian—after the translation of the second edition of his text into Chinese for the university. In 2007, he was invited to lecture at the First Behavioral Sciences Conference at the Home Team (Police) Academy in Singapore, where he also provided training to their behavioral science unit. In 2010, he examined a series of sexual homicides for the solicitor-general of the Crown Office and Procurator Fiscal Service in Edinburgh, Scotland.

In 2013, Dr. Turvey became the sponsor for the Criminal Profiling and Behavioral Analysis Unit of the Forensic Laboratory in cd. Juarez in Chihuahua, Mexico. That same year, he also traveled to Guatemala City, Guatemala, and Bogota, Colombia, at the request of these respective governments. He did so to lecture on the subjects of forensic science and behavioral evidence analysis, and also to begin the process of certifying law enforcement profilers in various government agencies.

Dr. Turvey has been court qualified as an expert in the areas of criminal profiling, victimology, crime scene investigation, sex crimes investigation, false reports, crime scene analysis, forensic science, and crime reconstruction in many courts and jurisdictions (state and federal) around the United States, in both civil and criminal matters—most often in capital murder cases.

Dr. Turvey has published in numerous peer-reviewed journals and is the author of *Criminal Profiling: An Introduction to Behavioral Evidence Analysis*, first, second, third, and fourth editions (1999, 2002, 2008, 2011) and *Forensic Fraud* (2013). He is also a coauthor of *Rape Investigation Handbook*, first and second editions (2004, 2011), *Ethical Justice* (2012), *Crime Reconstruction*, first and second editions (2007, 2011), *Forensic Victimology* (2009), and *Forensic Criminology* (2010)—all with Academic/Elsevier Science.

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### **RONALD MILLER, M.S.**

Ron Miller holds a bachelor of forensic science from the University of California at Berkeley, where he studied under Dr. Paul L. Kirk and Dr. John I. Thornton. He also holds a master in public service and a master in clinical mental health, and he is a licensed marriage and family therapist. He loved “working the street” as a police officer and as a crime scene investigator, detective, and EOD team member in the 1970s and 1980s in the San Francisco Bay Area. He left law enforcement due to a vision disorder, and it was then that he sought his graduate education.

Mr. Miller found himself continuing to work in the judicial arena doing mental health evaluations and treatment for the courts and critical incident debriefings for public safety and industry. Eventually, he shifted his focus to felony investigations, specializing in homicides, death penalty mitigation investigations, and postconviction appellate work in state and federal courts as a licensed private investigator in the Pacific Northwest. He can be contacted at [rjmiller@behavioralforensics.com](mailto:rjmiller@behavioralforensics.com).

# Miscarriages of Justice: An Introduction

**Brent E. Turvey<sup>1</sup>, Craig M. Cooley**

The criminal justice system in the United States rests on the principle that the accused is innocent until proven guilty. This is referred to as the *presumption of innocence*, which requires the state to prove a defendant's guilt beyond a reasonable doubt. As explained in *Coffin v. United States (1895)*: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."<sup>2</sup>

The presumption of innocence is founded on the belief that it is worse to convict the innocent than to let the guilty go free (e.g., *In re Winship, 1970*). In other words, convicting the innocent is viewed by the law, and by society, as an unacceptable price to pay for justice. As explained in *Schlup v. Delo (1995)*, "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."

To make this point, professors often ask their criminal justice students this question: "Which is worse: for one innocent man to be convicted or for ten guilty men to go free?" It is a question that is intended to help students confront their personal preferences and belief systems, as well as the extent to which they align with those required by criminal justice practitioners. It is also a helpful discussion starter—revealing threshold assumptions and attitudes.

However, the interesting reality is that when the innocent are convicted, those responsible almost always remain free to commit more crime. Therefore, convicting the innocent all but ensures protection for the factually guilty. The follow-up question then becomes whether it is ever acceptable to protect those responsible for crime. These questions are the perfect place to start our work.

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<sup>1</sup> Parts of this chapter are adapted from work originally presented in Turvey (2013b).

<sup>2</sup> The presumption of innocence was upheld in *Taylor v. Kentucky (1968)*, which states "the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment."

This text is written as a lighthouse for those in the criminal justice system and for those studying to become part of it. It will make readers aware of the essential responsibilities that must be serviced in the cause of justice—the required professional route through what can be treacherous weather and water. However, it will do so through the lens of consequence, by examining what happens when those who are employed to serve fail in their respective duties.

It is not enough that readers will come to understand the nature and extent of failures in the criminal justice system and how they can lead to miscarriages of justice. They will also learn how such failures are both preventable and correctable. It is believed that this knowledge will result in more capable professionals and better professional decision making.

## THE ROLE OF THE CRIMINAL JUSTICE SYSTEM

The *criminal justice system* in the United States is the network of government and private agencies intended to identify and manage criminal suspects, defendants, and convicted offenders. The modern criminal justice system consists of the following major interrelated and interdependent pillars: *academia, law enforcement, forensic services, the judiciary, and corrections*. Their unifying purpose is to facilitate legal justice. *Legal justice* is achieved by forging the rights of individuals with the government's corresponding duty to ensure and protect those rights (Crowder and Turvey, 2013).

Another way of understanding the role of the criminal justice system is as that of an impartial arbiter. Ideally, its representatives step in when there is a dispute, dispassionately determine who did what, establish whether the law has been broken and by whom, and then determine a fair punishment. Simply put, the primary function of the criminal justice system “is to convict the guilty and free the innocent” (*United States v. Nobles, 1975*).

This function is designed to be accomplished at different stages by separate parts of the justice system working at their respective tasks. Law enforcement is meant to investigate the facts and make arrests only when there is probable cause; forensic examiners are meant to analyze evidence and explain its strengths in court based on scientific proofs; prosecutors are meant to seek truth and justice; defense attorneys are meant to defend their clients; and judges are meant to impartially explain and render the law to preserve the rights of all parties. None of them can do their job competently until properly educated and trained.

All of this is to say that the role of the criminal justice system is to facilitate legal justice and to avoid miscarriages while doing so.

## MISCARRIAGES OF JUSTICE

Despite its intended role, the criminal justice system is not always fair and impartial. As we will explore in this text, there are those working within it who act unjustly. Consequently, a criminal defendant can become a victim of bias, corruption, ignorance, error, and even indifference (as well as the resulting shrunken budgets). When this happens, it is referred to as a *miscarriage of justice*.

However, the literature has been narrow in its treatment of miscarriages. As discussed in [Naughton \(2005\)](#), defining a miscarriage of justice tends to be a matter of law, applied retroactively (p.165):

One of the defining features of the study of miscarriages of justice is that whatever allegations of wrongful criminal conviction there may be, a miscarriage of justice cannot be said to have occurred unless, and until, the appeal courts quash a criminal conviction. For instance, the Birmingham Six (Mullin 1986)—perhaps one of the most notable cases in recent times—had two unsuccessful appeals before they successfully overturned their criminal convictions and were officially acknowledged as miscarriage-of-justice victims. This renders the study of miscarriages of justice inherently legalistic and retrospective. ‘Legalistic,’ as miscarriages of justice are wholly determined by the rules and procedures of the appeal courts—if those rules and procedures change, then the way in which miscarriages of justice are defined and quantified will also change. ‘Retrospective,’ as there is no way of knowing about how many wrongful convictions will be overturned in the future or how many are in the process of being overturned. They remain ‘alleged’ miscarriages of justice until they pass the test and achieve a successful appeal.

This discussion is useful, but its author ignores the reality that miscarriages of justice take many forms—and that they do not always involve a courtroom.

A more inclusive perspective can be found in [Forst \(2011, p. 1210\)](#):

The scholarly literature on miscarriages of justice has focused primarily on wrongful convictions, and with good reason: the presumption of innocence is a bedrock principle in our system of criminal justice. But miscarriages occur on both plates of the justice goddess’s balance scale. They begin at the point of community failures to report serious crimes and police failures to respond to the ones that are reported. They include wrongful arrests and convictions, as well as wrongful dismissals and acquittals. Miscarriages of justice often continue beyond conviction, through sentencing, correctional treatment, and eventually, to failures to support the successful reintegration of offenders back to the community.

The authors have had their own experiences regarding the variety of harms that can result when the justice system breaks down. These align more with the broad view taken by Forst than with those offered elsewhere. For the purposes of this text, therefore, we will define a miscarriage of justice as a major failure on the part of the justice system that harms defendants or society. This definition may seem overly inclusive, and it should. A discussion of specific miscarriage types is warranted.

## MISCARRIAGES: A TYPOLOGY

Miscarriages of justice come in a variety of forms. All of them relate to legal consequences, but they need not result in harm done by the court (which is only one branch of the criminal justice system). The most common miscarriages include:

1. Wrongful detention
2. False arrest
3. Failure to investigate and arrest
4. Failure to prosecute
5. Wrongful or malicious prosecution
6. Ineffective assistance of counsel
7. Wrongful acquittal
8. Wrongful conviction
9. Wrongful sentencing

*Wrongful detention* occurs when an individual is taken into law enforcement custody in violation of agency policy, individual civil rights, or the law. Usually, this occurs when law enforcement has reasonable suspicion to believe that an individual has committed a crime. However, law enforcement may also hold material witnesses who are considered a flight risk to ensure their cooperation and testimony before a grand jury. *Detention* has been generally defined as being held by law enforcement for more than 20 minutes, whether or not law enforcement understands that the clock is ticking (see the discussion in *United States v. Sharpe*, 1985). The suspect may be subsequently released from custody without facing courtroom consequences or even being arrested for specific charges. To be clear, criminal suspects need not be formally arrested to be detained.

The harm suffered from wrongful detention can be extensive, and increases with duration. This includes damage to personal health, loss to reputation, loss of income, loss of housing, and even damage to personal and professional relationships. When someone is absent from his or her life, that person's responsibilities suffer. This to say nothing of the physical and emotional harm that can be incurred while in police custody.