Miscarriages of Justice

Exception to the rule?

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A dissertation submitted to the University of Bristol in accordance with the requirements of the degree of Doctor of Philosophy in the faculty of Social Science

February 2003

Word count: 74,998
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Abstract

This thesis explores the ways in which miscarriages of England and Wales’ criminal justice system (CJS) are currently defined, quantified, constructed and deployed. Presented in two parts, the first identifies and argues against the pervasive but problematical tendency to conceive miscarriages of justice as exceptional occurrences, that are small in number, and that result from post-appeal procedures once existing appeal opportunities have been exhausted. In fact, the evidence is that a successful appeal against criminal conviction forms a routine and mundane procedure of criminal justice in England and Wales. This indicates a need both to re-orientate definitions and understandings of miscarriages of justice and to re-calculate the likely scale of the phenomenon, an attempt at which is then offered. The second part of the thesis involves a broader plane of analysis, examining a range of discourses which articulate challenges to, or reforms of, the CJS, with respect to miscarriages. In so doing, a critique is developed to show that counter-discourses against miscarriages of justice are hindered by their problematic definition and the consequential calculation of miscarriages as a small-scale statistical phenomenon. They also labour under a misconception of the relations of power in the sphere of criminal justice. This severely diminishes the potential force of critical counter-discourse in the existing terrain. As a possible way out of this malaise, a Foucauldian-inspired understanding of the inter-relations of power, knowledge and ‘governmentality’ is brought into dialogue with the emerging zemiological perspective, which seeks a more holistic appraisal of the harmful consequences of social and political decisions in the interests of social justice. The critical and reconstructive moves that I recommend enable miscarriages of justice to be thought about in new ways and to help assess what is to count as effective counter-discourse. The thesis, then, represents a determined effort to re-orientate our understanding of miscarriages of justice by moving away from ‘exceptionalism’. This encourages new ways of defining and quantifying miscarriages of justice and new ways of developing theoretical resources. The ultimate point of the thesis is to contribute towards the production of more effective counter-discourses that might achieve lasting practical change in this area of social regulation.
Acknowledgements

I would like to express my thanks to various people and organisations for the contribution that they made in the creation of the thesis.

For financial support, I am thankful to Ann-Marie Connaughton, Assistant Registrar, for brokering a University of Bristol Scholarship that paid my fees. Thanks also to the University of Bristol Alumni Foundation for a special award that provided the funding for necessary computer equipment and a small book allowance.

For supervision, I would like to thank all three supervisors that had some hand in the thesis. Firstly, gratitude goes to Professor Paddy Hillyard, now at the University of Ulster at Jordanstown, under whose supervision the general terrain for the thesis was originally conceived. Thanks, Paddy, for continued interest in the project, for supplying references along the way, and for your friendship. It was, perhaps, to my good fortune, however, that when I decided not to transfer to Ulster the thesis was in its very early stages. For it meant that as my own ideas were formulating they were able to benefit also from the (often differing) thoughts and insights of Professor Gregor McLennan and Doctor Thomas Osborne when they assumed supervisory responsibility. Thanks, Gregor and Tom for endless academic stimulation and your unflagging motivation. I am especially appreciative of Gregor’s expert guidance. I really could not have done it without him, and will always be indebted for his unstinting commitment and support.

Thanks to Professor Ruth Levitas, Director of Postgraduate Studies, Seyed Javad, Matthew Cole and colleagues in the Departmental ‘postgraduate basement’, and Christina Pantazis, Simon Pemberton and Kate White in the School for Policy Studies, for their support and generosity as ‘sounding boards’ when I needed to work through new ideas. I hope that I adequately reciprocated your own needs. Thanks to Aneurin Lewis and Peter Trump for sometimes (without realising it) providing the same service, but more importantly for times away from the department, when I could (almost) forget about the thesis. Thanks to my parents, Bernard and Carmel Naughton, to Raymond Naughton and to David and Patricia Gamlen for their abiding confidence and encouragement.

Finally, I am grateful to David and Olivia, to whom this thesis is dedicated, for being a eternal source of inspiration, and showing me that there really is more to life than a PhD! I am forever beholden to my wife, Amanda, for always being on my side, for her steadfast belief in my ability, for never doubting that this was my/our correct path, and for not ever complaining about the fact that she has virtually been a single parent for the last five years. Thank you.
Declaration

I declare that the work in this thesis is original except where indicated by special reference in the text and no part of the thesis has been submitted for any other degree.

Any views expressed in the thesis are my own and in no way represent those of the University of Bristol.

The thesis has not been presented to any other university for examination either in the United Kingdom or overseas.

Signed Dated 19 | June | 2003
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<tr>
<td>AAFAA</td>
<td>Action Against False Allegations of Abuse</td>
</tr>
<tr>
<td>BAFS</td>
<td>British Academy of Forensic Sciences</td>
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<tr>
<td>BBC</td>
<td>British Broadcasting Company</td>
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<tr>
<td>BCS</td>
<td>British Crime Survey</td>
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<tr>
<td>BESSST</td>
<td>Bryn Estyn Staff Support Team</td>
</tr>
<tr>
<td>CACD</td>
<td>Court of Appeal (Criminal Division)</td>
</tr>
<tr>
<td>CARF</td>
<td>Campaign Against Racism and Fascism</td>
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<tr>
<td>CCJU</td>
<td>Crime and Criminal Justice Unit</td>
</tr>
<tr>
<td>CCRC</td>
<td>Criminal Cases review Commission</td>
</tr>
<tr>
<td>CCSJ</td>
<td>Citizen’s Commission on Scandals in Justice</td>
</tr>
<tr>
<td>CICA</td>
<td>Criminal Injuries Compensation Authority</td>
</tr>
<tr>
<td>CJS</td>
<td>Criminal Justice System</td>
</tr>
<tr>
<td>CPIA</td>
<td>Criminal Procedure and Investigations Act</td>
</tr>
<tr>
<td>CPS</td>
<td>Crown Prosecution Service</td>
</tr>
<tr>
<td>CRE</td>
<td>Commission for Racial Equality</td>
</tr>
<tr>
<td>CST</td>
<td>House of Commons Select Committee on Science and Technology</td>
</tr>
<tr>
<td>DPP</td>
<td>Director of Public Prosecutions</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ESDA</td>
<td>Electrostatic Definition Analysis</td>
</tr>
<tr>
<td>FACT</td>
<td>Falsely Accused Carers and Teachers</td>
</tr>
<tr>
<td>FASO</td>
<td>False Allegations Support Organisation</td>
</tr>
<tr>
<td>GAI</td>
<td>Gloucester Against Injustice</td>
</tr>
<tr>
<td>GMP</td>
<td>Greater Manchester Police</td>
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<tr>
<td>HL</td>
<td>House of Lords</td>
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<tr>
<td>HO</td>
<td>Home Office</td>
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<td>HORST</td>
<td>Home Office Research Studies</td>
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<tr>
<td>HRA</td>
<td>Human Rights Act</td>
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<tr>
<td>IRA</td>
<td>Irish Republican Army</td>
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<tr>
<td>JFW</td>
<td>Justice For Women</td>
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<tr>
<td>KAI</td>
<td>Kent Against Injustice</td>
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<tr>
<td>LS</td>
<td>Law Society</td>
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<tr>
<td>LCD</td>
<td>Lord Chancellors’ Department</td>
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<tr>
<td>MAI</td>
<td>Merseyside Against Injustice</td>
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<tr>
<td>MOJO</td>
<td>Miscarriages of Justice Organisation</td>
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<tr>
<td>MOJUK</td>
<td>Miscarriages of Justice UK</td>
</tr>
<tr>
<td>MSbP</td>
<td>Munchausen's Syndrome by Proxy</td>
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<tr>
<td>NCRM</td>
<td>National Civil Rights Movement</td>
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<tr>
<td>NAPO</td>
<td>National Association of Probation Officers</td>
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<tr>
<td>NASUWT</td>
<td>National Association of Schoolmasters Union of Women Teachers</td>
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<tr>
<td>PACE</td>
<td>Police and Criminal Evidence Act</td>
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<tr>
<td>PCA</td>
<td>Police Complaints Authority</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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<tr>
<td>POOA</td>
<td>Prosecution of Offenders Act</td>
</tr>
<tr>
<td>QC</td>
<td>Queen’s Council</td>
</tr>
<tr>
<td>RCCJ</td>
<td>Royal Commission on Criminal Justice</td>
</tr>
<tr>
<td>RCCP</td>
<td>Royal Commission on Criminal Procedure</td>
</tr>
<tr>
<td>RDS</td>
<td>Research Development and Statistics Directorate</td>
</tr>
<tr>
<td>SBS</td>
<td>Southall Black Sisters</td>
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<tr>
<td>SIDS</td>
<td>Sudden Infant Death Syndrome</td>
</tr>
<tr>
<td>SWL</td>
<td>South Wales liberty</td>
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<tr>
<td>SWP</td>
<td>South Wales Police</td>
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<tr>
<td>UAI</td>
<td>United Against Injustice</td>
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<td>UCAFAAA</td>
<td>United Campaign Against False Allegations of Abuse</td>
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Introduction

Context and aims

In an historical analysis of miscarriages of England and Wales’ criminal justice system (CJS) what might be termed a ‘tradition of criminal justice system reform’ can be discerned. Within this tradition, corrective legislative reforms are introduced to the CJS in response to specific cases of successful appeal against criminal conviction that exemplified ‘failings’ in the existing procedural framework. For example, the Royal Commission on Criminal Procedure (1981) (RCCP) was established in response to the Confait Affair (see Fisher, 1977; Price and Caplan, 1976; Price, 1985) which exemplified the procedural ambiguity in the police’s role as criminal investigators and prosecution decision-makers. Similarly, the Royal Commission on Criminal Justice (1993) (RCCJ) was primarily established in response to the cases of the Guildford Four (see May, 1994), the Maguire Seven (see Kee, 1986) and the Birmingham Six (see Mullin, 1986)\(^1\) which exemplified a procedural reluctance to return meritorious cases back to the Court of Appeal (Criminal Division) (CACD). These reviews led to a plethora of legislative reforms of the CJS aimed chiefly at reducing the occurrence of miscarriages of justice, but also aimed at reducing the overt harm that was caused to these victims of wrongful criminal conviction. For example, the RCCP spawned the Police and Criminal Evidence Act (1984) (PACE) which formalised police codes of

\(^1\) The Royal Commission on Criminal Justice (1993) was announced on the day that the Birmingham Six had their convictions overturned by the CACD (see Royal Commission on Criminal Justice (1993) Report (Cm. 2263), London HMSO p. 1). It was also established, in part, to a line of other less well-publicised miscarriage of justice cases. See, for example, Woffinden, B. (1987) Miscarriages of Justice London; Toronto; Sydney: Hodder & Stoughton.
conduct when obtaining evidence and the Prosecution of Offences Act (1985) (POOA), which established the Crown Prosecution Service (CPS). As for the RCCJ, it created the Criminal Procedure and Investigations Act (1996) (CPIA), which introduced a system of advanced disclosure aimed at eliminating miscarriages of justice caused by prosecution non-disclosure. Perhaps even more significantly, the RCCJ also led to the Criminal Appeal Act (1995), which established the Criminal Cases Review Commission (CCRC) with the task of investigating alleged or suspected miscarriages of justice that have already been through the appeals system and have not succeeded. There are, then, two distinct aspects to the tradition of criminal justice reform: a legal concern to correct the procedural framework of the CJS to reduce the occurrence of miscarriages of justice; and, a moral concern about the harm caused to victims of wrongful criminal conviction as evidenced by successful appeals.

Despite this, the existing literature (discourse) on miscarriages of justice, whether from campaign organisations, the media, academic sources, the CJS and/or the governmental sphere, has not generally addressed the question of the likely scale of the miscarriage of justice phenomenon in any systematic way. Rather, all eyes have generally been directed towards what this thesis discerns as specific exceptional cases of successful appeal against criminal conviction, brought about through the post-appeal procedures of the CCRC, which exemplify new ‘failings’ in the procedural framework of the CJS. A profound limitation with this exceptionalism is that successful appeals that are achieved through the post-appeal procedures of the CCRC represent only a tiny fraction of the total annual number of successful appeals within England and Wales.
In this context, the overall aim of this thesis is to provide a more adequate sociological depiction of both the scale and consequences of wrongful criminal convictions in England and Wales, as indicated by the official statistics on successful appeals. In the absence of any properly established literature in this area, I want to begin to map a new terrain for miscarriages of justice as a field of empirical enquiry and as an activity of counter-discourse. I want to show that miscarriages of justice are not the exception to the rule but, rather, are a routine and mundane feature of the criminal justice process. To that end, the thesis firstly explores arguments about the meaning, scale and causes of wrongful criminal convictions and calls for a re-orientation of definitions of miscarriages of justice to include all successful appeals against criminal conviction. Simultaneously, this brings into focus a corresponding scale of victims of wrongful convictions that has not previously been sufficiently acknowledged or subjected to appropriate critical appraisal.

The analysis then turns to the ‘voices’ that have been constructed and deployed as counter-discourses aimed at the reform of the CJS for the reduction of the occurrence of miscarriages of justice. Following Collini (1991, p. 3) I use the metaphor of ‘voice’ as opposed to the more usual terminology of ‘thought’, ‘views’ or ‘theories’ of a particular author because it more adequately captures the ‘identity’, in the broadest sense, which a particular participator in the dialogue and/or mediation of miscarriages of justice seeks to present. At the same time, a notion of voice draws attention to the characteristic patterns of forms of ‘discourse’/’counter-discourse’ (in the Foucauldian sense) that reveal the relation between individual commentators in the various
domains and the ‘audiences’ to which they are addressed and hope to activate. The attempt here is to show that, because they are rooted in an extremely limited definition of miscarriages as exceptional events, and a corresponding perception of the scale of the phenomenon as rare and small scale, all existing voices against miscarriages of justice have themselves been limited in their remit and impact. Consequently, not only do existing voices tend to concentrate on the legal plane at the expense of the moral consequences and social harm of wrongful convictions, the form and extent of the reforms of the CJS that have been achieved have also been extremely limited. For the exceptionalism displayed in the terrain of miscarriages of justice, which is often geared to the exposure of alarming and outrageous individual moral wrongs, paradoxically only serves to minimise the sense that there is something systematically and routinely alarming about the operation of the CJS. Exceptionalism, in fact, makes it relatively easy to restore an adequate ‘legal equilibrium’ once the procedural ‘failings’ that the exceptional cases exemplify have been adjusted for. However, my own more ‘mundane’ approach actually leads to a fuller and deeper sense of the moral consequences which accompany the operations of the CJS. This contributes to the growing literature on the procedures by which utterances, generally written texts, but also visual presentations, are expressed and deployed in the disciplinary fields which constitute the human sciences and attempt to display how

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2 As will become apparent, this analysis, then, differs somewhat from Collini (1991) who did not invoke the abbreviations of ‘discourse’/counter-discourse’ due to the specific assumptions about ‘power’ that they conjure up. Alternatively, this thesis grounds notions of voice within a Foucauldian inspired reading of the interplay of discourse and its counter-discursive opposition precisely in an attempt to show the processes of power within the terrain of miscarriages of justice and the reform of the CJS.
such texts are organised and ultimately how voices articulate their claims (Hand and Velody, 1997, p. 1).³

In this respect, there is a theoretical dimension to the thesis of considerable importance for the available critical voices or counter-discourses against miscarriages of justice, which have generally been over-concerned with what Foucault described as a ‘sovereign’ view of power. Put another way, oppositional counter-discourses have tended to be caught up in ‘conspiracy’ accounts of the causes of miscarriages of justice and their remedy. Consequently, the counter-strategies that have been devised and/or deployed have been rather moralistic and negative in nature; as if nothing can be achieved by discursive contestation other than a legitimisation of the system or form of power to which critics stand totally opposed. Ironically, this severely diminishes the potential force of critical counter-discourse against miscarriages of justice. For, as Foucault’s researches demonstrated, forms of power are not just about the brutal domination of the weaker by the stronger, whether measured in physical or economic terms. They are also about the interplay of forms of knowledge (discourse) and their counter-discursive opposition that are productive and/or constitutive of forms of social reality and human conduct:

Accordingly, the various existing counter-discursive voices do, of course, need to be heard and appreciated for the contribution to the depictions of miscarriages of justice that they make and the reforms of the CJS that they achieve. I am emphatically not saying that existing voices are in any way wrong or unwarranted. Rather, because existing voices against miscarriages of justice are grounded in exceptionalist understandings, they are simply very limited, both in terms of the scale of wrongful criminal convictions that can be conceived, and the accompanying scale of victims. Furthermore, in being entirely reform-orientated, existing voices against miscarriages of justice have also been insufficient in analyses of the wider harmful implications of the current scale of successful appeals against criminal conviction. Moreover, existing voices do not deliver an adequate understanding of power, of discourse and its counter-discursive opposition, or of the *constitutive* character of the exercise of CJS power and procedural reform of the CJS. To attend to this, the analyses of the thesis contribute to a new account of the forms of power and harm inhabiting the terrain of miscarriages of justice, and seeks to encourage an array of anti-discursive voices of wrongful criminal conviction that are not currently articulated.

**Theoretical orientation**

"The idea of theory, or the ability to interpret and understand the findings of research within a conceptual framework which makes "sense" of the data, is the mark of a discipline whose aim is the systematic study of particular phenomena...The issue for us as (social)
researchers is not simply *what* we produce, but *how* we produce it. An understanding of the relationship between theory and research is part of this *reflexive* project' (May, 1993, p. 20 emphases in the original).

The conceptual framework or theoretical point of reference through which this thesis attempts to make sense of the 'data' is a Foucauldian-inspired reading of the inter-relations between power, knowledge and 'governmentality'. For, as indicated, perhaps Foucault's (1979; 1980; 1991) most important contribution to sociological epistemology was to develop the insight that *relations of power* are not (only) economically derived and coercively enforced, but are, also, *productive* and *constitutive* of various forms of discourse and subjectivity. To be sure, power is a much more 'material' *force* than the necessities required by economic priorities (Foucault, 1977, p. 221). In such a context, and for my purposes, power or *force* can be understood as the management or 'government' of society through the negotiated interplay of discourse and its counter-discursive opposition. The form of this negotiated outcome then constitutes (*produces*) a new regime of truth, and even new forms of 'social reality'.

On the face of it, an attempt to analyse the moral consequences of wrongful criminal convictions as evidenced by official statistics on successful appeals against criminal conviction from a Foucauldian-inspired perspective might seem unpromising or even contradictory. For the conventional perception of Foucault's work within the social sciences is that it presents a 'postmodern' (McNay, 1994, p. 159; Wolin, 1988, pp. 179-180; Hoy, 1988; Hillyard and Watson, 1996), 'relativistic' (Ramazanoglu, 1993, p. 8) account that is 'normatively confused' (Fraser, 1989, pp. 32-33) in its 'nominalistic' (Porter, 1996) and 'nihilist' (Major-Poetzl, 1983, p. 60; Rose, 1994)
denunciation of the social scientific enterprise (see also Osborne, 1994). From such a perspective Foucault really would have very little to offer an essentially realist, morally grounded enquiry into the scale of the miscarriage of justice phenomenon and likely forms of harm to victims of wrongful criminal convictions. A thorough exploration of such charges is beyond the scope of this introduction, and is not the object of the thesis. However, I would like to attend to this possible (mis)interpretation at the outset by stating the reverse. For it can plausibly be argued that rather than being an out-and-out relativist who denied the possibility of objective truth, Foucault was a perspectivist concerned to examine the operation of the ‘truths’ peculiar to ‘the societies within which we find ourselves’, the ‘truths’ of ‘what we are’, the ‘truths’ we live by (Gordon, 1986, p. 76). Foucault, in fact, described himself as a critic of ‘present-ness’ of ‘Today’ (Foucault, 1986, p. 90). This entails an entirely serious and critical commitment, if not an ‘absolutist’ one, to the production of credible accounts which problematise accepted and presentist thinking.

Furthermore, Foucault was not a nihilist, but a thinker whose conception of power presupposed the possibility of resistance, of a certain form of freedom (see, for example, Rose 1993; 1999), and of radical social and political change (see, for example, Patton, 1994). Indeed, for Foucault (1979, p. 95), resistance to power is not simply a reaction to a pre-existing power, for this would be to misunderstand the strictly relational character of power relations. Resistance, from a Foucauldian perspective is, in fact, part of the definition of power; resistance is never in a position of exteriority in relation to power. Rather, it is more likely the reverse: states of power are continually engendered or incited by virtue of the potential counter-powers which co-exist with them – ‘where there is power there is resistance’ (Foucault, 1979, p. 95).
From such a frame of reference, is it entirely legitimate to draw from Foucault in a qualified form of realist investigation (see, for example, Cain, 1993, p. 74). As Osborne (1998, p. xii) noted, Foucault was a nominalist of sorts, yet this 'oddly enough, leads to a kind of *realism*, because our only option becomes not to theorize about [the way things are] but attempt to picture it at work' (my emphasis). Moreover, as Ward (1999, p. 3) observed, for the purposes of analyses of 'social construction' it may make good methodological sense to 'bracket' the question of whether a criminal defendant 'really was' guilty, or whether some natural phenomenon 'really' exists. However, it certainly does not follow that one can set such questions aside once and for all when the aim of enquiry is, for instance, to correct a miscarriage of justice or quantify the harm that miscarriages of justice cause. If not obviously consonant with one another, therefore, it does not follow that constructionism/perspectivism and realism are engaged in some fatal metaphysical conflict. On the contrary: 'the results of sociological enquiries into "case construction" can help us to understand why miscarriages of justice occur' (Ward, 1999, p. 3). Accordingly, social constructionist analyses, whilst to an extent operating outside of the conventional disciplinary parameters of empirically grounded social research *and* realist-style theorising, can add a significant dimension in terms of accounting for the formation of existing hierarchies of knowledge in a given field (cf. Ward, 1999, pp. 4-5). In any case, there is undoubtedly some hazard in trying to colonise Foucault for any one specific line of critical enquiry (see Gane, 1986, p. 111; Osborne, 1994, pp. 493-499). As Sheridan (1980, p. 225) has argued:

'There is no "Foucault system". One cannot be a "Foucauldian" in the same way that one can be a Marxist or a Freudian: Marx and Freud left coherent bodies of doctrine (or "knowledge") and organizations which, whether one likes it or not (for some that is the
attraction), enjoy uninterrupted apostolic succession from their founders. If Foucault is to have any "influence" it will no doubt be as a slayer of dragons, a breaker of systems.'

Foucault can, thus, be taken to 'offer a set of possible tools for the identification of the conditions of possibility which operate through the obviousness and enigmas of our present, tools perhaps also for the eventual modification of those conditions' (Gordon, 1980, p. 258). It is within such a context that this thesis extends Foucauldian insights into the operations and exercise of prevailing forms of knowledge-power in the field of miscarriages of justice.

Methodological issues

This thesis draws from an archive of materials on miscarriages of England and Wales' CJS that was compiled during the 'research moment' January 1997-January 2003, when the CCRC started handling casework. I use the term 'archive' to indicate the diverse and incomplete range of materials that are germane to the research, in the absence of pre-packaged data and sources. But, I also use the term 'archive' in a Foucauldian sense. For, in exploring a public issue from a certain kind of critical perspective, one has to create anew a sense of the relevant 'facticity' of the situation or phenomenon being explored. The presentation of an archive of material is thus part of the argument and not just a means by which an argument might be 'tested'. Accordingly, it can be argued that the relation between evidence and argument is under serious consideration in many dimensions of Social Science work. As McLennan (1995, p. 57) noted:
'In what is often characterized as our “post-positivist” methodological condition today, it is increasingly accepted both that a diversity of valid philosophies, paradigms, general theories, approaches to research, and value orientation exist, and that it is neither possible nor desirable to say definitively which amongst these are more objective, true, scientific, or essential.'

Despite this variety and diversity of approaches, however, and the obvious change in emphasis that such a ‘condition’ represents in terms of the contemporary status of the knowledge produced by social research, there remains a united conviction among social researchers that ‘argument based on sound evidence is superior to argument based on false evidence, limited evidence, or no evidence’ (McNeill, 1990, p. 1).

What counts as sound evidence? Essentially, evidence that is the product of empirical researches that are ‘reliable’, ‘valid’ and ‘representative’. Such research is based on information that can be reliably repeated; information that gives a valid depiction of what is being studied; and, information that is representative of what is being studied (see McNeill, 1990, pp. 14-15).

In this context, it is important to consider a number of specific methodological issues that affect the reliability, validity and representativeness of the researches in this thesis. In particular, there are the issues of defining and measuring miscarriages of justice. ‘Miscarriages’ of England and Wales’ CJS are entirely defined as successful appeals against criminal conviction and they are retrospectively quantified in terms of the CJS’s appeal criteria. This determines the possible scale of the miscarriage of justice phenomenon that will be derived. It also determines the possible reliability, validity and representativeness with which miscarriages of justice can be measured.
(cf. Slattery, 1986, p. 10). For example, if new legislation is introduced that reforms or changes the appeals system in any way, then the way that miscarriages of justice are defined and quantified will also be reformed and/or changed.

The sources I draw on are: web-based campaign organisations and/or groups; information from television and/or newspaper media sources; historical newspaper reportage of important cases of wrongful criminal conviction which was only available on microfiche; previous primary researches; official statistics; and, other public documents.

Much substantive information on miscarriages of justice can be derived from web-based campaign organisations and/or groups. A potential methodological issue with such information is not so much that the ‘facts’ might be incorrect, more that such information is produced and presented from a particular political standpoint, with the overt political motivations/desire to undermine confidence in the CJS. Information so derived normally needs careful social scientific consideration, as it is, undoubtedly, ‘tainted’ by the political persuasions of its producers.

Another potential methodological problem with information derived from web-based campaign organisation/group sources pertains to authorship. Many of the accounts of victims of miscarriages of justice that appear on web-based campaign group sites are biographical accounts provided by the miscarriage of justice victims themselves. Conventionally, such information would be classified as personal documents. A potential problem with such information is whether such evidence is authentic, whether it is complete, how representative it is of the experiences described, whether
it is distorted by the bias of the author, and why it was written. Often, such personal accounts are written in an assault on the CJS. Accordingly, they might exaggerate the victim’s experiences and/or be self-justificatory (cf. McNeill, 1990, p. 109). The strategy employed by this thesis to account for such inherent biases is, wherever possible, to triangulate the information, that is, to check the reliability of the information against other sources, to cross-reference such information against other recorded information about the same case. For example, a personal biography of the experience(s) of a miscarriage of justice victim can be checked against news media reportage of the same case, reportage from the CACD and/or reportage from the CCRC.

A further potential methodological issue of web-based research relates to ‘reliability’, in two senses. Firstly, there is the issue of reliability in the sense that what the information purports to represents may be inaccurate in its reportage. During this research there have been numerous examples of web pages being altered without acknowledgement and, hence, such sources cannot be entirely trusted. A main problem here appears to relate to the quality control of such websites, which are normally run by volunteers. Under such conditions mistakes can be inadvertently made. In response, all information derived from web-based campaign sites was triangulated against other sources.

A second ‘reliability’ problem that emerged in the course of this research was that information from web-based sources might not be retrievable. Web-based campaign groups can be closed without notice, which means that information previously available is no longer available. In response, the strategy of this research has been to
produce a ‘hard’ paper copy archive of any useful information, recorded by the date the information was accessed.

As with information derived from web-based sources, *information from television and/or newspaper media sources* also contains a number of potential methodological issues that are, perhaps, better documented. For example, there are the issues of the particular editorial policy of the newspaper or television network (political bias) and/or unreliable reportage and/or omissions (see, for example, Mann, 1985, pp. 73-76; Glasgow University Media Group, 1976). Another aspect of information derived from media sources relates to ‘audience context’ As Gilbert (1993, pp. 191-192) has noted, the production of any medium of communication is consciously undertaken with an audience in mind. From a methodological standpoint, unless the researcher knows how that audience ‘reads’ the content, it is possible that the cultural message might be misinterpreted. As with the information derived from web-based sources, the same methodological strategies were employed. Information derived from television and newspaper media were checked for reliability against other sources to eliminate possible errors.

This thesis also draws from historical newspaper reportage of important miscarriage of justice cases during the period 1889-1907, which was only available on *microfiche*. In the course of that research various errors were encountered that had a direct methodological impact upon this thesis. For example, much of the reportage of the researched cases that was listed on the microfiche index on ‘Palmer’s Times Full Text Online’ (Palmer’s) that was accessed via the University of Bristol’s information services website did not appear on the correct page and/or in the correct column. In
response, microfiche’s were trawled in the hope that I happened to ‘come across’ what I was looking for. This proved to be very frustrating and time consuming, but was sometimes ‘rewarded’ when the reportage was found in a different edition, page and/or column than the one on the index. Even more frustrating, many articles that were listed on Palmer’s microfiche index about potentially important aspects of the cases that were being researched could not be found at all. This resulted in 16 untraceable documents and abandoned searches. Thus, many potentially significant reports of important miscarriage of justice cases were not found which might have contributed to this thesis in unknown ways. At the very least, they could have contributed to the triangulation of the sources that were retrieved. The problems of the reliability of working with microfiche have been attributed to the fact that it is not the original document that is being researched, but some form of copy. As Gilbert (1993, p. 192) noted, such materials depend on a copyist, under which omissions and transpositions are not unknown.

This thesis draws from previous primary researches into miscarriages of justice both applicable to England and Wales and the United States of America (US). Wherever possible, the methodological issues of previous academic researches are critically appraised. For example, I take issue in Chapter 2 with Brandon and Davies’s (1973) acceptance of Home Office (HO) pardons as evidence of a criminal appellant’s innocence. At other times, however, primary researches can reasonably be taken at ‘face value’, without specific reference to methodology, such as McConville et al’s (1991) finding that prosecution cases are driven largely in the interests of obtaining a prosecution victory. This presents no major methodological difficulties for me, because such politically charged research findings are not cited to premise this thesis.
On the contrary, they are applied to counter other politically charged research findings to illustrate differences of position. For example, McConville et al (1991) are set against Brandon and Davies' assertion that: 'The main duty of the prosecution in this country is not to get a conviction at all costs, but to make sure that justice is done' (1973, p. 70 emphases added).

This thesis draws from a range of official statistics – statistics collected by the state and its agencies. These include statistics on successful appeals against criminal conviction collected by the Lord Chancellor's Department (LCD); HO statistics on the penal costs per prisoner per annum; statistics from the CCRC; as well a range of documents derived from the HO's Research Development and Statistics Directorate (RDS). Conventional analyses of the use(s) of official statistics in social research discern the following methodological issues. On the positive side, official statistics are conceived as a ready-made source of information for social research. They are cheap, readily available, cover a long time-span and, hence, lend themselves well to longitudinal analyses, and are comprehensive in their coverage of the aspect of social reality to which they are directed. On the other hand, official statistics are generally collected for administrative as opposed to sociological purposes, as such they may contain profound definitional and/or methodological limitations. In particular, there is no real way to check the accuracy of the figures (McNeill, 1990, pp. 103-104).

In addition to noting these methodological issues, this thesis analyses official statistics from a methodological perspective informed by Foucauldian-inspired writings on the power of statistics in present exercises of power. That is, this thesis is critical of the construction processes of official statistics in the sense that they are not regarded as a
real, true or objective representation of the particular reality that they purport to represent. But, rather, they are constructed for particular purposes, with particular interests. Despite this, however, this thesis draws from Foucault, and others such as Hacking, Rose, Osborne and Latour, and notes that as official statistics are discursive, they are about the production of 'truth' and the exercise of power. Accordingly, they shape how people perceive and conduct their lives. From such a perspective, official statistics are not written off in the way that they might be from a conventional critical social theorist as inherently biased and, therefore, intrinsically untrue. But, rather, they are taken seriously and engaged with for the 'truths' that they engender, as well as the consequential human actions that those 'truths' invoke.

The thesis also draws on other public documents on miscarriages of justice, such as official reports of extra-judicial inquiries, court records, official publications on the aims of the CJS, the annual and press reports of the CCRC and an extensive range of other HO RDS researches. None of these, nor any of the previous range of sources was specifically produced for their applied purpose to this thesis. Consequently, I am aware of the possibility that my use of such 'data', whether separately or together, could be called into question in terms of satisfactory reliability, validity and/or representativeness. In response, I can only make three, rather different points. The first is to insist that the other modes for computing the miscarriage of justice phenomena, including 'official' modes, are at least as vulnerable to the same charge. Secondly, as previously noted, a post-positivistic and Foucauldian outlook requires us to see ideas, values and data not in some easy relationship of hypothesis-and-test, but rather as forming some kind of co-production of informed argumentation and as constitutive of forms of social reality. Thirdly, I try to be rigorous when it comes to
‘triangulating’ methodological approaches and quasi-quantitative information. The centrality and good sense of triangulation – of sources, methods, theories and calculations almost amounts to an ethical imperative, and stands above other types of – equally crucial – philosophical and political disputes. Finally, I would note that in such an emotive and controversial area of investigation, I have not had to rely on the co-operation on any particular participants involved in the miscarriage of justice processes, and that this is, arguably, a methodological advantage (see, Webb et al, 1981; 2000). Overall, then, I take my methodological cue from Webb et al (1977, p. 120). For although there is, undoubtedly, substantial errors in the material:

‘...it is not usual to find masking or sensitivity because the producer of the data knows he (sic) is being (or will be) studied by some social scientist. This gain by itself makes the use of archives attractive if one wants to compensate for the reactivity which riddles the interview and the questionnaire. The risks of error implicit in archival sources are not trivial, but...if they are recognised and accounted for by multiple measurement techniques, the errors need not preclude the use of the data.’

As the foregoing sections have indicated, this thesis has attempted to ‘recognise’ as many potential methodological issues as possible, and then ‘account’ for them through a broad form of triangulation. However, it also needs to be emphasised that drawing from secondary sources should not be regarded as somehow inferior to investigations that utilise primary sources. Indeed, errors and biases contained in primary sources, may be more difficult to recognise, and more difficult to account for.

A final methodological issue that needs to be acknowledged relates to the crucial matter of the limits of the available official statistical information from which the
thesis draws. Prior to 1987, the statistics concerning CACD appeals were represented in the LCD’s annual judicial statistics as ‘appeals heard’ and ‘appeals terminated’. Since 1987, however, much more useful information has been provided including the results of appeals heard by the full court. This information was vital to the thesis as it formed the basis for the re-orientation of miscarriages of justice. With this in mind, and in an attempt to provide a more longitudinal base, I contacted IMAGE (Information Management and Analysis) at the Court Service Headquarters (on several occasions by telephone and fax) and requested more information for successful appeals that pre-dated the 1987 shift of emphasis. Despite the fact that the requested extra information was available, and that I was promised that it would be forwarded to me, the information never materialised. This is significant because what is left out of an enquiry is often as important as what is included. In this instance, the thesis was restricted to evidence of successful appeals against criminal conviction since 1987.

**Thesis presentation**

As indicated, the thesis is presented in two parts: Part One deals with the matters of the definition and calculation of the scale of the miscarriages of justice phenomenon; Part Two with the different existing constructions or counter-discursive voices against miscarriages of justice that attempt to effect reforms for their remedy and/or reduction.
In three chapters, Part One argues that by focussing upon exceptional cases of successful appeal against criminal conviction in the interests of the reform of the CJS, those cases of criminal conviction that are routinely quashed by the CACD, or more mundanely quashed by the Crown Court from the magistrates' courts have received no attention at all. As a result, the likely scale of England and Wales' miscarriage of justice phenomenon that can be inferred from the official statistics, the size of the official 'iceberg', has been overlooked. Accordingly, the corresponding number of victims of wrongful conviction and the harmful consequences that they experience have also been overlooked. Part One also notes that there are a number of legitimate procedures that can cause wrongful convictions and act as deterrents against successful appeals that might never be acknowledged in the official statistics on successful appeals. When these are also considered, the true number of wrongful convictions is likely to be even higher than portrayed in the official statistics.

Chapter 1 argues that in order to arrive at a more appropriate definition of miscarriages of justice it is the issue of the routine 'carriage of justice', not the issue of a 'miscarriage', which needs further consideration to determine the ways in which it may be denied. For the evidence or test of a miscarriage of justice – a successful appeal against criminal conviction – is not a rare or exceptional judicial event within England and Wales. In such a context, the roots of existing definitions of miscarriages of justice are traced to a pragmatic decision taken by the legal reform organisation JUSTICE in 1957. Then, citing recent developments in human rights provision an attempt is made to shift notions of miscarriages of justice onto new and more productive ground that sees all successful appeals as miscarriages of justice. Finally, Chapter 1 draws from Foucault's thoughts on 'genealogy' and argues that a re-
orientation of miscarriages of justice to include all successful appeals can serve to unlock a vast array of anti-discursive voices about the experience of routine and/or mundane wrongful criminal conviction that are currently marginalised and/or unspoken.

Chapter 2 builds on Chapter 1 through a closer consideration of the official indices on successful appeals against criminal conviction within England and Wales. It proposes three categories of miscarriages of justice that can be inferred from the official statistics – the exceptional, the routine and the mundane. Furthermore, drawing from Foucault and others on the centrality of statistics in existing operations of power, a critical pragmatist approach is forwarded that engages with official statistics in the interests of the production of a more forceful form of counter-discourse against miscarriages of justice than currently exists.

Chapter 3 considers the question of causality of miscarriages of justice. It updates existing attempts to determine the most likely causes of miscarriages of justice in England and Wales. It also provides a supplementary analysis that highlights the likely procedural causes of miscarriages of justice and deterrents to a successful appeal which are currently minimised in the literature. This chapter, then, indexes a range of possible contemporary causes of wrongful criminal convictions, all of which should be represented in the calculation of the miscarriage of justice ‘iceberg’. In so doing, it is shown that whilst it is not possible to know for certain the total scale of England and Wales’ miscarriage of justice ‘iceberg’, what is clear enough, however, is that the total figure of wrongful criminal convictions is, undoubtedly, much greater
than is generally acknowledged, and even much greater than the total number of successful appeals against criminal conviction as recorded in the official statistics.

Part Two considers the production and promise of existing counter-discourses against miscarriages of justice, and the different voices and audiences that are activated by these means. It covers the principal voices in the debate about miscarriages of justice – campaign, socio-legal academic, governmental and human rights – and firmly locates each of these within the limitations of the narrow scope of prevalent definitions of miscarriages as the products of the post-appeal procedures of the CCRC and the aforementioned tradition of criminal justice system reform. To attend to this, Part Two also considers the promise of the zemiological approach and the potential contribution that it might make to understandings of the wider harmful consequences of wrongful criminal convictions.

Chapter 4 considers the governmental voice on miscarriages of justice and presents an historical overview of legislative responses to miscarriages within England and Wales. This is important because it sets the question of the possibilities of the reform of the CJS within a broader historical perspective that can take better account of the trends in CJS reform. In particular, through an historical analysis of the legislative responses to miscarriages of justice, a better understanding of the nature of miscarriages in the present is provided. In so doing, Chapter 4 distinguishes what makes an exceptional miscarriage of justice case. It also explicates further the tradition of CJS reform and argues that the focus of the existing governmental voice on exceptional successful appeals that exemplify procedural ‘failings’ indicates what is termed ‘bad’ government. Alternatively, ‘good’ government would more vigilantly
respond to the scale of wrongful criminal convictions that can be inferred from the official statistics on successful appeals. For they signal not only an excessive scale of judicial 'error' but, also, an excessive scale of harm to victims of wrongful criminal convictions whose wellbeing the government is mandated to enhance.

Chapter 5 considers the part that campaign organisations play within the tradition of CJS reform. In particular, the notion that there is any crucial difference between exceptional successful appeals and mundane and/or routine successful appeals is dispelled. For when exceptional cases exemplify previously unacknowledged failings in the CJS's legislative framework, which become translated into corrective reform of the CJS, they create the legislative foundations upon which mundane and/or routine appeals will be successful in the future. Despite this, campaign voices have not made the connection between exceptional cases of successful appeal and the constitution of the routine and/or mundane procedural framework of the CJS. Hence, the forcefulness of campaign counter-discursive utterances has been unnecessarily weakened.

Chapter 6 conducts an analysis of the forms of academic counter-discourse that were produced and deployed in reply to the most recent major governmental review of the CJS in response to the problem of miscarriages of justice - the RCCJ. In an attempt to re-orientate the more critical expressions of the academic voice, this chapter draws from Foucault and argues that the collective tendency of the critical academic counter-discourses that replied to the RCCJ to treat it as a 'failed' 'damage limitation exercise' was profoundly problematic. On the contrary, the RCCJ is shown to be an outgrowth of counter-discourse that exemplified a specific problematic in the legislative framework of the CJS that was able to induce a public crisis of confidence.
in the CJS, thus prompting the governmental introduction of corrective legislative reform. From such a frame of reference, it is concluded that public ‘crises’ that are induced by successful appeals that reveal previously unacknowledged ‘errors’ in the procedural framework of the CJS, and attain a high profile status, need not be conceived in entirely ‘negative’ terms. The more such counter-discourse is produced, then, potentially, the more ‘crises’ of public confidence in the CJS will be induced, and the more problematic aspects of the procedures of the CJS will have to be subjected to governmental intervention to correct the CJS.

Chapter 7 considers existing articulations of the ‘human rights voice’ since the introduction of the Human Rights Act (1998) (HRA). It argues that whilst this voice does contribute to existing depictions of the harmful consequences of wrongful criminal convictions in important ways, it does so in an incomplete way. In particular, an inherent limitation of the human rights approach is the conception of harm to individual subjects solely in terms of the contravention of legal rights and freedoms. This omits other associated forms of harm that also accompany wrongful criminal convictions more widely conceived, such as impacts upon the families of victims of wrongful criminal convictions, and the economic costs of justice in ‘error’ that impact upon other areas of public spending. This chapter consequently tries to re-orientate the human rights voice into more provocative territory to capitalise on the full promise contained within the HRA.

In an attempt to move still further beyond the limitations of existing counter-discourses against miscarriages of justice, with the primary focus on the procedural reform of the CJS and/or the individual victims, the final chapter of the thesis engages
with the zemiological standpoint. This perspective offers the promise of moving beyond the boundaries of existing counter-discourses against miscarriages of justice, and helps consolidate Part One of the thesis, by reinforcing the call for the re-orientation of definitions of miscarriages of justice to include mundane and/or routine successful appeals. However, the zemiological paradigm is itself problematical if taken to extremes, particularly in terms of the long-term call to replace categories of 'crime' altogether by those entirely of 'harm'. In the context of recent developments in human rights provision this, I feel, would weaken the discursive potential of zemiology to effect significant reforms of the CJS, because it 'elevates' critique to the level of a rather detached sociological moralism.

The thesis concludes by reiterating that what is required is a move away from exceptionalist understandings through the construction of a voice that can combine the various strengths of the existing voices, but which can also take account of their various limitations. For it is not that the procedural reform of the CJS is wrong in its own terms. Rather, the narrow concentration on procedural reform requires turning a blind eye to the extent of the scale of harm that exists and that requires recognition and redress.
Definition and Scale
The miscarriage of justice phenomenon: an inclusive approach

Introduction

This chapter confronts a question that has hitherto received almost no attention: What precisely constitutes a ‘miscarriage’ of England and Wales’ CJS? (Greer, 1994, p. 58). In so doing, it argues that, contrary to common sense and prevalent discourses in all relevant spheres – academic, campaign, media, CJS and governmental – it is very problematical to define miscarriages almost solely in terms of the factual innocence of appellants in cases of successful appeal against criminal conviction that are the product of post-appeal procedures. For the evidence upon which such a definition relies – a successful appeal – cannot simply be read off as an indicator of factual innocence. Nor is a successful appeal a unique outcome or product of a referral back to the CACD by the CCRC. On the contrary, successful appeals against criminal conviction are not the product of a judicial determination of the possible ‘innocence’ or ‘not innocence’ of criminal appellants. Rather, they are the products of a judicial adjudication process that attempts to assess the ‘safety’ of previous criminal convictions. Moreover, successful appeals do not only derive from a referral back to the CACD by the CCRC. They can also derive from routine appeals in the CACD.

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The term 'academic discourse' is applied in a broad sense to include any university-based research and/or analysis from socio-legalists, critical legalists and/or criminologists.
against criminal convictions given in the Crown Court. They can also derive from more mundane appeals heard in the Crown Court against criminal convictions given in the magistrates’ courts.

This chapter is structured into four parts. First, an historical analysis of the roots of the organisation JUSTICE and the rationale behind the ‘birth’ of the tendency to define miscarriages of justice in terms of factual innocence and the product of post-appeal procedures is conducted. Included in this section are examples from academic, campaign, media, CCRC and official governmental literature to demonstrate the correspondence of existing definitions and/or approaches to miscarriages of justice with JUSTICE’s initial formulation. Second, an alternative perspective of miscarriages of justice from the human rights approach is explored. This supports the notion that miscarriages of justice should be re-orientated to include all successful appeals against criminal conviction from whichever court they derive and whatever their cause. Third, the increased appropriateness and added force of the human rights approach following the introduction of the HRA is discussed. Finally, a theoretical note on Foucault’s ‘genealogical’ approach to unearthing ‘subjugated discourse’ is presented. This demonstrates the utility of producing discourse on successful appeals against criminal convictions to bring into focus a more appropriate and adequate depiction of England and Wales’ wrongful criminal conviction phenomenon and to give ‘voice’ to a plethora of anti-discourses on wrongful convictions that are currently marginalised and/or disqualified.
The root of the problem

In 1957, the organisation JUSTICE was established through ‘a common endeavour of lawyers representing the three main political parties [Labour, Conservative and Liberal] to uphold the principles of justice and the right to a fair trial’ (JUSTICE, 1989). Since its inception, JUSTICE began receiving requests for help by, and on behalf of, hundreds of prisoners alleging miscarriages of justice in their cases. Initially, because of the voluntary nature of the organisation, and the lack of staff and resources, it was decided that JUSTICE would operate a policy of not investigating individual cases. However, the sheer volume of allegations soon persuaded Tom Sargant, the organisation’s secretary for its first 25 years, that there was a real need to investigate where he could and assist with appeals and petitions to the Secretary of State (JUSTICE, 1989, p. 1). Since that time, JUSTICE has assisted alleged victims of miscarriages of justice and sought reform of the CJS in order to protect the human rights of individuals and uphold the rule of law (JUSTICE, 1994). Indeed, prior to the establishment of the CCRC in January 1997, JUSTICE was the primary organisation to undertake investigations into alleged miscarriages of justice in England and Wales (JUSTICE, 1989, p. 2).

The dilemma that confronted JUSTICE, however, was that without support staff and resources it was not possible for Tom Sargant to single-handedly investigate every alleged miscarriage of justice case that JUSTICE received. In response, it was decided that it was necessary to limit JUSTICE’s investigations into alleged miscarriages to cases where:
• lengthy terms of imprisonment of four years or more are being served;
• no other legal help is available to the prisoner;
• the allegation is of actual, rather than technical, innocence;
• an investigation might achieve something, given the existing operation of the appellate courts; and, a complaint about sentence involves an important point of principle. Assistance is not given where the sole complaint is that the sentence is too long (JUSTICE, 1989, pp. 1-10).

The pragmatism behind the criteria applied by JUSTICE appears entirely reasonable and perfectly understandable. For it seems to concentrate on what many would see as the most serious consequences of wrongful criminal conviction, i.e. significant loss of liberty through wrongful imprisonment. Therefore it seemed to focus on those individuals who have suffered the most harm. A more holistic approach to wrongful criminal convictions, however, shows that there are many forms of social, psychological, physical and/or financial harm engendered, and that loss of liberty cannot simply be taken as an obvious indicator of the most harm. For example, a wrongful conviction for a paedophile offence that may or may not incur a custodial sentence can have a catastrophic effect upon an individual within his/her community and upon his/her family relations (see, for example, Action Against False Allegations of Abuse, 2000).

Another problem with JUSTICE’s definition is that it inadvertently determined an agenda for miscarriages of justice that exists to the present day, an agenda that excludes from its frame of reference or critical gaze far more than it takes into consideration. Analyses that work within such a framework, for example, overtly
exclude all criminal cases in magistrates’ courts, where currently 98% of criminal cases are dealt with (Bright and Nicklin, 2002). They exclude all those cases of criminal conviction that did not incur a custodial sentence. They exclude all those criminal convictions that incur a custodial sentence of less than four years. Moreover, they exclude all those cases of wrongful conviction in England and Wales where the factually innocent are able to mount a successful appeal. Such analyses, then, would currently concern a maximum of 2% of all criminal cases. This meant in the year 2000, for example, critical analyses of miscarriages of justice grounded in JUSTICE’s formulation considered less than half of one per cent of all criminal convictions in England and Wales. For only 24.9% of all those who were convicted of an indictable offence in the Crown Court in 2000 received a custodial sentence, of which the average length of sentence was approximately two years (24.2 months) (Home Office, 2001, pp. 20-21; p. 157).

Since JUSTICE devised its working formulation, miscarriages of justice have henceforth, generally, been defined by all the relevant discourses as those cases of criminal conviction that followed a trial by jury which received a significant custodial sentence where there remained allegations of factual innocence after existing appeal procedures had been exhausted. As this relates to the academic sphere, the following quotation represents important and significant research into miscarriages of justice in England and Wales that was conducted by Brandon and Davies (1973, p. 19) and which exemplifies the academic approach:

Wrongful imprisonment we will define as follows: the man (sic) who has been wrongly imprisoned is the man who has been convicted of a crime he did not in fact commit and has been sent to prison on the basis of this conviction... Even when one has succeeded in
defining "wrongful conviction" there is still the difficult problem of demonstrating that it 
extists and measuring it. How could one possibly prove that someone has been wrongly 
imprisoned? For the purposes of this [research] we have considered as proved those cases 
where a free pardon has been granted, or where the case has been specifically referred to the 
Court of Appeal by the Home Secretary [since April 1997 the CCRC] and the conviction has 
been subsequently quashed. We have deliberately excluded those cases where the basis of 
the pardon or referral was simply a legal technicality' (my emphasis).

Brandon and Davies’s (1973) academic research was important because it was, in the 
authors’ words, the first English book of any kind to deal systematically with the 
problem of wrongful imprisonment (Brandon and Davies, 1973, p. 23; see also 
Baldwin and McConville, 1978, p. 68). Brandon and Davies’s research had added 
significance because of its close association with JUSTICE, and the authority 
bestowed upon it by Tom Sargant in the Foreword. For Sargant (1973, p. 9), the 
importance of Brandon and Davies’s research was that ‘they...isolated and identified 
the...hazards which may confront an innocent man (sic) once he (sic) falls under 
suspicion of having committed a criminal offence...[In so doing, they produced 
research] which is greatly needed and which I would have liked to write if I had been 
able to do so.’

Since Brandon and Davies’s research, academic researches into miscarriages of 
justice have not generally problematised definitions of miscarriages of justice. Rather, 
academic researches have been reform-orientated in response to specific cases of 
successful appeal in the CACD following a post-appeal referral by the CCRC that 
exemplified a previously unacknowledged ‘failing’ in the legislative framework of the 
CJS (see Nobles and Schiff, 1995, p. 299; explicated in chapter 6). However, the
academic discourse that has specifically commented on miscarriages has also, generally, emphasised the factual innocence of miscarriage victims, whatever the particular theoretical, methodological or political persuasion of the researcher (see, for example, Baldwin and McConville, 1978, pp. 68-71; Green, 1995, p. 8; Sanders and Young, 2000, p. 9).

As definitions of miscarriages of justice relate to campaign and media discourses, they have been (are) even more overt than academic discourses in asserting that successful appeals that are brought about following a referral back to the CACD by the CCRC are somehow *prima facie* proof of the factual innocence of the successful criminal appellant. To be sure, it is common practice in the campaign sphere to refer to individuals who are convicted of criminal offences and given a custodial sentence who allege to be miscarriage of justice victims are, in fact, innocent (see, for example, INNOCENT, 2002; The Portia Campaign, 2002; Action Against False Allegations of Abuse, 2002a; Merseyside Against Injustice, 2002), that whilst they are imprisoned they are ‘hostages of the state’ (see, for example, Miscarriages of Justice UK, 2002a; Taylor, 2002; Burke, 2002; McKay, 2002).

Similarly, the media, fuelled by the research of investigative journalists, also routinely declare the factual innocence of alleged victims of miscarriages of justice long before a successful appeal and the final decision of the CACD (see, for example, Gillian, 2001; Goodman, 1999; Foot, 2002; Woffinden, 1998a; Nobles and Schiff, 1995, p. 299). Critical approaches are succinctly summed-up by The Citizen’s Commission on Scandals in Justice (CCSJ) (2002, p. 1) that regards a ‘miscarriage of justice [as] com[ing] into being when a Single Judge and/or the Full Court of Appeal *rejects* an
appeal on grounds that continue to raise doubts about the appellants guilt’ (my emphasis). The problem with such a conception is that a miscarriage officially comes into being – is recorded in the official statistics on successful appeals as such - when a Single Judge and/or a Full Court of Appeal allows an appeal against a criminal conviction.

As for how miscarriages of justice are treated in the spheres of the CJS and the government, a similar very narrow definition prevails. Successful appeals that routinely flow from the CACD from criminal convictions given in the Crown Court are not regarded as miscarriages of justice. Neither are those successful appeals that flow so mundanely from the Crown Court against criminal convictions in the magistrates’ court. Rather, only successful appeals against criminal conviction that are the product of a referral back to the CACD through post-appeal procedures are thought to be miscarriages of justice. As this relates to current post-appeal provision, before April 1997, convicted persons in England and Wales, who alleged to be wrongly convicted, but who had exhausted their appeal rights looked to the Home Secretary and the Criminal Cases Unit (CCU) (formally C3 Division) of the Home Office. If it was thought that there might be some merit in the allegation, investigations would be arranged either within the HO, with the assistance of new police enquiries, or by setting up a judicial inquiry. The outcome of this process was that cases thought to be meritorious were referred back to the CACD (Nobles and Schiff, 2001, p. 282). There were a number of problems with these arrangements. In particular, the RCCJ was established in 1991 because of the apparent ‘constitutional reluctance’ of successive Home Secretary’s to return meritorious cases back to the CACD when their existing appeal rights had been exhausted for fear of undermining
the independence of the judiciary (Royal Commission on Criminal Procedure, 1993, p. 1; Nobles and Schiff, 2001, p. 283). In response, the main recommendation of the RCCJ (1993) was the creation of an independent body to assume the duties and responsibilities of the Home Secretary and CCU. In January 1997, CCU was replaced by the CCRC under the Criminal Appeal Act (1995) (CAA) with the same narrow agenda. The CCRC would also be 'a last resort' for cases that had already exhausted the appeal system (Criminal Cases Review Commission, 2002c; see also Royal Commission on Criminal Justice, 1993, chapter 11).

In all spheres, then, successful appeals against criminal conviction (analysed in the next chapter) tend to be perceived as a positive indicator that wrongful convictions are being remedied, and that what might be termed the routine 'carriage of justice' in England and Wales is working; they are a manifestation of the safeguards that are contained within the CJS, functioning in the interests of the protection of the wrongful conviction population (see, for example, Pattenden, 1996, pp. 57-58). Of course, in a sense the criminal convictions that are routinely quashed by the CACD and mundanely quashed by the Crown Court are a sign of the carriage of justice and that people who are wrongly convicted in England and Wales do have rights of legal redress. But, by the same token, routine carriage of justice safeguards are supposed to exist only for use in extreme circumstances and only then are they supposed to be used in the last resort, as in the rationale behind the CCRC. By concentrating the miscarriage of justice agenda only upon post-appeal successful appeals, the safeguard argument is sustained. For it reinforces the perception that miscarriages of justice are

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5 The CCRC started handling casework from the 31 March 1997 when all C3's files had been transferred.
rare occurrences that are small in number. But, by widening the critical gaze to incorporate all of the thousands of successful appeals against criminal conviction that annually occur in England and Wales, which themselves are a part and parcel of the routine and mundane carriage of justice, any notion of the right to appeal as a last resort appellate safeguard is undermined. From such a perspective, the entire judiciary can be called into question for the number of wrongful criminal convictions that are occurring.

This is not to suggest that JUSTICE’s working definition was entirely unbeneficial. It is acknowledged that JUSTICE did achieve a systematic agenda for miscarriages of justice to which all the major political parties subscribed. Nor is it to suggest that researches and/or forms of action that have been premised upon successful appeals that derive from post-appeal procedures have done no good whatever. As will be shown in Chapter 4, analyses that have focused upon post-appeal successful appeals have been successful in effecting a number of important reforms of the legislative framework of the CJS. For example, PACE (1984), which formalised a range of safeguards for criminal suspects against even more wrongful criminal convictions, was a corrective legislative outgrowth of the forms of critique that focused on the post-appeal successful appeals in the *Confait Affair* (see Price and Caplan, 1976; Kettle, 1979; Price, 1985) So, too, the critique of the failure of existing post-appeal remedies to quash the cases of the *Guildford Four* (see May, 1994), the *Birmingham Six* (see Mullin, 1986) and the *Macguire* (see Kee, 1986) which led to the establishment of the CCRC did represent a step forward in the post-appeal remedy of wrongful convictions. Thus, the problem with prevalent definitions and/or approaches to miscarriages of justice is not so much that they are somehow wrong or misguided.
Rather, the problem with analyses that focus only upon successful appeals that derive from post-appeal procedures is that they are so narrowly conceived that they only look at a tiny aspect of all the possible wrongful criminal convictions that occur in England and Wales. They, therefore, only depict the tiniest part of the miscarriage of justice phenomenon.

Another major challenge to prevalent definitions and/or approaches to miscarriages of justice is that they are premised upon what might be termed a judicial fallacy. For neither criminal trials nor appeals against criminal convictions in England and Wales seek to establish or pronounce upon the factual innocence of criminal defendants or appellants. Rather, criminal trials are a judicial adjudication that attempts to determine the ‘guilt’ or ‘not guilt’ of criminal defendants. And, criminal appeals are a judicial attempt to determine whether the previous criminal conviction that was given in the Crown Court is ‘safe’ or ‘unsafe’ (Criminal Appeal Act, 1995, s2). As such, there is no reliable method for separating successful appeals against criminal conviction into cases of factual innocence and technical or non-factual ‘innocence’. Therefore, the judgements of the CACD or the Crown Court do not provide the kind of factual objective knowledge required to prove the factual innocence of the wrongly convicted that is both, generally, assumed and claimed by all the existing discourses on miscarriages of justice. It is in this context that any attempt to determine factual innocence in a system where the ‘guilt’ or ‘not guilt’ of a criminal suspect can be conceptualised as a legal technicality can be conceived as an entirely erroneous pursuit. For criminal convictions and quashed criminal convictions alike are intrinsically technical, in the sense that they are both the product of the discursive rules, practices and procedures of the system. Accordingly, Brandon and Davies
(1973) (in the above quotation) were correct to raise the question of the possibility of proving that someone has, in fact, been wrongly imprisoned. They applied the judicial fallacy, however, in their uncritical acceptance of the granting of a free pardon and/or the quashing of a previous criminal conviction by the CACD upon appeal as prima facie evidence of such proof. This fallacy has generally been unproblematically followed ever since.

**Two wrongs don’t make a right**

Against the prevalent trend to define miscarriages of justice in terms of the wrongful conviction of the factually innocent, an alternative account from the human rights approach lends support for a more properly inclusive understanding of miscarriages of justice. For theorists such as Walker (1993, p. 2) and Greer (1994, p. 59) the ‘obvious’ point to be made (the main point being made by this chapter) is that what counts as a ‘miscarriage’ will depend critically upon what ‘criminal justice’ is said to mean. From such a standpoint, Walker (1993) and Greer (1994) offered complementary analyses wherein it is the issue of ‘justice’, not the issue of a ‘miscarriage’, which needs further consideration to determine the ways in which it may be denied.

The starting point for Walker’s (1993) analysis was that ‘justice’, at least in stated principle, is about distributions – according persons fair shares and treatment. As far as this relates to the impacts of the CJS, Walker (1993, p. 3) asserted that ‘just’ treatment in a liberal, democratic society is stated as the treatment of individuals with equal respect for their rights and the rights of others:
‘...it is...the responsibility of the [agencies of the] state to treat citizens...justly...and that if their treatment is disproportionate to the need to protect the rights of others or is wholly unwarranted, then serious damage will be inflicted not only on the individual but on society as a whole.’

In such a context, a major cause of miscarriages of justice can be conceived to occur ‘whenever individuals are treated by the State [or the agencies of the State] in breach of their rights’ (Walker, 1993, p. 5). The criminal conviction of persons believed to be innocent, or who are in fact innocent, fall into this category of breach of rights, and indeed might be said to be a core case. However, as Walker (1993, p. 4) argued, the conviction of anyone, even someone who has committed a crime, on the basis of inadequate legal proof could equally be said to be a breach of rights:

‘Some observers attempt to distinguish between those who are really “innocent” and those who are acquitted “on a technicality”. However, a conviction arising from deceit or illegalities is corrosive of the State’s claims to legitimacy on the basis of due process and respect for rights, and there may be practical deleterious effects in terms of diminished confidence in the forces of law and order, leading to fewer active citizens aiding the police and fewer jurors willing to convict even the blatantly guilty. Accordingly, even a person who has in fact and with intent committed a crime could be said to have suffered a miscarriage if convicted on evidence which is legally inadmissible or which is not proven beyond reasonable doubt’ (my emphasis).

This points to an added problem with prevalent definitions of miscarriages of justice in that they are asymmetrical – they look at the issue in one direction only. Miscarriages of justice have never only been about the wrongful conviction of the factually innocent (see, for example, Royal Commission on Criminal Justice, 1994, p.
1). They have also always been about the acquittal of the factually guilty. The crux of the issue being the difficult question of balance. As Walker (1993, p. 5) noted, because no human system can ever be perfect the CJS has historically been ‘weighted’ in favour of the accused, with ‘the burden of proof upon the prosecution’. Accordingly, in order to minimise the potential harm that might be caused by the agencies of the state in their task of ‘crime control’ the ever-present dangers of mistakes are accounted for by the procedural safeguards such as the ‘burden of proof’ and the ‘right to silence’. The reasoning being that ‘it is better that 10 guilty offenders are acquitted than one innocent person wrongly convicted.’ Theoretically, then, one thousand factually guilty acquittals or successful appeals against criminal conviction would be tolerable to safeguard against the wrongful conviction of one hundred factually innocent victims. In this context, and in the context that all successful appeals are technical because there is no reliable way to separate them into ‘factual innocence’ and ‘technical innocence’, there really are no justifiable grounds for not considering all successful appeals as miscarriages of justice.

Moreover, there is support in judicial reality for the notion that the conviction of the factually guilty would constitute a miscarriage of justice. For example, in quashing the convictions of the Cardiff Three (BBC, 2000c) Lord Taylor asserted that whether Steven Miller’s admission to the murder of Lynette White were true or not was ‘irrelevant’. For the oppressive nature of his questioning (he was asked the same question 300 times) required the interview to be rejected as evidence (cited Green, 1995, p. 77). Similar examples include the CACD’s pronouncement in quashing the convictions of the M25 Three that ‘this does not mean that they are innocent’ (cited
Another example is the judgement in the quashing of the Bridgewater case that declared that the CACD was not concerned with the question of the possible innocence of the appellants, but, rather, with the integrity of the trial in which the appellants had been found guilty:

'This Court is not concerned with the guilt or innocence of the appellants; but only with the safety of their convictions. This may, at first sight, appear an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair; if it is distorted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened' (England and Wales Court of Appeal (Criminal Division) Decisions, 1997).

In his analysis, Greer (1994) also attempted to unravel the meaning of the notion of a miscarriage of justice within a human rights framework. In so doing, he applied a distinction between 'unjustified convictions' and 'unjustified avoidance of conviction'. This point of departure was preferred by Greer to the more readily apparent distinction between 'unjust acquittals' and 'unjust convictions' which has tended to underpin miscarriage of justice debates. This was because 'unjust acquittals' do not include injustices that arise from decisions not to charge or prosecute. In a similar vein to Walker (1993), Greer (1994, p. 63) made a further distinction between 'structure' and 'agency' and noted that miscarriages do not only result from human error, malpractice or corruption. It is also possible that they are caused by existing procedures of the CJS: 'Some features of the current... procedures of the criminal justice system may themselves create miscarriages of justice irrespective of the

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6 Norman (2001b) raises the interesting question that if the appeal judges really thought that the M25 were robbers and murderers would they quash their convictions or would they order a re-trial?
manner in which they are applied, while other types of miscarriage stem more directly from the decisions or behaviour of given agencies or officials. This is important, for it extends existing analyses of the causes of miscarriages of justice into the area of the procedures of the CJS that has not previously been acknowledged (explicated in Chapter 3). From such a perspective, Greer (1994, p. 74) concluded that much more research in this area is badly needed as there are many types of miscarriages of justice of which the conviction of the factually innocent is only one:

`...the conviction of the factually innocent is only one amongst several types of miscarriage of criminal justice. Others include four kinds of unjustified avoidance of conviction (those due to defects in substantive criminal law and procedure, indefensible decisions not to charge or prosecute and unjustified acquittal) and six types of unjustified conviction (those deriving from defects in substantive criminal law and procedure, plea bargaining, anti-terrorist criminal justice processes, impropriety by tribunals of fact and other agencies, and mistakes) not to mention the numerous subcategories...for example, misidentifications and reliance by the police upon the evidence of informers.'

Both Walker's and Greer's attempts to extend definitions of miscarriages of justice can be conceived under a general rubric of 'two wrongs don't make a right'. For they conceive that miscarriages can be institutionalised within the procedures of law as well as failures in the application of laws. Moreover, 'a miscarriage of justice must involve a shortcoming by some form of State agency and therefore a degree of State responsibility' (Walker, 1993, p. 6). Accordingly, even 'noble cause corruption' (see Green, 2000c), whereby the agents of the CJS 'fit-up' criminal suspects that they genuinely believe to be (or even actually are) factually guilty, cannot be justified and can be conceived as a miscarriage of justice. This is supported in the examples of the judicial declarations in the quashed convictions just cited. It is also supported by the
HO Compensation Unit that decides upon the compensation paid to victims of miscarriages of justice. For it makes no distinction between ‘technical’ and ‘factual’ miscarriages as all successful appeals against criminal conviction receive the same entitlement if the test of ‘judicial error’ has been met (see, for example, Criminal Justice Act, 1988; Dyer, 2001; Walsh, 2001).

The ascendency of the human rights approach

The recent introduction of the Human Rights Act (1998) (HRA) that came into force in England and Wales on 2nd October 2000 increases the significance, as well as the potential discursive force of the human rights based definition. For when Walker (1993) and Greer (1994) produced their analyses, appeals against criminal conviction that hoped to be successful on the grounds of violations of signed-up-for human rights legislation would have needed to have been brought before the European Court of Human Rights at Strasbourg. To do so, they would have had to have exhausted all domestic remedies and also satisfied a range of other obstacles in the form of other rules and procedures (see European Court of Human Rights, 2002). Now, however, the opportunities for domestic challenges have been enhanced. For the HRA takes the European Convention on Human Rights (ECHR), which was ratified by Britain in 1951, and introduces most of it into England and Wales’ domestic law. It is expected, then, that the potential of the HRA is not only that it will save time and money, but,

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7 Since devolution, the devolved legislatures and executives of Scotland, Wales and Northern Ireland have also been required to act in a manner compatible with the ECHR rights and freedoms (for example, see Hope, L. (2000) ‘Rights of passage’ The Guardian October 9.
also, that more complainants will decide to pursue their cases and, hence, it could result in a more fair and just society (see, for example, Taylor, 2000). Indeed, for the Home Secretary that oversaw its introduction, the HRA is intended to be a ‘cornerstone of British democracy’, ‘a vision of a human rights culture’, part of an ‘inclusive’ ‘fair and decent society’ (Straw, 2000).

An important aspect of the HRA (1998, s3) relates to its compatibility with existing primary and subordinate legislation which, so far as it is possible to do so, must be read and given effect in a way which is compatible with the Convention rights. Accordingly, the HRA has profound implications for successful appeals against criminal conviction, both in terms of the accountability of CJS agents and the thorny issue of liability. Although victims in successful appeal cases do receive compensation from the state if their wrongful conviction can be shown to have derived from ‘judicial error’, the state does not accept liability for the injustice or the harm caused. As for the issue of accountability, this has tended to operate at the level of the individual with victims of successful appeals attempting to bring to account those individual police officers, prosecutors, or in some cases their own defence lawyers, that they allege are responsible for or caused their wrongful criminal conviction (see, for example, Whelan, 1998). These attempts have, however, generally been unsuccessful. So, for many victims and their supporters, there remains the issue of a lack of closure on their injustice as, more often than not, no one is brought to account. In such a context, many victims feel a general sense of dissatisfaction that justice has not been done.

The HRA, however, provides the potential resolution of such a problem, as a significant feature of the HRA (1998, s6) is that it makes the actions of a ‘public authority’ or ‘any person certain of whose functions are functions of a public nature’ ‘unlawful’ if they ‘act in a way which is incompatible’ with the incorporated ECHR rights and freedoms. A public authority or public authority employee would also be deemed ‘unlawful’ under s6(6) of the HRA by an act of ‘omission’ or a ‘failure to act’ in a way that was compatible with the incorporated ECHR rights and freedoms. This could have far-reaching consequences for successful appeals as public sector organisations such as the courts, the CPS, the police, prisons, and so on, and those persons employed by such organisations could potentially be liable for breeches of the HRA. It could also have implications for many private sector organisations that carry out public sector duties such as private prisons, and so on, as well as those individuals employed by such public-private partnership companies.

Under the HRA (1998, s6), then, employers can, arguably, be conceived as vicariously liable and equally accountable for any possible transgressions of their employees. This was officially acknowledged in the recent test-case decision on Lister and Other v Hesley Hall Ltd by the HL, which held that the Respondent company was vicariously liable for the sexual abuse of the Appellants by its employee. Significantly, this was the first decision against a company where the heinousness of the act did not absolve the company of liability by taking the acts of the employee outside the scope of employment. Avoiding this debate, the Law Lords focused instead on what they termed the ‘closeness of the connection’ between the acts committed by the employee and the duties that the employee was employed to
perform (see Saxon, 2002). This new ‘closeness of connection’ test could mean that
whatever the reason a person who is acting on behalf of the various public authorities
– police, CPS, prison service – that together comprise the CJS causes a successful
appeal – overzealousness, corruption, error - the CJS can be conceived as vicariously
liable and unlawful in accordance with the HRA. In such a context, there is a possible
corresponding shift of emphasis in attempts to determine accountability. No longer
are the individual victims and their supporters on the ‘outside’ of the system and alone
in attempting to obtain judicial accountability of the person on the ‘inside’ alleged to
have caused the miscarriage of justice. Now, as the particular public authority of the
CJS that employs the person alleged to have caused the miscarriage of justice can be
held to be vicariously liable for their employees’ actions, it is also very much in their
interests to assist in the attempt to find the person responsible, as well as the precise
reason for the miscarriage in an attempt to ensure that such causes do not happen in
the future. Moreover, it could be argued that in the interests of restricting or
minimising the bad publicity or scandal that accompanies the public knowledge of
miscarriages of justice, it is in the interests of the various public authorities that
together comprise England and Wales’ CJS to more closely monitor the
actions/activities of their employees. This might, in turn, contribute to the overall
reduction of miscarriages. It is within this context that miscarriages of justice must be
defined and within which the exclusion of any successful appeal against criminal
conviction, deliberate or not, seems not only an impossible distinction to make, but
also a wholly ill-considered omission.
Giving ‘voice’ to ‘subjugated discourses’

Foucault (1980, pp. 80-81) noted that in recent times there has been an ‘insurrection’ of what he termed ‘subjugated knowledges’ or forms of ‘anti-discourse’ that have interrupted established regimes of thought; forms of particular, localised and/or discontinuous criticism that have been so efficacious that they have undermined, for example, psychoanalysis, the asylum, the legal system or the prison. There are two ways in which such forms of knowledge can be understood. On the one hand, they are ‘those blocs of historical knowledge which were present but disguised [or buried] within the body of...systemising theory and which [meticulous erudite, exact historical knowledge]...has been able to reveal’ (Foucault, 1980, p. 82). On the other hand, however, Foucault (1980, p. 82) argued that by ‘subjugated knowledges one should understand something else, something which in a sense is altogether different, namely, a whole set of [local, specific and popular] knowledges that have been disqualified as inadequate to their task or insufficiently elaborated: naïve knowledges, located low down on the hierarchy, beneath the required level of cognition or scientificity.’ For Foucault (1980, p. 83), what tied these two types of subjugated knowledge together – those buried discourses of academic erudition and those popular disqualified discourses of popular experience – is that both are essentially concerned with a ‘historical knowledge of struggles’ (original emphasis). As he (1980, p. 83) said: ‘In the specialised areas of erudition as in the disqualified, popular knowledge there lay the memory of hostile encounters which...have been confined to the margins of knowledge.’ What emerged out of this ‘union’ between erudite academic knowledge and local experiential knowledge are ‘genealogical, or rather a multiplicity of genealogical researches, a painstaking rediscovery of struggles together with the
memory of their conflicts’ (Foucault, 1980, p. 83). As Foucault (1980, pp. 82-87) pointed out, the utility of genealogical research that produces subjugated forms of knowledge is that it can be tactically deployed in struggles that oppose the effects of the forms of power that predominate in societies like ours.

Foucault’s (1980) genealogical approach has an important relevance to this analysis of prevalent definitions of miscarriages of justice. For in the same way that counter-discourse or ‘anti-discourse’ was necessary in undermining prevalent perceptions of the realities of the asylum and/or the prison, there is a corresponding necessity for the elevation of disqualified discourses of routine and/or mundane wrongful criminal convictions. This can serve to undermine the predominant perception that miscarriages of justice are an exceptional occurrence and small in number, and provide a more comprehensive depiction of the wrongful criminal conviction phenomenon. As the next chapter will show, successful appeals are not only an exceptional occurrence in England and Wales, they are also routine and mundane features of the criminal justice process that occur every day of every week of every year. Accordingly, analyses that attempt to depict the extent of miscarriages of justice that consider only those cases and forms of knowledge that derived from post-appeal procedures will, inevitably, be partial and, hence, inadequate. Alternatively, a more comprehensive depiction of the miscarriage of justice phenomenon needs also to include all successful appeals to provide access to a whole variety of currently disqualified and marginalised forms of discourse about the forms of miscarriages of justice and their consequences, both to the individual victims and to society as a whole. This is the purpose of the next chapter.
How big is the miscarriage of justice ‘iceberg’?

Introduction

Largely due to definitional limitations, then, existing analyses and researches into miscarriages of justice in England and Wales have not generally addressed the question of the likely scale of the phenomenon in any systematic way. On the contrary, they have generally been directed towards individual cases of successful appeal against criminal conviction brought about through post-appeal procedures. Despite this, many analyses have routinely speculated upon the possible scale of England and Wales’ miscarriage phenomenon by asserting that the exceptional case being ‘exposed’ is the ‘tip’ of some much greater ‘iceberg’ (see, for example, Nobles and Schiff, 2001, p. 281; Baldwin and McConville, 1978, p. 68; Brandon and Davies, 1973, p. 4). But just how big the ‘iceberg’ might be has hardly received any critical attention at all.

In redressing this, I draw from the CCRC’s published case statistics and the LCD’s published statistics on successful appeals against criminal conviction in both the CACD and the Crown Court to demonstrate a scale of wrongful criminal convictions in England and Wales that far exceeds all previous estimations of the problem. It follows that the customary wholesale rejection of official statistics of successful appeals by the critical discourses against miscarriages of justice is misplaced. Despite
their inherent limitations, official statistics on successful appeals are a vital element in depictions of miscarriages of justice and a core component in the exercise of existing forms of power. In other words, a more pragmatic approach towards official statistics on successful appeals needs to be adopted for critical purposes.

With that in mind, I briefly outline the appellate structure in England and Wales and the appellate opportunities that are provided to rectify miscarriages of justice. Secondly, the official statistics of successful appeals against criminal conviction are analysed and three categories of miscarriage of justice discerned – the exceptional, the routine and the mundane. Thirdly, I point up some inherent methodological difficulties that are involved in quantifying miscarriages of justice in terms of successful appeals, before more generally considering the issue of official statistics usage within an account of the production and exercise of existing forms of power.

**Three categories**

Within England and Wales, there are a number of appellate opportunities available to those who receive criminal convictions. In order of ascending judicial superiority:

- the Crown Court deals mainly with appeals by persons convicted in magistrates’ courts against their conviction or sentence or both whereupon the case is re-heard (Criminal Appeal Act, 1995, s26);
- the CACD hears appeals in criminal matters from the Crown Court (for a discussion of the criteria and procedures see Pattenden, 1996, pp. 83-128);
an appeal can be made to the HL where it has been certified by the CACD that a point of law of general public importance was involved in a decision;

- the Attorney General has the power to refer what are thought to be unduly lenient sentences for offences triable on indictment to the Court of Appeal;

- the CCRC can re-investigate and refer cases that have already been through the appeals system and have not succeeded for any reason back to the appropriate appeal court' (Chapman and Niven, 2000, pp. 42-43); and,

- when all domestic appellate attempts have been exhausted, criminal appeal cases can also be taken to the European Court of Human Rights at Strasbourg (for details see European Court of Human Rights, 2002a).

In terms of official statistics on successful appeals against criminal conviction, the LCD collects statistics from each of these appeal courts in terms of applications for leave to appeal and their success. Taken together, these statistics would provide a depiction of the scale of England and Wales' miscarriage of justice 'iceberg' that can be inferred from the official statistics. Despite this, as the last Chapter showed, public perceptions and all forms of discourse on miscarriages of justice have been almost entirely focussed upon what might be termed exceptional cases of successful appeal that were referred back to the CACD by the CCRC having previously failed through routine appeal procedures. For example, the following cases have dominated the recent discourse on miscarriages: Stephen Downing (see Vasagar, 2000; Vasagar, 2000b; Vasagar and Ward, 2001); Derek Bentley (see Campbell, 1998; Birnberg, 1998; Oliver, 2002); Mahmood Mattan (see Lee, 1998; Wilson, 2001), John Kamara (see Quinn, 1999; Carter and Bowers, 2000; Gillan, 2001), the M25 Three (see Hardy, 2000; Bird, 2000; Times Law Report, 2000), the Cardiff Newsagent Three (see
Carroll, 1998; Lewis, 1999). The problem with this is not that these cases were not miscarriages but, rather, that they are all cases that were successful in appeal following a post-appeal referral back to the CACD by the CCRC. The problem with this is that they, therefore, constitute only a tiny aspect of all wrongful convictions, as evidenced by successful appeals, in England and Wales. Table 1, for example, represents the number of criminal convictions that were quashed by the CACD as a result of being referred back to the CACD by the CCRC since it started handling casework in April 1997. In the year 1998, for example, there were 7 cases that were successfully quashed in the CACD after referral by the CCRC. This compares with a total of 341,000 criminal convictions from the Crown Court and magistrates' courts in the same year, 1998 (Home Office, 2000). Thus, in the context of the iceberg analogy, depicting what might be termed only the tiniest of icecubes.

Table 1: Criminal Cases Review Commission: Successful quashed convictions after referral back to CACD*

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<th>Year</th>
<th>1997**</th>
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<th>2001***</th>
<th>Total</th>
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<td>Number of quashed convictions</td>
<td>0</td>
<td>7</td>
<td>10</td>
<td>10</td>
<td>9</td>
<td>36</td>
<td>7</td>
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Source: Criminal Cases Review Commission, 2002a. * The methodology upon which this analysis is based differs from the CCRC's own analysis in that it only includes those criminal convictions that were successfully quashed after referral back to the CACD that involved no further action. That is, this analysis does not include those 'quashed' convictions that were included by the CCRC that resulted in an altered charge or sentence. Nor does it include those 'quashed' convictions that the CACD referred for retrial. ** Figures for the year 1997 are from 31 March when the CCRC started handling casework. *** Figures for the year 2001 are up to and including to October.

A major limitation of concentrating on exceptional cases of successful appeal that are brought to light via the post-appeal procedures of the CCRC, is that all manner of routine successful appeals have been neglected. For in addition to the exceptional successful appeals there are also all those routine successful appeals in the CACD against criminal convictions given in the Crown Court. Indeed, if definitions of
miscarriages of justice are re-orientated to also include all those successful appeals that are routinely quashed upon appeal by the CACD, then miscarriages can, perhaps, be said to be far more widespread than is commonly first thought. Table 2 shows that in the decade 1988-1998, for example, the CACD abated a yearly average of 267 criminal convictions – over 2,670 in total.

Table 2: Court of Appeal (Criminal Division): Successful appeals against criminal conviction 1988-1998

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<td>290</td>
<td>171</td>
<td>150</td>
<td>2671</td>
<td>267</td>
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To put the figures presented in Table 2 into context, as well as to give some indication of the split between the routine and exceptional successful appeals that can be discerned from the LCD’s official statistics, it is worth comparing the CCRC’s reported case statistics in a little more detail. For if definitions of miscarriages of justice are re-orientated to incorporate routine successful appeals the official scale of England and Wales’ miscarriage of justice phenomenon increases from an annual average of 7 cases to an annual average of around 267 cases. Thus, exponentially increasing the miscarriage of justice ‘iceberg’ as it is conventionally perceived and understood.

In addition, Table 3 and Table 4 show that if a broader definition is applied that also includes successful appeals made against length of sentence, then the number of miscarriages (the number of times that the CJS itself indicates that it previously got either the conviction or the sentence wrong), increases still further to an annual average of 2,852 appellants or 28,523 for the period.
Table 3: Court of Appeal (Criminal Division): Successful appeals against sentence 1988-98

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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>2837</td>
<td>3105</td>
<td>2842</td>
<td>2590</td>
<td>2906</td>
<td>2597</td>
<td>2485</td>
<td>2923</td>
<td>3269</td>
<td>3498</td>
<td>25783</td>
</tr>
</tbody>
</table>


Table 4: Court of Appeal (Criminal Division): Successful appeals against conviction and sentence 1988-98

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>3106</td>
<td>3404</td>
<td>3244</td>
<td>2941</td>
<td>3159</td>
<td>2847</td>
<td>2721</td>
<td>3213</td>
<td>3440</td>
<td>3648</td>
<td>28523</td>
<td>2852</td>
</tr>
</tbody>
</table>

Source: Tables 2 and 3.

This broader definition is also important to analyses that attempt a qualitative depiction of the wrongful criminal conviction phenomenon or the harmful consequences of justice in ‘error’. For a prison sentence of 10 years, for example, could, arguably, be conceived as more harmful that one that is reduced to 5 years on appeal (see, for example, Herbert, 2002). Of course, prison sentences can also be increased. This could also be significant. For if persistent perpetrators of serious offences (murder, rape, paedophilia, for example) are given sentences that are too lenient then there is the potential that they will inflict further harm upon their early release. Undoubtedly, more research needs to be conducted on the statistics of appeal against sentence and the precise number of sentences being reduced and/or increased.

The point to be made here, however, is that a significant number of sentences are altered (approximately 3,000 each year). This would indicate a scale of wrongful criminal sentences that is also at odds with popular perceptions of criminal justice. The CJS not only sometimes makes ‘mistakes’ in sentencing. It routinely and
mundanely gets the categories of sentence wrong, too, which also contains significant consequences that have not previously been acknowledged and/or analysed.

In addition to successful appeals in the CACD from the CCRC and the Crown Court, criminal convictions given in magistrates’ courts can be appealed in the Crown Court whereupon the case is re-heard. When the criminal convictions from magistrates’ courts that are quashed upon appeal to the Crown Court are also taken into account the extent of England and Wales’ miscarriage of justice phenomenon that can be inferred from the official statistics on successful appeals is even further extended. For example, Table 5 shows an annual average of 3,546 quashed convictions at the Crown Court for criminal convictions that were given by magistrates’ courts between 1998-2000 (inclusive). If this average is added to the CACD annual average then an official picture of England and Wales’ miscarriage of justice phenomenon, the official miscarriage of justice ‘iceberg’, is multiplied to an annual average of 3,813 cases.

Table 5: Crown Court: Successful appeals against criminal conviction in the magistrates’ court 1998-2000 (inclusive)

<table>
<thead>
<tr>
<th>Year</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>Total</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>3,980</td>
<td>3,575</td>
<td>3,090</td>
<td>10,645</td>
<td>3,546</td>
</tr>
</tbody>
</table>


In calling for the re-orientation of notions of miscarriages of justice to include all the official statistics of successful appeals there is the crucial question of the distinction between exceptional, routine and mundane cases. Conventionally, it has been perceived that the denial of individual liberty is the most severe punishment and, therefore, constitutes the most harm. This, probably, contributes to the concentration on exceptional cases. Against this, I am seeking to show that although the available
evidence of routine and mundane successful appeals is not as extensive or detailed as the evidence on exceptional successful appeals, there is enough available evidence to show that loss of liberty cannot be simply read-off as an indicator of the most harm that an individual can experience. For there are also a range of social, psychological, physical and/or financial aspects of wrongful criminal convictions that also need to be considered. For example, in June 1998, 58 motorists won a joint action against Greater Manchester Police (GMP) against wrongful conviction for drink-driving offences. It transpired that the kit that was being used to determine blood alcohol levels contained a fault that actually introduced alcohol into the suspect’s sample and gave a positive reading even if the suspect had not been drinking. The harmful consequences attached to this case were as substantial as in many exceptional cases. For some of those concerned served prison sentences, some lost their businesses, several suffered mental breakdowns, and some even tried to take their own lives (see Ford, 1998). The main point to be made here is that such mundane counter-discourses against miscarriages of justice are themselves exceptional (exceptions to the rule). Hence, the trend of existing critical discourses against miscarriages to focus on exceptional successful appeals produced through post-appeal procedures does not take adequate account or properly utilise the potential ‘anti-discourses’ of the victims of routine and/or mundane cases. On the contrary, the experiences and/or harmful consequences of routine and/or mundane wrongful convictions are either marginalised or disqualified altogether in the hierarchical regime of miscarriage of justice discourse. As such, depictions of the full extent of the harmful consequences of wrongful conviction have been severely limited in their scope.
A further potential problem in advocating the reorientation of definitions of miscarriages of justice to include all successful appeals relates to a range of theoretical and methodological issues and the reliability of the official statistics. There is also the crucial matter of the nature and operation of power in the sphere of the CJS, which informs my rationale that official statistics of successful appeals must be embraced for the counter-discursive force that they can provide. To these matters the chapter now turns: How reliable are official statistics on successful appeals against criminal conviction as a way of quantifying England and Wales’ miscarriage of justice phenomenon? Furthermore: Why is it necessary to re-orientate definitions of miscarriages of justice to include the official statistics of all successful appeals against criminal conviction?

**Reliability**

In a *pragmatic* critical mode, there is a strong case for defining miscarriages of justice as embracing *all* the official statistics on successful appeals against criminal conviction. The very nature of the enterprise means that legal definitions and categorisations cannot be transcended. Thus, at best it seems inappropriate to consider only part of the picture – exceptional post-appeal cases – at the expense of broader statistical appraisals of mundane and/or routine successful appeals that derive from the same existing appeal procedures. At worst, the wholesale exclusion of official statistics of successful appeals by those who seek to be critical about miscarriages (campaign groups, investigative media, critical academics) seems entirely misplaced. For whether successful appeals be mundane, routine or exceptional in character, they
each encompass a wide range of extensive social, psychological, physical as well as financial forms of harm within which length of time spent in prison cannot simply be read as an indicator of more harm. For example, a person could spend five years in prison wrongly convicted of an aggravated burglary and experience a relatively peaceful time in prison. In contrast, a person could spend only a few months in prison as a result of being wrongly convicted of a sexual or paedophile offence, or not go to prison at all, and experience more damaging and longer-lasting harmful consequences in terms of harm to reputation, and so on (see, for example, Falsely Accused Carers and Teachers, 2002; 2002b). As such, official statistics that represent mundane and/or routine successful appeals are just as important for critical analyses as those analyses that focus only upon exceptional cases that cannot in any meaningful sense be proven, nor legalistically differentiated. This opens-up a scale of miscarriages of justice for further critical substantive analyses, that was formally inaccessible due to definitional restriction, that can provide a more adequate depiction of wrongful criminal convictions in England and Wales.

Inextricably related to the problem of definitional reliability is the matter of the potential political dimension of the official statistics on successful appeals. To be sure, official statistics on successful appeals are inherently political in the sense that they are the products of legal judgements grounded in politically derived legislative reforms. If the law on appeals changes, so too do the criteria for defining successful appeals as well as official measurements of successful appeals (cf. Hindess, 1973, p. 12).
A further potential political dimension with official statistics of successful appeals against criminal conviction according to Woffinden (1987) is the problem of political obstruction. Drawing support from Koestler (1956), Woffinden (1987, p. 341) asserted that it is 'impossible to tell' how many miscarriages of justice occur, but 'it is not unreasonable to assume that the number of undetected errors may be greater than we believe' (Woffinden, 1987, p. 341):

'The major problem... (with) miscarriage of justice (cases) is that to acknowledge the case as such would inevitably involve admitting to a catalogue of serious errors in the detection of crime and the administration of justice. The authorities are loath to countenance this... with the result that... even allowing murderers to go free and commit further crimes becomes a small price to pay for the maintenance of the façade of judicial infallibility (Woffinden, 1987, p. 342).

Woffinden is correct that a finite calculation of miscarriages of justice is, probably, impossible. He is also right to raise the issue of the political dimension of the problem of miscarriage of justice research, as well as the associated harmful consequences of such governmental inaction. However, the impossibility of a finite calculation of miscarriages is not merely due to the reasons that he supposes. Firstly, miscarriages are not only about the wrongful conviction of the factually innocent, but are also about the acquittal of the factually guilty. Secondly, as this discussion is attempting to show, it is not only about political interference, but also about the reliability and/or validity of the available statistical information and the accompanying problem of an appropriate definition.
Moreover, as the above statistics on successful appeals show, even in a strictly legalistic sense, the appellate courts indicate wrongful criminal convictions and/or wrongful criminal sentences are not only widespread, they are commonplace. Thus, it is not the case that the agencies that comprise England and Wales' CJS are 'loath' to acknowledge the quashing of criminal convictions as Woffinden (1987) asserts. Successful appeal statistics are collected and produced from all manner of appellate court that indicate that quite the reverse is true. Rather, the 'political problem' seems to reside more with those critics who have accepted definitions of miscarriages of justice as very rare and exceptional occurrences of judicial error. Alternatively, if miscarriages of justice are taken as systemic mistakes, then they are not only an intermittent socio-legal phenomenon, they are a mundane and routine, as well as an exceptional feature of England and Wales' system of criminal justice. This needs wider dissemination in the interests of a more realistic and sustained critical debate, both about the procedures of the 'law in books' and the 'law in action'. Official statistics of successful appeals against criminal conviction, then, need to be taken seriously to provide a more adequate depiction of the wrongful criminal conviction phenomenon. For, although they may not be an objectively accurate index of all wrongful criminal convictions in England and Wales, they can be viewed as an index of the institutional or organisational processes and forms of behaviour that produce wrongful criminal convictions about which very little is known (cf. Kituse and Cicourel, 1963, p. 137).

Another interrelated challenge to such empirically grounded research into miscarriages of England and Wales' CJS is the validity of the available statistical information and what it purports to cover. Since the 1960s there has been an ongoing
debate within the Social Sciences on the reliability of statistical ‘data’ and its usefulness (or uselessness) as a tool of sociological analysis - the very idea of statistical sociology being anathema to some. This debate has, to a large extent, been centred upon Durkheim’s *Suicide* (1952) to the effect that it is commonplace for ‘A’ level and undergraduate Sociology students to cut their critical and methodological teeth on that text.

In the area of research into miscarriages of justice, the problem is just as profound. If Durkheim’s *Suicide* (1897) can (rightly) be criticised on the grounds that ‘suicide’ as an official category of social reality is the product of the interpretations of official coroners (see Douglas, 1967), then the idea of research on miscarriages of justice is open to the same criticism. Official statistics of successful appeals against criminal conviction are not an exhaustive indicator of England and Wales’ miscarriage of justice or wrongful criminal conviction phenomenon. On the contrary, they are entirely legalistic and retrospective socio-legal *constructions* (cf. Box, 1971, pp. 208-210). They are the product of the official pronouncements and categorisation of the different appellate courts comprised within the CJS. As Miles and Irvine (1979) noted: ‘Official statistics are not objective reflections of social reality, neutral pictures emerging from purely technical decisions. Their production involves a host of decisions about the objects, techniques and methods involved’ (Miles and Irvine, 1979, p. 115). The official figure of successful appeals that appears in the LCD’s publications relates only to the records of the various appellate courts that comprise England and Wales’ CJS as prescribed by the Criminal Appeal Act (1995). These records are also subject to an acute technical problem in their compilation, as the decisions of judges are very much subject to their own *interpretations* of the law. As
is possible for different judges, in different places, at different times to interpret the
same law differentially, official statistics can be conceived as inherently incorporating
an inevitable degree of inconsistency in their construction which can never be

Furthermore, if the official statistics on successful appeals are to be included in a re-
orientated definition of miscarriages of justice, it needs also to be acknowledged that
they take no account of those appeals against criminal conviction that are in the
process of being quashed. Nor do they take account of allegations and suspicions of
miscarriages of justice, including the factually innocent, that might never be officially
adjudicated as such. As the following chapter will show, there are a whole host of
procedural barriers, obstacles and/or disincentives that will also have a profound
impact upon the reliability and/or validity of the official statistics on successful
appeals to comprehensively represent England and Wales’ miscarriage of justice
phenomenon, however conceived. Thus, even if all of the officially collected statistics
on successful appeals were considered as miscarriages they would not represent the
total scale of England and Wales’ wrongful criminal conviction phenomenon. But,
rather, the official statistics are themselves only a partial indicator, and an official
index of the total extent of England and Wales’ miscarriage of justice phenomenon.
Their inclusion in critical analyses together with the knowledge of their partiality,
however, represents a scale of wrongful criminal conviction that has the potential to
inform critical praxis in a direction that has hitherto received no theoretical or
substantive appraisal.
Necessity

In general, critical social scientific conceptions of official statistics were derived in response to ‘positivist’ and/or ‘empiricist’ approaches. The positivist simply observes phenomena, establishes the links between them, and uncovers the fundamental laws of human behaviour (see, for example, Aron, 1965, pp. 62-66). Similarly, the empiricist tends to see the open-minded collection of data, and the unbiased discovery of findings, as the key to knowledge of the social world (Miles and Irvine, 1979, p. 115 original emphasis). Against such conceptions, critical theorists generally tend to regard official statistics as politically biased forms of information that are systematically manipulated both by, and in the interests of, power structures in society (see for example, Nichols, 1996; Doyal, 1979; Hird and Irvine, 1979; Hyman and Price, 1979; Kincaid, 1979; Oakley and Oakley, 1979). From such a standpoint, official statistics have historically been regarded with great suspicion by critical social scientists and are generally engaged with only in the interests of theoretical and/or methodological criticism in an attempt to weaken or undermine their governmental authority; critical social scientists are generally unwilling to work ‘within’ the discursive agendas that have been predetermined by their adversaries; and the application of official statistics is either generally avoided, or undertaken with extreme caution, which inevitably results in the production of diffident, if not extremely weak counter-discourse.¹⁰

¹⁰ An alternative critical view of official statistics which recognises their critical utility has been offered by a group of ‘critical realists’ who regarded them as problematic and in need of careful interpretation, but better than nothing, see Levitas, R. & Guy, W. (1996) (editors) Interpreting Official Statistics London; New York: Routledge.
As this situation relates to the specific area of critical discourse against miscarriages of justice, the situation is even more profound. Miscarriage of justice researchers have seemingly rejected official statistics of successful appeals against criminal conviction altogether in favour of critical analyses of particular exceptional post-appeal cases of successful appeal that are achieved through a process that might, retrospectively, be termed the ‘campaign spiral’ – a process whereby alleged or suspected innocent victims of wrongful convictions that have previously exhausted existing appeal procedures are the central focus of a power struggle between the campaign group or organisation and the State. It is almost as if the struggle for the ‘victory’ of a publicly acknowledged quashed criminal conviction of an alleged innocent victim of wrongful conviction somehow makes those cases that attain a high profile status in the process somehow more noble and/or worthy than those successful appeals that result from the mundane and/or routine pronouncements of the CACD. It is as if the media attention that accompanies high profile cases of wrongful conviction in some way embarrasses the government and, consequently, weakens its power.

The problem with this is that analyses that focus only upon exceptional cases of successful appeal that are produced through post-appeal procedures, result only in small-scale critiques, which in the context of all successful appeals represent only the minutest of ‘error’. Accordingly, such critical analyses cause little disruption to the everyday affairs of the CJS. To be sure, in the years 1997-99 (inclusive) roughly 200,000 criminal convictions were given in the Crown Court (Lord Chancellors Department, 1999). Compared to this, the total number of exceptional successful appeal cases that were referred back to the CACD during the extended period 1 January 1997 to 31 July 2001 through the post-appeal procedures of the CCRC
amounted to only 73 cases, of these cases only 55 were quashed (Criminal Cases Review Commission, 2002a; 2002b). In such a context, the routine defence of the CJS, that no human system is perfect, that a certain number of miscarriages of justice is, therefore, inevitable, and that that is why such appellate safeguards as the CACD exist and extra-judicial appellate safeguards were introduced, appears extremely convincing (see, for example, Report Royal Commission on Criminal Justice, 1993, pp. 6-7). The problem with this is that England and Wales’ wrongful conviction phenomenon is not only a small-scale intermittent media driven phenomenon that relates only to the post-appeal cases that are quashed as a result of being referred back to the CACD by the CCRC. On the contrary, wrongful convictions in England and Wales’ CJS are a mundane, routine, and everyday, feature of the England and Wales’ CJS. And, there is a world of difference between an annual average of 12 exceptional, post-appeal, high profile cases being quashed by the CACD and the annual average of 267 criminal convictions that are routinely quashed by the CACD, and the 3,500 or so cases that are mundanely quashed by the Crown Court. Not to mention the thousands of sentences that are altered upon appeal each year.

This wholesale rejection of the official statistics on miscarriages of justice can be conceived to have its roots in a general critical social scientific tradition: Critical social science is, generally speaking, wedded to the pursuit of truth (see, for example, Feyerabend, 1981). This is manifested in critical criminological and socio-legal discourses against miscarriages in terms of the pursuit of factually innocent victims. From such a frame of reference it is little wonder that critical discourses have rejected even the consideration of official statistics of successful appeals. The general critiques produced by social science are enough for any self-respecting critic to leave them well
alone. As was shown, the official statistics on successful appeals are entirely legalistically determined and retrospectively directed. They contain inherent and acute theoretical and methodological problems that can never be resolved, no matter how ‘technical’ their encoding. Accordingly, there has been no critical criminological or socio-legal assessment at all of the official statistics on successful appeals and their potential discursive utility if they were to form a re-oriented definition of miscarriages of justice.

The main problem with such a rejection is that whether manipulated or not, truthful or not, official statistics are probably the most forceful constituent element in the interplay of competing discourses and the exercise of modern forms of power. As Levitas (1996, pp. 45-63), for example, observed, official statistics on the unemployment figures generally determine the meanings that are attributed to ‘unemployment', both in terms of public perceptions and the governmental departments that deal with unemployment. As Miller and Rose (1990) noted, official statistics are inseparable from the forms of calculation and expertise of the objects of government. Indeed, official statistics are intrinsically and intimately connected to the exercise of governmental power within the various domains that comprise society. They shape public perceptions on the various governmental problematics within society on such issues as social class, gender, ethnicity and so on. Furthermore, they determine the policies that are designed and implemented in response to those problematics (see, for example, Government Statistician’s Collective, 1979). In this context, the apparent unwillingness of those engaged in the production of critical counter-discourse against miscarriages to engage with official statistics of successful appeals can be conceived as ensuring the discursive dominance of its adversaries,
both in terms of the definition of miscarriages of justice and the consequential neglect of the harm caused to the victims of mundane and routine wrongful convictions.

Moreover, the general critique of official statistics from the critical social scientific community tends to presuppose that if statistics were not ‘manipulated’ or ‘abused’ they would be truthful. It serves to reinforce the scientific notion that statistics are, on the whole, or, at least, would be through the proper technical correction, about truth, and that only those statistics that are interfered with are false and, therefore, illegitimate. But, as we have seen, official statistics generally, as well as official statistics on successful appeals specifically, are intrinsically politico-legal technicalities. To be sure, official statistics are not about truth in any objective or absolute sense. But, they do produce the discursive ‘truths’ that shape, guide, channel, and control modern western societies, in a Foucauldian sense, the ‘truths’ we live by (see Foucault, 1986). As Rose and Miller (1992, p. 174) noted, existing forms of power are not so much a matter of ‘imposing’ constraints or limitations upon citizens, upon a population, but more a matter of statistically ‘making-up’ citizens capable of bearing ‘a kind of regulated freedom’. Thus, official statistics are not simply ways of collecting information about a state, but are in fact about ‘normalisation’; about normalising the population. In defining those outside the ‘norm’ such as the unemployed, the poor, criminals, the mentally ill, and so on, official statistics determine the norm. And, because ‘few of us fancy being pathological “most of us” try to make ourselves normal, which in turn affects what is normal’, indeed we desire to be normal (Hacking, 1990, p. 2). In such a context: ‘Even our personalities, subjectivities, and “relationships” are not private matters...On the contrary, they are intensively governed...Thoughts, feelings and actions may appear as the very fabric
and constitution of the intimate self, but they are socially organised and managed in
minute particulars’ (Rose, 1990, p. 1). This is because ‘in modern societies “freedom”
is “imposed”, not through force but through the “shaping”, “channelling” and
“enhancement” of “subjectivity” in all of the operations of modern government; and
the “government of subjectivity” which characterises modern political power is
“explicitly connected” with social scientific statistical knowledge, a *technique* of the
management of a population…modern government is to “know”, to “proscribe”, and
to “monitor” the lives of those for whom one is responsible’ (Rose, 1990, pp. 221-
223). Moreover, a history of the practical applications of official statistics shows that
in practice they have always been about the governmental maintenance of societal

Against this, the critical social sciences are intrinsically about social justice; they are
in a discursive programmatic struggle to improve the material conditions of those
most unfairly and unjustly treated in our inherently biased political societies. The
critical social sciences are (or should be) about the recognition of diversity in society.
They are about an awareness of the inequality of treatment of differential groups and
individuals within society. They are about illuminating the ‘other’ in contemporary
societies, about highlighting the unequal, unjust, and discriminatory experiences that
exclude certain groups and individuals from participating fully within our societies
and from sharing the benefits that our societies produce. They are an attempt to bring
about a more just, fair, and well-ordered society (see, for example, Hillyard and
Watson, 1996). The critical social sciences are certainly not about a single objective
universal truth, within which all are expected to ‘fit’.
Alternatively, then, perhaps a more fruitful way of conceiving official statistics should be as utilities, tools to aid understanding and discursive weapons in political struggle. As Latour (1987) has shown, because statistics are highly rhetorical they are used strategically to convince people. From such a frame of analysis official statistics on successful appeals do not simply passively depict social reality, they are part of the discourse of governing. They discursively create forms of reality. They enable centralisation by fabricating a ‘clearing’ within which thought and action can occur. They set up a homogeneous domain inhabited only by other numbers. They establish a single ‘plane of reality’, with a single concern reducible to numbers. Thus, they enable a machinery of government to operate from centres that calculate (see Latour, 1987; also 1986). Moreover, as Rose (1991, p. 674) has shown, official statistics are a very persuasive form of power because they promise a ‘de-politicization’ of politics, ‘redrawing the boundaries between politics and objectivity by purporting to act as automatic technical mechanisms for making judgements, prioritizing problems and allocating scarce resources’.

It is in this kind of framework that a critical pragmatist application of the official statistics on successful appeals as miscarriages of justice is advocated. A pragmatic approach that recognises that critical notions of ‘truth’ must not be disconnected from the practices of belief, assertion and inquiry (cf. Misak, 1999, p. 2); that, critical discourse needs also to concern itself with the truth of the consequences of the official statistics on successful appeals, with ‘the ‘truths’ we live by. As James contended:

‘The pragmatic method is primarily a method for settling metaphysical disputes that might otherwise be interminable...A pragmatist turns his back resolutely and once for all...from abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed
principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action and power' (James, 1992, pp. 39-41 original italics; Festenstein, 1997; Murphy, 1990).

In such a context, despite the inherent limits and technical difficulties of official statistics in terms of reliability and validity, they are probably the most powerful force in discursive struggles and disputes. Indeed, the centrality of official statistics in governmental policy design and implementation suggests that existing societies can almost entirely be conceived as societies of discursive statistical argumentation. In the governmental processes of the negotiated reform of the CJS, statistical forms of knowledge are vital. They both inform and enhance the force of counter-discursive productions, wherein the most convincing statistical discourse will succeed.

Conclusion

This chapter has attempted to further substantiate the re-orientation of prevalent definitions of miscarriages of justice to include all successful appeals against criminal conviction. This will provide a more adequate depiction of wrongful convictions and generate a greater scale of miscarriages for further critical substantive analyses that might carry greater counter-discursive weight. In so doing, a critical pragmatist approach towards official statistics on successful appeals was adopted to re-orientate conventional definitions of miscarriages of justice. This exposes a scale of miscarriages that far exceeds all previous calculations, which has previously been neglected and, hence, has not been critically explored. This is not to suggest that the official statistics are somehow a reliable or even valid representation of the total
extent of England and Wales’ miscarriage of justice phenomenon. This they are not. But, they do provide a more adequate depiction of wrongful convictions in England and Wales and expose a scale of officially generated statistics of miscarriages of justice that might more effectively engage with official discourse and dominant exercises of power in the struggle over criminal justice.

Finally, it must be noted that this chapter has only considered the likely scale of England and Wales’ miscarriage of justice phenomenon in the entirely legalistic and retrospective confines of the official statistics of successful appeals in the CACD and the Crown Court. That is, a miscarriage has only been considered to occur when an appeal against criminal conviction has been successfully achieved in one of these two appellate courts. This does not include all of the successful appeals that might occur each year in the remaining appellate courts both domestically in England and Wales and internationally in the European Court of Human Rights. Moreover, as the next chapter on the causes of wrongful convictions will show, there are a whole host of procedural causes of wrongful convictions and procedural deterrents to successful appeals. This also needs to be taken into critical consideration in attempts to depict the wrongful conviction phenomenon in England and Wales. For it indicates that the 3,813 successful appeals that make-up the annual average of official statistics (the official statistics of miscarriages of justice) can themselves be conceived as just the ‘tip’ of some even greater miscarriage of justice ‘iceberg’.
On the causes of wrongful convictions

Introduction

The main purpose of this chapter is to further extend the depiction of the scale of miscarriages of justice by showing that certain procedures of the CJS can cause wrongful criminal convictions and then act as deterrents to a successful appeal. This builds on the last chapter, for if it can be shown that not all wrongful convictions are successfully overturned, then, the official statistics on successful appeals can be conceived to be statistically partial, as they do not comprehensively represent all of the wrongful convictions that occur in England and Wales. As a result, the miscarriage of justice phenomenon can be conceived to be even greater than that which can be inferred from the official statistics of successful appeals. This supports the notion that the official statistics on successful appeals are themselves just the ‘tip’ of a much larger wrongful conviction ‘iceberg’, and that the harmful consequences that they engender effect even more victims than can be quantified from the official statistics.

This chapter is structured into four parts. First, existing theoretical attempts to explain the causes of miscarriages of justice are outlined to illustrate a distinction between theories that focus upon individual blame and those that apportion blame on a more structural plane of analysis. Second, the most recent systematic account to map the
causes of miscarriages is applied to the recent literature on successful appeals to map the most likely current causes of wrongful convictions. This updates existing systematic accounts. And, it firmly locates the systematic account within a pragmatic tradition that works within the appellate procedures to overturn wrongful convictions by apportioning the causes of miscarriages either to the procedural error or intentional misconduct of agents of the CJS. Third, the various methodologies that underpin existing accounts are explored to highlight the competing approaches that currently prevail. In so doing, an integrated methodological approach is advanced in an attempt to marry the systematic account with more critical theories and methodologies to provide a more comprehensive depiction of wrongful criminal convictions and enhance the potential of counter-discourse. Finally, a range of significant procedures of the CJS are analysed to show that they indeed act as barriers, obstacles and/or disincentives against the remedy of many wrongful convictions through a successful appeal. Accordingly, the official statistics on successful appeals are also, indeed, only a partial indices of all wrongful criminal convictions within England and Wales – the ‘tip’ of the miscarriage of justice ‘iceberg’.

Existing theoretical perspectives

An analysis of existing theoretical accounts of the causes of miscarriages of justice shows the terrain to be highly disorganised with various competing, limited, partial in scope and/or overlapping theoretical explanations being advanced. For example, whilst the case of the M25 Three (see Bird, 2000) was a successful appeal on the ground of a ‘material irregularity’ in the prosecution evidence (Editorial, 2000a), it is
also widely speculated that their miscarriage of justice was due to racism. For although all three of the appellants in the case were black four of the six witnesses had referred to at least one of the offenders as being white (see Hardy, 2000). In an attempt to make some sense of the terrain, Green (1995, pp. 46-73) discerned five ‘ideal-type’ theoretical formulations that can be discerned in existing explanations of the causes of miscarriages: a theory that generally posits the CJS as unproblematic and the causes of wrongful convictions in terms of individual procedural error or transgression; a theory based on an inherent imbalance of rights; a model based on systemic prejudice against ethnic minorities; a social structural theory of class bias and economic disadvantage; and, a model that conceptualises the police as inherently corrupt.

Putting Green’s analysis to work, the first, and most common explanation of the causes of miscarriages of justice is what might be term the error formulation which attempts to attribute miscarriages to individual ‘errors’ or ‘defects’ in the procedural framework of the CJS. In this category are problem-bearing individuals, either a criminal suspect who misleads the agents of the CJS or overzealous agents of the system who break the rules (for examples of this formulation see Fisher, 1977; May 1994). In this formulation the CJS is conceived to be entirely concerned with dealing with problematic individuals. In such a context, the procedural framework of the CJS is in a continual state of on-going reform as errors emerge and show the existing procedures to be inadequate (explicated further in the next chapter as the predominant miscarriage of justice voice).
Secondly, Green discerned a rights-based system imbalance formulation. Rights and procedural safeguards are provided to suspects because they are powerless and the system is powerful, they, thus, provide a balance between the opposing parties. This second possible formulation discerned by Green seems to contradict the first formulation because it contends that the process of criminal justice routinely denies criminal suspects their rights because the system is unbalanced. There are two versions of this unbalance theory. According to one side of the argument, the view generally put forward by agents of the CJS itself is that there are too many procedural safeguards that hamper police investigations and the successful prosecution of the factually guilty (for a classic example of this formulation, see Mark, 1977; 1978; for a more recent example see Blair cited Travis and Hopkins, 2002). Against this, it is argued that the procedures of the criminal justice process are weighted against criminal suspects (for the classic socio-legal analysis of this position see McBarnet, 1981).

The third formulation discerned by Green flowed from the second and argued that criminal suspects who are denied rights or safeguards and wrongly convicted are more likely to be from minorities, especially ethnic minorities. This is because the system contains deeply rooted structural prejudices and values which are built into the system's procedures (see, for example, Scraton and Gordon, 1984; Hillyard, 1993). In particular, this formulation argues that the CJS is unable to exclude external prejudices or effectively prevent them from affecting the work of its agents which is expressed through the practices of 'stereotyping' and 'targeting' (see, for example, Box, 1983; Hillyard, 1996, pp. 13-15; Hillyard, 1998, pp. 36-46).
A fourth theoretical explanation discerned by Green was a *social-structural* explanation that asserts that the CJS cannot be balanced, because rights and safeguards cannot compensate for social structural inequality. In this formulation, victims of miscarriages of justice are most likely to be 'poor' and, therefore, 'powerless' (McConville et al, 1991, p. 206; Box, 1983). This formulation argues that the CJS comprises people whose social background and class affiliations make them unsympathetic or even hostile to the working class, on whom most of the police's attention is focused (for example, see Hall et al, 1977; 1980; Woffinden, 2001; Reiman, 1995, pp. 4-5; 114-117; Pantazis, 1998).

Finally, Green discerned a fifth theoretical formulation of the causes of miscarriages that is opposed to the previous four formulations, and this he termed the *corruption* explanation. According to this formulation, rights and/or safeguards count for nothing if criminal suspects are 'fitted up' by the agents of the CJS by 'planting' evidence against them, fabricating witness statements, and not disclosing evidence that might support a defence case. These things can occur for reasons of ambition or other personal gain. This is perhaps the most straight-forward theoretical perspective on the cause of miscarriages of justice, and the one that appears most in media coverage: 'Corrupt groups of police officers are not rotten apples, but are cancerous growth in an otherwise healthy criminal justice body, whose other organs are unaffected: the system is composed of discrete elements police and courts, and the first can mislead the second' (Green, 1995, p. 49; examples of this formulation include, Hillyard, 1994a, pp. 75-78; McConville, 1989, pp. 5-6; Morton, 1994)
In assessing the existing theories of the causes of miscarriages of justice, it must be stressed that my point is not that critical theoretical accounts are wrong. For the composition of the prison population alone substantiates the claim that England and Wales’ CJS tends to discriminate against the poor (for example, Hall, 1980) and ethnic minorities (for example, Hillyard, 1996; 1998), and that this translates into the routine imbalance of suspects’ rights (McBarnet, 1981). Moreover, as will be illustrated below in the examples of the continuing problem of police misconduct, there is ample evidence of various forms of police corruption. Overall, then, whilst the existing critical theories of the causes of miscarriages of justice are not wrong as such, they tend to operate on a plane of critical analysis that is external to the procedures of the CJS through which successful appeals are produced and, so, do not attempt to produce statistical analyses to substantiate or support their claims. In such a context, a distinction can be made between the first formulation and the other four formulations. The ‘error’ theory operates within the remit of the CJS and conceives the procedures of the CJS as generally unproblematical, with the causes of miscarriages set in terms of problematic individuals who transgress the procedures of the system either by intent or error. Against this, the remaining theories all conceive miscarriages of justice as caused by some form of structural discrimination, disadvantage or institutional source, within which the individuals who cause miscarriages of justice, either by error or intended misconduct, are of lesser importance. In terms of discursive force and reform success, the ‘error’ formulation apportions the blame firmly upon the individual miscreant and attempts to contribute more directly with the reform of problematic procedures of the CJS, whereas the other theories apportion the blame elsewhere and are, therefore, less directly engaged with the reform of the procedures of the CJS identified as problematic. The strength of such critical theoretical
perspectives is that they do shed light upon the possible ways in which the procedures of the CJS may cause wrongful convictions. They, therefore, extend perceptions of the miscarriage of justice ‘iceberg’ by emphasising the increased likelihood of wrongful convictions to criminal suspects from, for example, ethnic minorities or the economically disadvantaged. A main problem with critical theoretical accounts that work outside of the procedures of the CJS is that they do not engage at all with the procedures through which successful appeals are achieved. For instance, critical theoretical perspectives that cite class bias or ethnic minority prejudice can be conceived to practice an anti-pragmatist approach to law that renders their critiques largely ineffectual, both in terms of their statistical force and legal reform. For under England and Wales’ case law system appeals against wrongful convictions are not achieved through speculative arguments that procedures of the CJS are inherently problematic or prejudicial against certain individuals and/or groups, no matter how accurate they might be. On the contrary, successful appeals are achieved through showing that the procedures of the CJS were in some way not correctly adhered to, either by error or some form of errant intent and that individuals were wrongly convicted. Accordingly, from the perspective advanced in the last chapter, to the effect that statistical forms of knowledge are the most powerful force in the interplay of forms of power, the forms of counter-discourse that are generated by critical theories that work outside of the procedural agenda of the CJS do not carry much decisive force.
Updating the systematic approach

There have been two previous systematic attempts to map the causes of miscarriages in England and Wales. These accounts are systematic in the sense that they are broader forms of analysis that include more than a single case of successful appeal against criminal conviction and include a variety of different causes of miscarriages of justice. The object of such researches is the production of lists of the causes of miscarriages of justice that are discerned from the data sources. The first systematic account was presented by Brandon and Davies (1973) who conducted an analysis of Home Office pardons and referrals between 1950 and 1970, as well as material on individual cases of wrongful imprisonment provided by JUSTICE, and identified a seven-fold categorisation. More recently, JUSTICE (1989) updated Brandon and Davies’ earlier research. In so doing, JUSTICE (1989, pp. 76-94) drew from their own case files and produced a sophisticated analysis of the four stages of the criminal justice process - pre-trial, trial, appeal and post-appeal - and discerned five common threads that cause miscarriages of justice:

- wrongful identification;
- false confessions;
- perjury by a co-accused and/or other witnesses;
- police misconduct; and,
- bad trial tactics by the defence.
Putting JUSTICE's categories of causes to work, this section applies them to the recent literature on successful appeals. Because of space constraints this section will not provide an extended discussion of each of the causes that can be discerned from the recent literature. Rather, each of the causes listed by JUSTICE will be briefly considered in turn to determine if it continues as a cause of wrongful conviction, and to illustrate the apportioning of blame in systematic accounts upon individuals who transgress the procedures of the CJS or are erroneous in their procedural application.

Wrongful identification as a cause of wrongful conviction in the current literature of successful appeals has generally been blamed on the errant behaviour of the agents of the CJS to obtain wrongful convictions by offering some form of inducements in return for false evidence. For example, one of the main problems has been identified as 'prison grasses' who provide false evidence (that causes a wrongful conviction) in exchange for some kind of sentence discount or other bargain as in the recent cases of Reg Dudley and Robert Maynard (for details, see Dudley, 2002; Dodd, 2002a; Campbell, 2002; Woffinden, 1998; Campbell and Hartley-Brewer, 2000; Woffinden, 2001; 1987, p. 343). Another cause of wrongful convictions that stems from the intentions of the agents of the CJS is when they offer of a financial payment for false

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11 This application of the systematic account, then, can be said to reverse the methodology of previous accounts. For existing systematic accounts analyse a data source of successful appeals and generate a range of categories by mapping the reasons for the successful appeal as the cause of the miscarriage of justice. Against this, this analysis works the other way around and starts with a list of categories and applies then to the recent literature of successful appeals to see if they still exist. A potential methodological problem with the conventional approach is that the range of categories that can be discerned are determined by the range of cases that are analysed. Accordingly, important causes might not be identified. Similarly, the potential methodological problem with this attempt is that in applying JUSTICE any categories that they failed to identify will also not be identified. The main point of this application of the systematic account, however, is not to provide a comprehensive analysis of ALL the current causes of wrongful convictions. Rather, the attempt here is to update JUSTICE's research to act as a literature review and to illustrate that successful appeals are the products of a pragmatic approach to the procedures of the CJS and the need to apportion some form of procedural blame so that successful appeals can be achieved.
identification evidence. An example of this in the recent literature on successful appeals is the case of Mahmood Mattan, who was executed at Cardiff prison in September 1952 for the murder of Lily Volpert. As the CACD quashed Mattan’s conviction in February 1998, it was revealed that at his trial the prosecution case relied almost entirely on the evidence of Harold Cover, who claimed that he had seen Mattan in the area where Volpert had been murdered on the night that she was murdered. But, what the jury were not told was that Cover, who was himself jailed for life in 1969 for the attempted murder of his own daughter, had been paid by the prosecution to give his evidence (for details see Wilson, 2001; Lee, 1998a).

Identification evidence can also derive from false accusations that are induced by the hope of obtaining criminal compensation. An example is the case of David Jones, the former manager of Southampton Football Club, who was cleared of care home child abuse when his trial collapsed when an alleged victim refused to give evidence against him (for details see Chrisafis, 2000). The blame for this cause of wrongful conviction is generally attributed to the criminal intentions of individuals outside of the CJS (for a discussion of the phenomenon see Falsely Accused Carers and Teachers, 2002; Action Against False Accusations of Abuse, 2002; Action Against False Allegations of Abuse, 2002a; Woffinden, 2001a; Rose, 2002; Rose, 2002a; Dodd, 2000).

JUSTICE (1989, pp. 15-16) discerned three categories of false confessions: 12 (1) the ‘voluntary group’ who confess to notorious crimes because they want publicity or

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12 In their earlier systematic account Brandon and Davies (1973, pp. 49-65) also discerned three categories of false confession: (1) the ‘mentally retarded’, (2) the ‘young’, (3) ‘people with a psychological predisposition that makes them prone to make false confessions to crimes with which they have no connection’. These categories can also be illustrated by the examples cited.
have fantasies about committing crime; (2) the 'guilt group' who want to be punished for a crime because they have general feelings of guilt about some aspect of their lives; and, (3) a range of 'coerced groups' who are essentially suggestible in personality or in a situation which they find intolerable. In the literature of recent successful appeals all of JUSTICE's categories can be discerned, and are blamed upon the actions of individual police officers who transgress the rules of interrogation.

For example, the case of Andrew Evans, who confessed to the police in October 1972 that he had murdered Judith Roberts resonates with JUSTICE's first category of the 'guilt group'. In December 1997, however, after he had served 25 years in prison, Evan's conviction was quashed by the CACD when new psychiatric evidence showed him to be susceptible to 'false memory' because of his extreme anxiety and hysterical state (see Duce, 1997; Randall, 1997; Vasagar, 2000a).

An example of JUSTICE's third category of suspects who are 'coerced' is the recent case of Stephen Downing. In one of the longest cases of wrongful imprisonment in the history of England and Wales' CJS, Downing's conviction for the murder of Wendy Sewell in February 1974 was quashed by the CACD in January 2002 on the grounds that: 'police officers who questioned him before he confessed had committed "substantial and significant" breaches of the rules on the interrogating suspects' (Rozenberg, 2002). Downing was 17 years old with the mental age of an 11-year old when he was arrested after he had found Sewell unconscious in the Derbyshire cemetery where he worked (see Ward, 2002). At the police station, Downing was interrogated for seven hours without being informed that he was under arrest or that he had a right to consult a solicitor before he finally made oral and written confessions to Sewell's assault (see Rozenberg, 2001). Moreover during Downing's
interrogation, he had, at times, to be shaken awake and the officers took bets on whether he would confess (Vasagar and Ward, 2001). Sewell died two days later without recovering consciousness and, hence, without revealing the identity of her murderer (see, also, Vasagar, 2000; Weaver, 2000; Vasagar, 2002; James, 2002). A possible critique of the Downing case could be that it predated the introduction of PACE (1984). In this context, it has been argued that such miscarriages of justice can no longer occur (Steele, 1997).\textsuperscript{13} However, a post-PACE (1984) example of JUSTICE’s second category of the ‘voluntary group’ has resonance with a phenomenon in the recent literature that revolves around the vulnerability of the young and the predisposition of certain criminal suspects to make false confessions/statements. An example is the case of Ashley King and Billy Waugh who were jointly convicted in 1986 of the murder of Margaret Greenwood. In December 1999, however, the CACD quashed King’s conviction, after he had spent 13 years in prison, on the ground of ‘new psychological evidence of King’s vulnerability during police questioning’ (Dyer, 1999d). Waugh, who was one of the youngest people ever to be convicted of murder within England and Wales, was released from custody in 1987, after the CACD ruled that his conviction was ‘unsafe and unsatisfactory’.

There are numerous examples in the current literature of perjury by a co-accused and/or other witnesses or what might be termed malicious accusations in England and Wales, all of which are attributable to errant individuals who are external to the CJS.

In particular, whilst the discussion above on the potential of financial inducement as a cause of wrongful convictions focused upon teachers and care workers, it must also be noted that teachers and care workers are also subjected to many false accusations for entirely malicious reasons (see Carvel, 1999; 2000). In addition, there have been a number of successful appeal cases involving false allegations of rape including Ashley Pittman (for details see Gibbs, 2000); Austen Donnellan (see Berlins, 2000) and Nicholas Buoy (see Merritt, 2000) who were both successful in appeal against criminal conviction against false allegations of ‘date rape’.

In the current literature on successful appeals a range of subcategories of police misconduct as a cause of wrongful criminal conviction can be discerned, all of which are blamed upon the errant actions of individual police officers. These include police collaborations with major criminals and ‘losing’ key evidence, both in the interests of obtaining convictions of the innocent and in the interests of securing the acquittal of the guilty (Sweeney et al, 2000); drug dealing (Hopkins, 2000c); the misuse of informants (Hopkins and Dodd, 1999); planting evidence (Hopkins, 2000b; Woffinden, 2000); and, fabricating evidence and sabotaging cases (Thompson, 2000; Pallister, 1999). In addition, wrongful convictions can also be caused by prosecution misconduct. For despite the introduction of the CPIA (1996) which introduced the system for advance disclosure aimed at reducing miscarriages (see Green, 2000), a main factor in ‘prosecution misbehaviour’ remains a ‘culture of non-disclosure’ (for details of the case see Gillard and Flynn, 2000). For example, in May 2000 the CACD quashed Kamara’s conviction on the ground that the prosecution failed to disclose over 200 witness statements taken by Merseyside police to the defence lawyers at the original trial (see Carter and Bowers, 2000; BBC News, 2000; Liverpool Echo, 2000).
There is evidence in the recent material on successful appeals that demonstrates the continuing relevance of *bad trial tactics by the defence* as a significant cause of wrongful convictions in England and Wales. For example, *inadequate representation* was blamed in the successful appeals of *John Taylor* (see Criminal Cases Review Commission, 2002) and *Mark Day* (see Criminal Cases Review Commission, 2002a; Woffinden, 2001b). Significantly, the associated problems of poor defence will have a profound impact upon the official statistics on successful appeals to fully represent all wrongful convictions. For an inadequate defence is almost certainly not grounds for appeal, whether the failure lies with lawyers or with expert witnesses (Brandon and Davies, 1973, pp. 101-102; JUSTICE, 1989, pp. 51-55).

The foregoing analysis contributes to the existing terrain, then, by *updating* the most recent analyses of the causes of miscarriages of justice in England and Wales and by showing that all of the causes of wrongful convictions discerned by JUSTICE over a decade ago are still significant today. In addition, as the foregoing analysis was grounded in already achieved successful appeals, it illustrates the point that successful appeals are not achieved through general or speculative arguments to the effect that procedures of the CJS are inherently problematic or prejudicial against certain individuals and/or groups. On the contrary, successful appeals are pragmatically achieved by working within the appellate procedural framework and by showing that the procedures of the CJS were in some way *not* correctly adhered to, either by error or some form of errant intent, and that individual victims of wrongful convictions *were* wrongly convicted. In this sense, as the systematic attempt draws evidence for the causes of miscarriages from already achieved successful appeals, it can be
depicted as operating entirely within the procedures through which successful appeals are produced and within a general theoretical rubric of 'error'. From such a standpoint, existing systematic accounts do not problematise the procedures through which successful appeals are produced. Nor do they consider the possible ways in which certain procedures may cause wrongful criminal convictions and/or act as deterrents to their remedy. Rather, victims of wrongful convictions and their supporters attempt to determine some form of procedural irregularity to account for their wrongful conviction and achieve a successful appeal. Essentially, this is achieved by taking the procedures of the CJS seriously and apportioning blame to an agent of the CJS either through procedural error or transgressive misconduct from a procedure. A main limitation with such accounts is that they are grounded in prevalent definitions of miscarriages of justice that concentrate on successful appeals that are produced through the post-appeal procedures of the CCRC. As such, although systematic accounts map a range of causes of exceptional successful appeals they can be said to be not systematic enough. For they do not map the likely causes of routine and mundane successful appeals. Nor do they map the likely procedural causes of wrongful convictions and/or the possible deterrents to a successful appeal that procedures might present.

In terms of discursive force, such accounts are not very persuasive as they only consider a tiny aspect of all successful appeals – post-appeal exceptional cases – which, as shown in the previous chapter, amount to around 7 cases per year. Moreover, it does not necessarily follow that because a particular exceptional successful appeal was successful on the ground of non-disclosure, for example, that this amounts to prima facie evidence of a non-disclosure ‘iceberg’. In part, this
accounts for the ‘tip of the iceberg’ analogy that prevails. For victims of wrongful convictions, and critics of the system alike, know full well that when blame cannot be apportioned to an individual agent of the CJS, who either intentionally or erroneously failed to adhere to a procedure of the CJS, a successful appeal will, probably, not be achieved. Thus, it is widely held that there are likely to be more wrongful convictions than there are exceptional successful appeals. As the last chapter showed, however, the irony is that by working entirely within the agenda of the CJS in a pragmatic attempt to overturn a wrongful conviction through post-appeal procedures, the forms of counter-discourse against miscarriages of justice that can be levelled against the CJS are inevitably small scale.

**Methodological approaches**

In terms of the methodologies that have informed the existing theoretical perspectives and systematic attempts to map the causes of miscarriages of justice, there are two broad methodological approaches that have been advanced: the *interactionist* and the *structuralist*. On the one hand, the interactionist approach is a micro-sociological attempt to explain the *effectiveness* of the law and measuring the ‘gap’ between the ‘black’ letter of the law and the law in practice. This is the favoured methodology for systematic researches in their attempts to explain the interactionist ways in which individual CJS administrators such as police officers, prosecutors, judges, and so on, have been unintentionally erroneous or have intentionally subverted the law in their attempts to obtain wrongful convictions (for a discussion see Black, 1972; Feeley 1976; McBarnet 1981). The structuralist account, on the other hand, is a less common
macro-sociological approach that focuses on the socio-economic structures and legal-bureaucratic rules of law. In so doing, it asserts the political function and permissive character of legal rules to legitimate forms of behaviour by the agents of the system that cause miscarriages (for examples of this approach see McBarnet, 1981; Jefferson and Grimshaw, 1987). This is the favoured approach of critical theorists who attempt to locate the causes of miscarriages of justice within the context of broader forms of discrimination that exist within society. In addition, and in between these two opposing approaches, McConville et al (1991, p. 11) followed Henry (1983, p. 62) and applied an integrated approach that attempted to unite the interactionist and structuralist approaches to explore 'the interpenetration of the micro-structures with the macro and vice versa.'

Following, the kind of methodological approach adopted by McConville et al (1991), the remainder of this chapter considers a number of procedures and practices of England and Wales’ CJS that might contribute to the miscarriage of justice phenomenon by causing wrongful convictions and/or presenting barriers, obstacles or disincentives to an eventual successful appeal: procedural barriers that cannot be overcome by victims of wrongful convictions; procedural obstacles that can be overcome by some victims of wrongful convictions but the difficulties mean that there will inevitably be some victims that will not achieve a successful appeal; procedural disincentives that serve to deter victims of wrongful criminal conviction from even making an appeal. This marries the systematic account that presently fails to problematise the procedures of the CJS that might cause wrongful convictions and/or act as deterrents to a successful appeal with more critical theoretical perspectives that do problematise the procedures of the CJS but do not presently engage with statistical
analyses of the likely extent of wrongful convictions. Such a union shifts existing expressions of the systematic account onto a new theoretical and methodological footing that can serve to strengthen the forcefulness of forms of counter-discourse against miscarriages of justice. For it demonstrates that there are likely to be many wrongful convictions that are caused by the procedures of the CJS that will never achieve a successful appeal and, hence, the official statistics do not present a comprehensive depiction of all wrongful convictions. This consideration, however, will not be exhaustive in the sense that every procedure and/or practice will be covered. Rather, some of the more significant procedural candidates that cause wrongful convictions and/or act against a successful appeal are analysed to show that there are indeed possible causes of wrongful convictions that might never feature in the official indices of successful appeals against criminal conviction.

**Procedural causes**

*Plea bargaining* is, perhaps, the most obvious and widespread cause of wrongful convictions and *procedural barrier* to a successful appeal that has a profound impact upon the official statistics to adequately depict the full extent of miscarriages of justice in England and Wales. Plea bargaining can be defined as a judicial practice whereby judges and barristers strike a secret deal in return for a guilty plea (Gibb, 2000). Accordingly, plea-bargaining can be conceived as interactionist in the sense that it is determined though the negotiations of individual social actors. Plea-bargaining, however, is also a routine procedural practice of the CJS and, hence, it is also appropriate to conceive and analyse it within an integrated methodology. In their
discussion of plea-bargaining in the US, Huff et al (1996) started with the observation that perhaps the most puzzling of all wrongful conviction cases, as well as the least publicised, are those in which innocent people plead guilty. After all, asked Huff et al (1996), why would a perfectly innocent person plead guilty? In response, Huff et al (1996) drew from a social psychological experiment conducted by Gregory et al (1978) and discerned ample reasons why some innocent people might plead guilty. For example, criminal defendants might be more likely to accept plea-bargains when they are faced with a number of charges or when the probable severity of punishment, as they perceived and feared it, was deemed to be great (Huff et al, 1996, p. 73). Moreover, innocent criminal defendants in the US who face execution might be induced to make deals. Even though they might face long prison sentences, such defendants can live in the hope that eventually the truth of their innocence will be discovered and they will be freed (Huff et al, 1996, p. 73). As for the lack of publicity in plea-bargain cases in the US, Huff et al (1996, p. 73) noted that one of the reasons is probably that most plea-bargains result in immediate freedom, suspended sentence, or perhaps prohibition and hence in such cases there is no aftermath, no continued investigation, no exoneration. As Huff et al (1996, p. 73) pointed out, in the US, the revocation of a guilty plea is legally permitted only under limited conditions, for example, when a judge refuses to abide by a plea-bargain that has been made between the defendant, through defence counsel, and the prosecution. Ordinarily, a plea bargain closes the case.

Although the practice of plea-bargaining is widely acknowledged in the US (see also, for example, Guidorizzi, 2001; Mather, 1979; Heumann, 1978), there is much controversy, indeed secrecy, about the use of such a practice in the judicial
pronouncements of England and Wales' judiciary. In line with a court ruling of 30 years ago which stated that plea bargaining should not occur (Gibb, 2000), officially plea-bargaining does not take place in English courts (Dyer, 2000b). Despite this, the practice of plea-bargaining was exposed to be widespread in two criminal cases that were widely publicised in 2000 (see Gibb, 2000).

One of those cases was that of Robin Peverett, the former headmaster of Dulwich College Preparatory School in Kent, who walked free from Maidstone Crown Court in July 2000 with an 18-month suspended prison sentence after pleading guilty to nine offences of sexual molestation between 1969 and 1977 (see, for example, Ahmed, 2000), an offence which could have carried a maximum custodial sentence of ten years (see Weale, 2000). Peverett's lenient sentence, it transpired, was the result of a bargain that had been struck between the defence and prosecution lawyers with the co-operation of the trial judge in return for his guilty plea (see, for example, Dyer, 2000a; Weale, 2000).

In response to the public fury that accompanied the sentence in the Peverett case, the Attorney-General, promptly restated the earlier court ruling that plea-bargaining is a breach of a barrister’s professional conduct and is banned (Gibb, 2000). In addition, the Attorney General also referred the case to the CACD on the grounds that the sentence was too lenient. The CACD ruled, however, that the sentence stand as the prosecution’s involvement in the ‘lamentable’ plea-bargain, in effect, barred the crown from going back on the deal (Times Law Report, 2000). More specifically, on the general practice of plea-bargaining, the CACD judgement issued by Lord Justice Rose stated that:
'There were, of course, wholly exceptional cases [of which the Peverett case was not one] where that [plea-bargaining] might properly be done, for example if a defendant were dying... Apart from such wholly exceptional cases, no good usually came of this kind of activity... [which] affronts the public' (Lord Justice Rose cited Times Law Report, 2000).

This indicated that, contrary to the Attorney General's earlier statement, plea-bargaining is not an altogether breach of a barrister's professional conduct, nor is it entirely banned. On the contrary, then, it is truer to say that plea-bargaining is a legitimate procedure of England and Wales' CJS which should only come into play under rigid 'exceptional' circumstances. This served to fuel the debate on plea-bargaining and the possible 'exceptional' circumstances of its applicability. For example, retired Recorder, Geoffrey Davey, distinguished between plea-bargaining where the effect is to 'pervert the course of justice', and the kind of plea-bargaining, which was commonplace during his judicial career, that might elucidate an early guilty plea, thus achieving the ends of justice and saving court time and expense (Davey, 2000). More recently, Lord Justice Auld's Report into the reform of the criminal courts recommended that there should be a 'graduated scheme' of discounts so that the earlier a guilty plea is made the lighter the sentence. To aid in this process, the judge would also be able to indicate in advance the sentence for a guilty plea (Lord Justice Auld's recommendations cited Travis, 2001; Dyer, 2001a).

Strictly speaking, whilst the events of, and the debate surrounding the Peverett case served to shed some light upon the socio-legal realities of plea-bargain practice, the Peverett case was not a miscarriage of justice. To be sure, Blackstone's principal: 'better that ten guilty persons escape than one innocent suffer' is still a foundational
stated aim of England and Wales' CJS. Accordingly, the system is weighted to the extent that the non-conviction of the factually guilty is not normally conceptualised as a 'miscarriage' of the CJS. But, having established the existence and widespread practice of plea-bargaining, it must be noted that it can work both ways. As Huff et al (1996) observed, it can also be about the inducement of innocent people to plead guilty to criminal offences that they did not commit, which would constitute a wrongful conviction, however defined.

Such was the finding of Baldwin and McConville's (1977) classic research of the extent to which plea-bargaining occurred in the Birmingham Crown Court. In particular, Baldwin and McConville (1977) showed that plea-bargaining was not unusual in the Birmingham Crown Court, that the bargains that are negotiated are not always in the defendant's interests, and that the processes that are involved in the bargain being struck sometimes went beyond the publicly acknowledged guidelines on plea-bargaining as they existed within the law of England and Wales at the time. Perhaps, more disturbingly Baldwin and McConville's (1977) research also showed that from the defendant's perspective the process of plea-bargaining may be perceived as involving pressure to plead guilty to charges of which they regard themselves as innocent (see Campbell and Wiles, 1977, p. ix). In their analysis, Baldwin and McConville (1977) found that a fundamental source of judicial defect is the customary 'sentence discount' that is awarded to defendants who indicate their apparent repentance by pleading guilty. The present rules on sentence discount are that judges and magistrates are required, when sentencing an offender who has pleaded guilty, to take into account the stage at which the guilty plea was entered, and the circumstances in which the plea was made. If a discounted sentence is passed, this
must be stated in court. The CACD has stated that a discount of one-third should normally be given for a timely guilty plea (Chapman and Niven, 2000, p. 37). As in Davey’s (2000) recent assertions on plea-bargaining cited above, Baldwin and McConville (1977) saw the argument in favour of the sentence discount being centred around an attempt to discourage defendants from wasting the valuable time of the court by needlessly contesting lost causes. As Williams (1976) put it:

‘...offenders who have no defence must be persuaded not to waste the time of the court and public money; pleas of guilty often save the distress of witnesses in having to give evidence, as well as inconvenience and loss of time; and in present conditions such pleas are essential to prevent serious congestion in the courts’ (Williams cited Baldwin and McConville, 1977, p. 106).

Against this, Baldwin and McConville (1977) turned the concept of sentence discount on its head by asserting that it is customary within the law of England and Wales to boast of a person’s fundamental right to require the prosecution to prove their case beyond reasonable doubt, yet person’s are in effect penalised when the prosecution are able to do so (Baldwin and McConville, 1977, p. 108). Moreover, as Baldwin and McConville (1977) drawing from Trasler (1976) pointed out:

‘Counsel and judges...may...complain of the waste of their time. Yet their time (unlike that of the accused, should he (sic) be convicted) is sufficiently repaid...the cost falls not upon them, but upon the people at large, who may be content to pay a price for the assurance that others will not be convicted upon inadequate evidence...To impose so severe a penalty [an extra third to the sentence] for wasting the time of a group of notably well-paid men (sic) seems excessive (Trasler cited Baldwin and McConville, 1977, p. 109).
In the context of the official statistics on successful appeals, plea-bargaining has an undoubted effect on their accuracy. An effect that makes a precise calculation impossible, but which, nonetheless, illustrates that the official statistics on successful appeals do not fully represent England and Wales' miscarriage of justice 'iceberg'.

The parole deal is another major procedural barrier to a successful appeal that has an impact upon the accuracy of the official statistics. In his analysis, Hill (2001) defined the parole deal as very much akin to a plea bargain for it attempts to make innocent prisoners acknowledge guilt for crimes that they did not, in fact, commit. Significantly, for Hill (2001), both offer the same essential deal in an attempt to obtain judicial finality in cases: 'We say you are guilty. Admit it and you get something in return'. The rationale behind the parole deal is connected to a range of ‘cognitive skills’, ‘thinking skills’, ‘reasoning and rehabilitation’ and various other ‘offending behaviour’ programmes and courses that have come to dominate regimes within prisons in England and Wales over the last decade. These courses are almost universally based on the work of psychologists in the correctional service of Canada and work from the premise that as offenders ‘think’ differently to law abiding citizens, once their ‘cognitive distortions’ are corrected then they could be released with a reduced risk of recidivism (Wilson, 2001a). The effect is that whilst the prison service acknowledges that it is unlawful to refuse to recommend release solely on the ground that a prisoner continues to deny guilt, it tends to work under the simultaneous assumption that denial of offending is a good indicator of a prisoner’s continuing risk. Accordingly, prisons proceed on the basis that convictions are safe, which, in principle, seems an entirely reasonable and practical policy. In practice, however, this serves to exacerbate the harmful consequences of the injustice already done to the
wrongly convicted prisoner (Woffinden, 2000b; 2001d; Hill, 2002; Hill, 2002a; Berlins, 2002). In consequence, prisoners who protest their innocence experience a range of discriminatory practices and inevitably serve longer sentences, as the basis for release under the parole system is that prisoners attend offending behaviour courses and acknowledge their offence that they have not in fact committed. For example, Stephen Downing whose conviction was quashed in January 2002 spent 27 years incarcerated for an offence which he might normally have served 12 years had he not been classified ‘IDOM’ – in denial of murder. His continued denial of a murder that he did not commit meant that he was also deprived of better jobs, training opportunities and parole consideration (see Editorial, 2002a). To emphasise the point, Hill (2002b) reported that: ‘All the prison officers knew Stephen [Downing] was innocent. They were begging him to say he had done it [murdered Wendy Sewell] so they could release him.’

In a similar vein, Wilson (2001a) conceptualised the situation as one which political philosophers would describe as a throffer – the combination of an offer or promise of a reward if a course of action is pursued, with a threat or penalty if this course of action is refused. This plays out with the prisoner being offered an enormous range of incentives including more out-of-cell time, more visits and a speedy progress through the system, to follow the course of action desired by the prison regime – to go on an offending behaviour course to ensure that the prison’s performance target is met. This is made to appear as an entirely rational and subjective choice, especially as it will be the basis for ensuring early release through parole. At the same time, if the prisoner does not go on a course, the threat of continued imprisonment remains, as the prisoner will be deemed too much of a ‘risk’ for release at all. Accordingly, the practice to
treat prisoners more harshly who maintain their innocence, whilst at the same time rewarding prisoners to accept their ‘guilt’ can be conceived as an additional cause of miscarriages of justice that may never come to light. For a likely consequence will be for many innocent prisoners to ‘acknowledge’ their ‘guilt’ in the interests of a more tolerable prison experience or existence and early release through parole. Once embarked upon this course of action, however, not only will it be virtually impossible for the wrongly imprisoned innocent to overturn their wrongful conviction, there will also be a profound impact upon the number of successful appeals that it is possible to quantify.

The Criminal Procedure and Investigations Act (1996) (CPIA) serves to facilitate wrongful convictions that will be almost impossible to overturn and, hence, impact upon the ability of the official statistics of successful appeals to depict all wrongful convictions. Under the CPIA (1996) a three-stage disclosure process between prosecution and defence was introduced whereby the prosecution must firstly:

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor’s opinion might undermine the case for the prosecution against the accused; or
(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a) (s. 3(1)).

Once such materials or such a statement has been disclosed to the defence, the defence must then provide some indication of the nature of the defence case. This takes the form of a ‘defence statement’ with the following objective:
(a) setting out in general terms the nature of the accused’s defence;

(b) indicating the matters on which he (sic) takes issue with the prosecution; and,

(c) setting out, in the case of each such matter, the reason why he (sic) takes issue with the prosecution (s. 5(6)).

Once such a defence statement has been submitted, there follows a re-examination of the unused material by the prosecution who must:

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might be reasonably expected to assist the accused’s defence as disclosed by the defence statement given under section 5 or 6; or,

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a) (s, 7(2)).

The introduction of the CPIA (1996), then, can be conceived as introducing a procedural regime for advance disclosure that is at odds with the operational practices of police officers, the CPS and defence solicitors (for a discussion see, for example, Davies, Croall and Tyrer, 1998, p. 12). For the Act introduced a new and in many ways more restrictive scheme for how material is handled. Whereas previously the defence could go and inspect all the material, now in most cases a police officer will decide the materials that undermine his or her own case and only then, in theory, pass it on to the accused. As Bennathon (2000) noted, the CPIA (1996) “is an awful and dangerous piece of legislation, but just how bad it is tends to get hidden by its
technical nature.’ As a consequence, ‘errors’, whether inadvertent or otherwise, may not be recognised and the result is a system that presents real risks of future miscarriages of justice (see Taylor (2001). The CPIA (1996) also questions the possible limits of the notion contained in the official account of the prosecution and defence parties’ ability to freely present their respective ‘opposing’ or ‘adversarial’ cases in court ‘as they see fit’. For under the CPIA (1996), the case must be substantially set out before it gets to court (see Green, 2000; Emmerson, 1999; Woffinden, 1999). In concrete terms, questionnaires by the Law Society (LS) and the British Academy of Forensic Sciences (BAFS) have produced a list of over 200 examples of wrongful criminal conviction caused through non-disclosure (see Langdon-Down, 1999). Thus, although the CPIA (1996) was a legislative consequence of the cases of the Guildford Four and Judith Ward, in which key evidence pointing to the defendant’s innocence was not disclosed to the defence by the prosecution, the CPIA (1996) is, probably, causing more miscarriages (Dyer, 1999c; 2000c; Rowe, 2000). In this context, perhaps the most obvious consequence of the CPIA (1996) is that no one knows how many miscarriages of justice are being caused simply because no one knows how much material is being withheld (Woffinden, 1999). Accordingly, although the CPIA (1996) can be conceived to cause wrongful convictions and act as a barrier to a successful appeal it is impossible to know how many successful appeals are not achieved.

The Criminal Cases Review Commission can be conceived as presenting some of the most significant potential procedural obstacles to a successful appeal. In particular, a major problem with the CCRC emerges in an analysis of the procedures when allegations of police misconduct or error are made. For at such time it is normal
CCRC practice to send such allegations to the original investigating force/officer(s) for comment. As Green (2000a) notes, none of this is in itself unreasonable. For anyone against whom allegations are made should have the opportunity to know of those allegations and to respond to them. The main problem, however, is that if police officers have indeed done what they are alleged to have done, this procedure allows them the opportunity to destroy any evidence that there might be in support of those allegations (Green, 2000a). Another procedural aspect of the CCRC that mitigates against successful appeals, and affects the reliability of the official statistics, can be derived from an analysis of the CCRC’s delays in referring meritorious appeals back to the CACD. For, as James (2002a, p. 5) noted, when assessing an appeal mechanism, it is necessary to do so in the light of its ability to accord fast and fair resolutions to those cases where justice failed the first time around. In such a context, James et al’s (2000, pp. 143-146) research showed the CCRC’s ability to deal with a daily intake of around four applications against a best disposal rate of two has resulted in delays and backlogs in the post-appeal processes of the CCRC that indicates a profound injustice which can be conceived to be in contravention of Article 5 s(4) of the HRA (1998) and possibly Article 6 of the ECHR, as the CCRC is failing in its task of providing fast and fair resolution to miscarriage of justice victims.

Finally, a major procedural disincentive to a successful appeal in cases of wrongful conviction is the time loss rule. In essence, the time loss rule refers to the information provided to applicants who intend to make appeals against their criminal convictions that if their appeal is ultimately unsuccessful it could result in substantial increases to their sentence. Under the time loss rule when the criminally convicted apply for an appeal they are advised that if their appeal is ultimately unsuccessful it could result in
substantial increases to their sentence. Very little research exists about the time loss rule. Research conducted by JUSTICE (1994, p. 7), however, found that 'the effect is to transform a minor check on wholly groundless applications into a major barrier in some meritorious cases'. The time loss rule, then, discourages appeals against wrongful convictions, and further illustrates the inability of the official statistics to adequately depict all wrongful convictions that occur.

Conclusion

This chapter has synthesised the systematic approach to the causes of miscarriages of justice with critical theoretical and methodological approaches. In so doing, existing depictions of the wrongful criminal conviction 'iceberg' were extended to include a range of significant procedures of the CJS that can cause wrongful convictions and/or act as deterrents to overturning those wrongful convictions through a successful appeal. What this chapter has not determined, however, is the precise number of wrongful convictions that are engendered by the routine operations of the procedures of the CJS that were discussed. On the contrary, it has demonstrated that a precise figure of wrongful convictions is impossible to arrive at. But, a precise depiction of all wrongful convictions was not the object of this chapter. Rather, the primary purpose was to emphasise that there are indeed procedures that cause wrongful convictions and/or act as deterrents to their remedy through a successful appeal. This analysis can then be used as a tool of analysis against the official indices of successful appeal to show that they can be conceived to be only a partial indicator of England and Wales's miscarriage of justice phenomenon. Hence, the official statistics on successful appeals
against criminal conviction are not an exhaustive or comprehensive indicator of England and Wales' miscarriage of justice 'iceberg'.

So far, I have been concerned to question the limits of prevailing definitions of miscarriages of justice, their scale, and understandings of their causality. But when JUSTICE inadvertently set in motion a certain kind of discursive orthodoxy about the nature and the extent of the miscarriage of justice phenomenon, it also shaped the character of the counter-discursive voices aiming at significant CJS reform. In Part Two of the thesis I examine some of these principal voices in the debates about the morality of CJS procedure and reform. I make a number of constructive criticisms of each of these voices, and in line with my more radically inclusive approach to the whole terrain of miscarriages of justice, I argue overall that the many voices which echo the harms associated with mundane and routine successful appeals against criminal conviction need to be mapped and attended to in a developing critical perspective.
II

Voices
The governmental voice

Introduction

This chapter begins by noting that England and Wales’ CJS is a case-law system within which procedural reform is not effected through speculative critique but, rather, through showing procedural error or irregularity in concrete cases, i.e. by showing that particular individuals are being harmed. In such a context, an historical analysis of governmental responses to miscarriages of justice is conducted and what was termed a ‘tradition of criminal justice system reform’ in the introduction is further explicated as a kind of ‘governmental voice’ which responds to forms of counter-discourse in a particular official way. Interestingly, however, the governmental voice shares with ‘counter-voices’ the assumption that miscarriages of justice are exceptional cases of successful appeal that have failed to be overturned through existing appellate procedures. Given the arguments in Part One, this constitutes a crucial limitation if the terrain of wrongful criminal convictions is to be properly understood.

There are four parts in the development of this analysis. First, an outline of Foucault’s (1991) analysis of the ‘art’ of government is presented and a useful ideal-type of ‘good’ government is discerned that can assist in evaluating the governmental voice in question. Then, an historical analysis of governmental legislative responses to specific
successful appeal cases is conducted. In so doing, a broader analysis of the operations of the governmental voice is provided. Following this, Foucault's thesis on power, knowledge and resistance is outlined to show that procedural reforms can be seen as intrinsically bound up with forms of counter-discourse – counter-voices – that are grounded in successful appeals that illustrate new procedural problematics. Finally, the limits of the focus upon procedural reform of the CJS are discussed in the context of the thousands of victims of wrongful criminal convictions that the reforming gaze overlooks.

The art of 'good' government

Foucault's (1979) research found that from about the 16th century a new form of political structure has been developing - the modern state. However, Foucault (1979) argued, the state is not to be regarded in the conventional way, as a kind of power which ignores individuals in the interests of the totality, nor in the Marxist sense, as being concerned only with the interests of a particular class group in society. Rather, state power is both an 'individualizing and a totalizing form of power' (Foucault, 1979; Rabinow, 1991, p. 14; Gordon, 1991, p. 3). Foucault conducted a history of government and argued from the middle of the 16th Century a series of treatises began to appear which not only concerned the traditional questions of the nature of the state, nor even with the problems of how the prince could best guard his power. Their scope, Foucault pointed out, was much wider concerning the 'art of government', in almost every area of social life such as the 'governing of a household, souls, children, a province, a convent, a religious order, or a family' (Rabinow, 1991,
p. 15). Political reflection is, thus, broadened to include 'almost all forms of human activity, from the smallest stirrings of the soul to the largest military manoeuvres of the army' (Rabinow, 1984, p. 15). As Rabinow (1984, p. 16) has argued, the treatises on government are linked directly to the rise and growth of centralised state administrative apparatuses, which would evolve in the following century into all the detailed knowledge of the resources at the state's disposal.

In his analysis, Foucault's history of government also emphasised the centrality of statistical forms of analysis in the modes of government that distinguish the modern world and the ways in which they are (should be) used to enhance the wellbeing of the population. In particular, Foucault (1979, pp. 14-16) argued that from about the 18th century on, the 'arts of government', which replaced Sovereign authority, emerged as a consequence to the problem of population and 'consist(ed) essentially of the knowledge of the state, in all the different elements, dimensions and factors of its power, termed precisely "statistics", meaning the science of the state'. Statistics, argued Foucault, gradually revealed that the population had its own lawlike regularities such as its own rate of death, of suicide, of disease, its own cycles of scarcity, etc. He asserted that under the 'art', 'population' management became the ultimate interest of government, embracing the welfare of the population to improve its conditions, increase its wealth, longevity, health etc. Hence individual interest and that of the population as a whole becomes both the target and the instrument of government (Foucault, 1979, p. 18). For Foucault, (1979, p. 17) 'statistics...make it possible to quantify the phenomena specific to population', such that 'the art of government and empirical knowledge of the state's resources and condition - its...
statistics - together formed the major components of a new political rationality’ (Rabinow, 1984, p. 16).

From such a perspective, governmental rationalities are intrinsically linked to developments in statistical forms of knowledge and to the powers of governmental expertise. Existing modes of power are thus not so much a matter of ‘imposing’ constraints or limitations upon citizens, but become rather a matter of ‘making up’ citizens capable of bearing ‘a kind of regulated freedom’ (Rose and Miller, 1992, p. 174). Thus, personal autonomy ‘is not the antithesis of political power, but a key term in its exercise, the more so because most individuals are not merely the subjects of power but play a part in its operations’ (Rose and Miller, 1992, p. 174). To be sure, to regard the state as some kind of ‘monstre froid’ ‘confronting and dominating’ is to ‘over-value the problem of the State’ (Rose and Miller, 1992, p. 174. And, of primary importance ‘is not so much the State-domination of society, but the ‘governmentalization’ of the State’ (Rose and Miller, 1992, p. 175). This highlights a certain paradox of ‘governmentality’. For whilst modern liberalism is usually defined as a political philosophy which limits the legitimate exercise of power by political authorities over society, it, at the same time, also obliges the government with regard to the organisation and wellbeing of society (Rose and Miller, 1992, p. 179).

‘Good’ government, then, need not be conceived as a conspiratorial, negative or coercive form of control or domination over a population or domain of government. On the contrary, legitimate government is obliged to take as its object the enhancement of the population or domain to which it is mandated to be responsible. As Foucault (cited Rose, 1996, p. 44) has pointed out: ‘legitimate government will not
be arbitrary government, but will be based upon intelligence concerning those whose wellbeing it is mandated to enhance’ (also Foucault, 1991, p. 100). In this process, statistics on all aspects of the domain to be governed or managed are drawn from that inform government about the needs of the population to be managed. To be sure, ‘pastoral’ government attains the ‘intelligence’ to enhance the wellbeing of those individuals and domains for which it has responsibility through new forms of rationality that also emerged alongside the replacement of ‘sovereignty’ by ‘government’ that are intrinsically connected to the production and deployment of statistical forms of knowledge, calculation, categorisation and expertise (see, for example, Hunt & Wickham, 1994, p. 27; Foucault, 1991, p. 96).

Accordingly, these developments – the emergence of governmental rationality and what might be termed statistical forms of reason – ushered in a new regime of power, namely ‘bio-power’. In order to manage a population well, governmental rationality requires detailed knowledge about the population or the domain to which it is directed. Bio-power made possible the fostering of life and the growth and care of populations by bringing ‘life and its mechanisms into the realm of explicit statistical calculations and made knowledge-power an agent for the transformation of human life’ (Foucault cited Rabinow, 1984, p. 17). This is provided through a whole array of governmental devices and techniques such as school, factory, health and/or prison inspectorates, royal commissions, departmental committees of inquiry, social surveys, journalistic reportage and so on (Osborne, 1996, p. 114) that are utilised to visualise and statistically represent populations and societal domains. The purpose of such knowledge being to inform government as to the norms proper to the particular domain, rather than to provide the direct rationale for government itself (Osborne,
1996, p. 101). It is from such a perspective that the next section conducts a historical analysis of governmental interventions into the legislative framework of the CJS to correct procedural errors that were exemplified by certain exceptional successful appeals against criminal conviction. The question is: does the tradition of criminal justice system reform represent a governmental concern with the wellbeing of the population?

The tradition of criminal justice system reform

‘All law-abiding citizens have a common interest in a system of criminal justice in which the risks of the innocent being convicted and the guilty being acquitted are as low as human fallibility allows. For a person to be deprived of his or her liberty, perhaps for many years, on account of a crime which was in fact committed by someone else is both an individual tragedy and an affront to the standards of a civilised society...mistaken verdicts can and do sometimes occur and our task [when such occasions arise] is to recommend changes to our system of criminal justice which will make them less likely in the future’ (Royal Commission on Criminal Justice, 1993, pp. 2-3).

The above quotation derives from the most recent major governmental review of the CJS – the RCCJ. It underlines the fact that the loudest voice on miscarriages of justice has been directed towards exceptional cases of successful appeal exemplifying new procedural ‘errors’, and the fact that procedural reform is case-driven, being a combination of common law – decisions of judges of the higher courts – and of statute law enacted or authorised by ‘Acts of Parliament’ (see Criminal Justice System, 2001). It is, perhaps, not surprising, then, that an analysis of public/media concerns, social or legal debates, or, indeed, governmental legislative responses to the
perceived ‘problem’ of miscarriages of justice shows that they have correspondingly tended to concern only a comparatively small number of high profile cases. For the consensual concern with the corrective reform of CJS procedural errors has dictated that it has been necessary to mobilise behind specific miscarriage of justice cases that exemplify the most significant problematic procedural aspect of the CJS at any particular time (see also Greer, 1994, p. 59). Thus, the RCCJ was not established in response to a crisis caused by an excessive number of successful appeals but, rather, in response to the specific cases of the Birmingham Six, the Guildford Four, the Maguires and Judith Ward (see Emmerson, 1999), which exemplified a procedural problem with returning potentially meritorious cases back to the CACD when appeal rights had been exhausted (Royal Commission on Criminal Justice, 1993, pp. 1-6).

Moreover, a history of the CJS shows that whichever era one chooses for analysis, the governmental voice on the perceived problem of miscarriages of justice has been articulated around exceptionality. In illustration, four of the most important legislative events that have defined the historical phasing of the CJS are:

- the establishment of a Court of Criminal Appeal under the Criminal Appeal Act (1907) (CAA (1907));
- the first step towards the permanent abolition of capital punishment under its temporary abolition in the Murder (Abolition of Death Penalty) Act (1965) (MADPA (1965));
- the introduction of formalised police codes of practice and conduct under PACE (1984) (Police and Criminal Evidence Act, 1985); and,
- the establishment of the CCRC (Criminal Cases Review Commission Annual Report, 1998-2000) an ‘independent’ body responsible for investigating suspected

Crucially, each of these legislative events was connected with an extra-judicial inquiry previously set up by the government to address the problem of miscarriages of justice as perceived at the time. The CAA (1907) was connected with a Committee of Inquiry, which reported in 1904, set up in response to the Beck case (see Report of the Committee of Inquiry into the Beck Case, 1904). The MADPA (1965) was connected to the parliamentary debate about the establishment, terms of reference and recommendations of the Royal Commission on Capital Punishment (1953) (RCCP (1953)) (see Block & Hostettler, 1997; Royal Commission on Capital Punishment, 1953). PACE (1984) was an outgrowth of some of the recommendations of the RCCP (see Report, Royal Commission on Criminal Procedure, 1981). And, the CAA (1995) was a consequence of some of the recommendations advised by the RCCJ (see Report, Royal Commission on Criminal Justice, 1993).

Significantly, although each of these events and inquiries followed long legal and political campaigns, they were not initiated because of campaigning pressures alone. Nor were they a consequence of the overwhelming weight of the statistics on successful appeals. On the contrary, they were in direct response to the pressures of specific cases of successful appeals. Such cases being those that provided the exemplifying counter-discourse of the most problematic aspect of the procedural framework of the CJS as perceived at that particular time that was able to induce a public crisis of confidence in the CJS and activate governmental intervention.
The establishment of the Court of Criminal Appeal

Throughout the nineteenth century there was a longstanding Parliamentary campaign for the establishment of a court capable of hearing criminal appeals (see Colvin, 1994). This was fuelled by the recurrence of miscarriage of justice cases that were evidenced by HO pardons (see Pattenden, 1996, pp. 5-33). Despite this, the eventual establishment of the Court of Criminal Appeal in 1907 was attributable to the combined counter-discursive public pressures exerted by the cases of Maybrick (see Editorial, 1889a – Editorial, 1889m; MacDougall, 1889; Moulton, 1889; F. G., 1889; Bourke, 1889; Blyth, 1889; Herbert, 1889; Times Parliamentary Proceedings, 1889; Barrister of Eight Years Standing, 1889), Edalji (Lihiri, 2000) and Beck (see Editorial, 1904a – Editorial, 1904f; Editorial, 1907). These cases exemplified the urgent need for a court of criminal appeal as they provided the necessary counter-discourse to the legal sphere that people such as Edalji and Beck were being wrongly imprisoned and others, as exemplified by the Maybrick case, were given the death penalty for crimes that they probably did not commit. Taken together the Maybrick, Edalji and Beck cases served to diminish public confidence in the CJS to the extent that a committee of inquiry was established to investigate the Beck Affair. Subsequently, a court of criminal appeal had to be established to dispose of the public crisis and restore confidence in the government of the CJS (see Woffinden, 1987). Indeed, in announcing the establishment of the Criminal Court of Appeal under the CAA (1907) the then Home Secretary, Herbert Gladstone, told the House of Commons that 'the only way to reverse the public belief that miscarriages of justice were an every-day occurrence...was the establishment of a court capable of hearing appeals of fact, law
The abolition of capital punishment

Following the establishment of the Court of Criminal Appeal in 1907 the concern that people were being, or could be, convicted of criminal offences, and in some cases executed, without an appeal soon dissipated from the public consciousness and the ‘normal’ assumption that the CJS was operating correctly was re-established. The belief that the CJS now contained the necessary legislative safeguards to correct wrongful criminal convictions created what in Elias’s (1978) analysis could be termed a new ‘figuration’ of criminal justice. This period of ‘normality’, however, would be temporary, lasting only until the success of the Court of Criminal Appeal could be determined and the knowledge entered the public domain that even with a criminal appeal system people were still being given the death penalty in questionable circumstances. This intensified the long-standing campaign for the abolition of capital punishment but did not, in and of itself, result in abolition (see Capital Punishment UK, 2002). For abolition to be achieved cases that exemplified the problem, thus providing the necessary counter-discourse to the systemic practice of capital punishment, would have to be disseminated to the public to induce the prerequisite public crisis of confidence in the CJS needed to activate corrective governmental response. That necessary counter-discourse would revolve around the cases of Bentley, (see Campbell, 1998; Parris, 1991; Trow, 1990), Evans (see Kennedy, 1961) and Ellis (see Jones, 2001; Travis, 1999; Hancock, 1963) which together exemplified
to the public the question of the justness and/or appropriateness of the continuance of capital punishment (see, for example, Ryan, 1983, pp. 10-16; Christoph, 1962). In disposing of the public crisis surrounding the cases of Bentley, Evans and Ellis the MADPA (1965) temporarily abolished capital punishment for a five-year period (see Block and Hostettler, 1997). Upon its expiry in 1969, capital punishment was permanently abolished (see Callaghan, 1997).

The Police and Criminal Evidence Act (1984)

With the abolition of capital punishment a space was provided wherein critical thoughts could turn to other potential CJS procedural problems. Despite longstanding allegations of police corruption and calls for police accountability (see, for example, Chibnall, 1979, pp. 138-142; Manning, 1979, p. 45; Miller, 1979, pp. 21-22; Jefferson and Grimshaw, 1984, pp. 71-72; Reiner, 1985; Punch, 1985), guidelines for the conduct of police conduct could not be formally introduced. Once again, what was required was a case or small cluster of cases that exemplified improper police conduct, thus providing the counter-discursive evidence to induce a public crisis and subsequently prompt government to introduce corrective CJS legislative reform. That case turned out to be the Confait Affair (see Price and Caplan, 1976; Kettle, 1979; Price, 1985) which exemplified the need for police accountability, both in the interests of greater reliability of evidence and the enhancement of suspect's rights (Report, Royal Commission on Criminal Procedure, 1981, para, 10.1). In particular, the Fisher (1977) inquiry into the case had been especially critical of the police practices that led to the wrongful convictions of the three youths for the murder of Maxwell Confait.
The whole prosecution, argued Fisher, (1977) was geared simply to providing the case against the boys. As a result, the RCCP’s main recommendation was governmentally translated into PACE (1984) (for a discussion see Leigh, 1985; Birch, 1985; Gibbons, 1985; Mirfield, 1985; Munro, 1985) and the public crisis of confidence was duly disposed of.

*The establishment of the Criminal Cases Review Commission*

Following the introduction of police codes of conduct under PACE (1984), the next significant CJS procedural problematic to emerge was the need for an independent body for the investigation of suspected or alleged miscarriages of justice once existing domestic appeal processes had been exhausted. The limits of the appeal process in terms of the criteria of fresh evidence coupled with the apparent reluctance of the HO to refer cases back to the CACD raised further concerns about the safety of the high profile criminal convictions of the *Guildford Four*, the *Birmingham Six*, the *Maguires*, and so on. In response, the government set up the RCCJ and subsequently translated its main recommendation into the CCRC through the CAA (1995), and, once again, the public crisis of confidence in the law of appeals was dissolved.

*Power, knowledge and resistance*

In assessing the governmental voice in the tradition of criminal justice system reform, Foucault’s (1977; 1979) thoughts on power and resistance are again useful. For it can
be conceived as expressing a form of what might be termed *procedural reform resistance* to existing forms of CJS power through the following discursive rules. At particular times, cases of successful appeals that exemplify problematic aspects in the legislative framework of the CJS attain a high profile media status. In consequence, the government, legal and public/media spheres are thrown into chaotic collision as the counter-discursive forces inform government of a crisis of public confidence in its management of the CJS. In response, extra-judicial inquiries are launched whose recommendations are subsequently translated into corrective CJS legislation that restores public confidence and reaffirms governmental authority in the CJS, and harmony between the colliding spheres, is, temporarily, restored. This sequence of events is conceived as a ‘tradition’ because the temporary resumption of CJS procedural ‘normality’ will prevail only until the next occasion (event) that counter-discourse against miscarriages of justice produces a successful appeal that exemplifies a new problematic in the procedural framework of the CJS. At such time, a public crisis of confidence will, once again be induced, and the governmental sequence of events will, once again, be initiated.14

From this outline of the tradition of criminal justice system reform the following three significant features can be drawn:

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14 There is a potential question in terms of the appropriateness of the vocabulary of ‘tradition’ to describe the sequential process by which the CJS is governmentally reformed. Usually, a ‘tradition’ refers to the ‘conscious reference back to legitimating roots and precedents’, something which is not present in this analysis. It should be noted, however, that the term ‘tradition’ is applied here in the very specific context of the operation and exercise of CJS power from a perspective inspired by Foucault, which might not correspond with conventional or, even, common-sense understandings. From such a perspective the use of the term ‘tradition’ is justified within which the operation and exercise of CJS power is shown to be ‘intentional yet nonsubjective’. In this context, although there is no power that is exercised without a series of aims and objectives, this does not mean that it results from the choice or decision of an individual subject or group (see Foucault, 1979, p. 95).
corrective legislative reforms of the CJS are intrinsically bound up with the production and dissemination of counter-discursive forms of knowledge of successful appeals that exemplified new problematic aspects of the procedural framework of the CJS. Such cases are the ones that attain a high profile media status;

- the forms of counter-discourse that were successful were those that were able to induce a public crisis of confidence in an aspect of the CJS; and,

- legislative reforms to the CJS that are able to dispose of public crises of confidence are connected to the recommendations of extra-judicial inquiries governmentally employed in specific response to the discourse that was able to induce the public crises of confidence in the CJS.

Each of these features raise critical questions pertaining to power and knowledge in the operations of CJS power, the possibilities of resistance and the role and rationality of government (in a Foucauldian 1979; 1991 sense) in the disposal of public crisis of confidence in the CJS. To be sure, perhaps the most significant contribution of Foucault’s thesis on existing forms of power was his stress on the productive or constitutive nature of its exercise. His major achievement was to have turned a negative concept on its head and to attribute the production of concepts, ideas, and the structures of social institutions to the operations of power in its existing forms. As he argued: ‘We must cease once and for all to describe the effects of power in negative terms: it “excludes”, it “represses”, it “censors”, it “abstracts”, it “masks”, it “conceals”. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth’ (Foucault, 1977, p. 194). In such a context, the procedural reforms of the CJS, that were introduced in governmental response to exceptional
successful appeals that exemplified forms of harm that could not be procedurally remedied, can be conceived to have *produced or constituted* new forms of CJS reality. To be sure, a CJS without a Court of Criminal Appeal and the possibility of overturning wrongful convictions, for example, is a fundamentally different 'product' to a system that is constituted to contain such an appellate procedure.

Foucault’s conception of ‘modern’ ‘power’, then, is very different from traditional socio-political conceptions of it. Power is not ‘owned’ by some privileged person or group and exercised ‘simply as an obligation or a prohibition on those who “do not have it”’ (Foucault, 1977, p. 27). On the contrary, ‘power’, or ‘government’ for Foucault, is not just the ruthless domination of the weaker by the stronger, in fact, it is not to be ‘had’ at all: ‘Power is everywhere; not because it embraces everything but because it comes from everywhere...there is no binary and all-encompassing opposition between ruler and ruled at the root of power relations, and serving as a general matrix - no such duality extending from the top down and reacting on more and more limited groups to the very depths of the social body. One must suppose, rather, that the manifold relations of force that take shape and come into play in the machinery of production, in families, limited groups and institutions, are the basis for wide-ranging effects of cleavage that run through the social body as a whole’ (Foucault, 1979, pp. 93-94). From such a standpoint, Foucault conceived that forms of resistance to power are not simply a reaction to a pre-existing power. ‘This’, he argued, ‘would be to misunderstand the strictly relational character of power relations’ (Foucault, 1979, p. 95). Forms of resistance, for Foucault, are, in fact, never in a position of *exteriority* in relation to power. Rather, it is more likely the reverse: states of power are continually engendered or incited by virtue of the potential
counter-powers which co-exist with them: ‘Where there is power there is resistance’ (Foucault, 1979, p. 95). Power, then, presupposes resistance of some form. He asserted: ‘Relations of power are not in a position of exteriority with respect to other types of relationships (economic processes, knowledge relationships, sexual relationships), but are immanent in the latter; they are the immediate effects of the divisions, inequalities, and disequilibriums which occur in the latter, and conversely they are internal conditions of these differentiations; relations of power are not in superstructural positions, with merely a role of prohibition or accompaniment; they have a directly productive role, wherever they come into effect’ (Foucault, 1979, p. 94).

The key to understanding Foucault’s conception of resistance lies in his meaning of a ‘power relation’. In the context of the present discussion, ‘power’ within the sphere of criminal justice can be conceived as nothing more than the multiplicity of force relations extant within the socio-legal body. Power’s conditions of possibility actually consist of this moving substrate of force relations: the struggles, confrontations, contradictions, inequalities, transformations and integrations of these force relations. Thus individuals are ‘positioned’ within any struggle only as a consequence of the existence of a struggle for power. He argued: ‘politics is war by other means’. Accordingly, both existing forms of power and resistance to them involve the invention of ‘tactics’ and the co-ordination of these various tactics into coherent strategies. This is, perhaps, the most important political consequence of Foucault’s thesis on power: a strategic manoeuvre must be countered by an opposing manoeuvre; a set of ‘tactics’ must be consciously ‘invented’ in opposition to the setting in place of another; a different procedural ‘art’ of CJS, for example, is what will oppose the
existing one. ‘One is always “inside” power, there is no “escaping” it’ (Foucault, 1979, p. 95). Moreover, Foucault argued, resistance is more effective when it is directed at a technique of power rather than at ‘power’ in general. It is techniques of power which allow for the exercise of power and the production of knowledge. Resistance consists of ‘refusing’ these techniques. Most importantly, Foucault argued, oppressive forces of domination do not hold the monopoly in the capacity to ‘invent’ tactics. If resistance is to be effective, it requires the acknowledgement that tactics are being employed in a struggle, and the active interrogation of those tactics. Foucault suggested that in the interrogation of ‘tactics’, ‘power’ is intelligible, and susceptible to analysis down to its most minute details, in terms of the historical strategies and sets of ‘tactics’ designed to mobilise these techniques to political advantage (Foucault, 1979, pp. 95-96).

From such a frame of reference, what might be termed the governmental ‘ear’ is, perhaps, even more significant than the governmental voice. For legislative reform of problematic procedures of England and Wales’ CJS is inevitable in a system where power and resistance are about the governmental management of competing discourses (also cf. Nobles and Schiff, 1995). In this process, governmental techniques, such as committees of inquiries and the royal commissions into problematic aspects of the CJS, represent an arena within which an enactment in the power struggle between dominant forms of CJS power and its counter-discursive resistance takes place (see, for example, Osborne, 1996, p. 114). And, the success of the governmental translation of their recommendations into corrective CJS legislation that disposes of public crises represents an episode in the ongoing negotiated management of the CJS.
From this it follows that exceptional successful appeals that exemplify new errors need not be conceived in entirely negative terms. As Coser (1956) noted: ‘Far from being only a “negative” factor which “tears apart”, social conflict may fulfil a number of determinate functions in groups and other interpersonal relations’ (Coser, 1956, p. 8). Accordingly, the more critical counter-discourse that is produced around cases that exemplify procedural problems in the CJS, then, potentially, the more crises of public confidence in the CJS will be induced, and the more problematic aspects of the CJS will have to be subjected to governmental disposal and legislative domestication. Moreover, as Coser (1956), in a reformulation of Simmel’s (1955) proposition, also noted: ‘Struggle may be an important way to avoid conditions of disequilibrium by modifying the basis for power relations’ (Coser, 1956, p. 137).

The limits of the existing governmental voice

On the face of it, the tradition of criminal justice system reform would seem to indicate that the governmental voice has followed its remit and introduced a range of corrective legislative reforms to the CJS that have, indeed, served to enhance the wellbeing of the population for which it is mandated. For the reform of the CJS illustrates that some of the most significant procedural reforms of the CJS have been introduced in an attempt to either reduce wrongful convictions or remedy them when they occur. As shown, the debate about the case of Timothy Evans contributed to the abolition of capital punishment. And, the focus upon the Confait Affair resulted in the introduction of PACE (1984), through which many thousands of mundane and routine
appeals against criminal conviction are successful each year. To be sure, the procedural reforms that were outlined in the tradition of criminal justice system reform, such as the introduction of the Court of Criminal Appeal and the abolition of capital punishment, can be conceived as representing what Foucault (1979) might term *tactical victories* in the discursive interplay of existing forms of CJS discourse and its counter-discursive opposition. For prior to the Court of Criminal Appeal there was no official mechanism for overturning wrongful criminal convictions. And, although wrongful criminal convictions are extensive, the abolition of capital punishment was also a step in the right direction. For prior to its abolition many of the victims in exceptional cases of successful appeals would not have been alive to overturn their wrongful convictions, for example, the *Birmingham Six*, the *Guildford Four*, and so on.

There is, however, a significant limitation with the focus of the existing articulation of the governmental voice. In particular, its complicity with prevalent notions that miscarriages of justice constitute only exceptional cases of successful appeals takes no account whatever of the thousands of mundane and routine successful appeals that occur each year. It, therefore, can be conceived to divert attention away from, even disqualify, the potential voices of the thousands of victims of mundane wrongful convictions that occur annually in the Crown Court. It also excludes from the dialogue about miscarriages of justice the potential voices of the many hundreds of victims of wrongful conviction each year in the CACD. Accordingly, it is not that the existing tendency of the governmental voice to focus upon exceptional cases of successful appeals that exemplify newly discovered procedural errors in the operation of the criminal justice process is wrong. Rather, there has been no governmental ‘eye’ at all...
upon the scale of wrongful criminal convictions as evidenced by successful appeals that are not exceptional, or do not exemplify new procedural errors. In this sense, the legitimacy of the governmental voice is called into question. If good and/or legitimate government is about enhancing the wellbeing of the population to which it is mandated, then, it can be argued that the responsive ear of the government should not be entirely fixed upon listening to forms of counter-discourse that emphasise exceptional successful appeals. On the contrary, there should also be a governmental eye upon its own collected statistics of successful appeals. As it stands, however, the governmental voice on miscarriages really says very little about the real extent and forms of injustice within the domain of criminal justice. This is contrary to its remit and indicates a governmental neglect of a severe judicial lack of wellbeing. As Rose, (1991) noted, all aspects of the social economy are evaluated through their numericization. For example, poverty is transformed into the numbers claiming social benefits; public order statistics define the crime rate; the divorce rate becomes synonymous with the nation’s morality; the spread of AIDS (or the lack of it) is regarded as a sign of the success of the government of sexual conduct. In the same way, the current scale of successful appeals indicates far too many wrongful convictions and, therefore, serves to undermine the entire judiciary. To be sure, ‘if sceptical vigilance over politics has long been a feature of liberal political thought, it is today increasingly conducted in the language of numbers’ (Rose, 1991, p. 674).
Conclusion

This chapter has considered four of the most significant legislative events in the history of the CJS. In so doing, what was termed a tradition of criminal justice reform was explicated that can be interpreted within a Foucauldian power/knowledge theoretical perspective. For forms of procedural reform resistance of the CJS are intrinsically connected to forms of knowledge (counter-discourse) that exemplify new errors in the procedural framework. The point to be made about this is not that the reform of problematic procedures of the CJS is wrong. But, rather, in the metaphor of voices, the governmental reform voice has ranted on about reforming apparent errors in the procedural framework of the CJS in attempts to appease counter-discursive voices of particular cases of successful appeal. This has been at the expense of more vigilant government that ensures the wellbeing of the population as a whole from the harmful consequences of wrongful criminal conviction.
Campaign voices

Introduction

There is a notable absence of literature generally on campaigns against the CJS in England and Wales, and specifically on campaigns against miscarriages of justice. In the course of this research, the closest sources that I could find were two analyses by Mick Ryan (1978; 1983) on the performance of the penal lobby in England and Wales. In those analyses, Ryan (1978, p. 1; see also 1983, pp. 105-121) argued that 'governments discriminate against radical pressure groups in favour of liberal or conservative groups whose views imply no fundamental critique of the existing economic and political order'. In addition, there have been other numerous critical researches into the general unjust 'treatment of the confined' with a view to a radical restructuring or complete abolition of the existing penal regime (for example, Scraton et al, 1991, pp. 154-160; Ruggiero et al, 1995; Fitzgerald and Sim, 1982; Mathiesen, 1974). Such researches routinely draw upon the testimony of victims of exceptional successful appeals to support or substantiate their theoretical claims, but do so only in the limited context of the general unjust treatment of prisoners or as a critique of the politics of incarceration. For example, Scraton et al (1991, pp. 152-153) presented an extensive quotation by Paul Hill of the Guildford Four as evidence of the general unjust treatment of Irish prisoners.
In an attempt to redress this neglect, this chapter presents the findings of a web-based analysis of the part that campaign voices play in the discursive dialogue about miscarriages of justice in England and Wales.15 In so doing, an analysis is presented which opposes Ryan’s (1978; 1983) findings of a governmental conspiracy to block radical forms of counter-discourse in favour of more friendly forms of reform discourse. On the contrary, it is shown that successful campaigns against miscarriages of justice produce the counter-discursive raw material for the radical and progressive reform of the system.

In general terms, this Chapter offers an account of the specific logic of campaigning against miscarriages of justice through the following steps. Firstly, attention is drawn to organisational diversity, campaign aims and types of cases that are assisted. Despite their important differences, it is argued that all campaign organisations share the same primary and secondary aims. Moreover, the proclivity of campaign organisations to focus upon serious cases that involve lengthy sentences of imprisonment is explored to indicate the possible factors behind such an approach. Second, the processes through which campaigns transform previously unsuccessful appeal cases into forms of counter-discourse resulting in successful appeal are traced. Finally, an assessment of the achievements and limitations of existing forms of campaigning against miscarriages is conducted.

15 In addition, this chapter benefits greatly from Andrew Green’s (Conviction, INNOCENT, United Against Injustice) generous insights on the organisational structure, history and logic of campaign groups and organisations against miscarriages of justice within England and Wales. These were provided during two informal interviews conducted on 21 July 2002 (Bristol) (Green, 2002) and 7 August 2002 (Manchester) (Green, 2002a).
Campaigns: organisational diversity and aims

If further support were needed to confirm the extensive scale of England and Wales’ miscarriage of justice phenomenon, this is indicated in the sheer number and diversity of groups and organisations that campaign against miscarriages. These include United Against Injustice (UAI), a supra-federal system of miscarriage of justice umbrella organisations which support small single case groups within their geographical location; United Campaign Against False Allegations of Abuse (UCAFAA), which is a further federal system of groups and organisations concerned with sexual abuse as a specific cause of miscarriages of justice; other national miscarriage of justice organisations; other cause specific miscarriage organisations; and, a host of other national campaign organisations with other specific concerns (such as human rights, civil liberties, feminism and ‘racism’), which also support and/or campaign for certain miscarriage of justice victims within their specific area of concern. In practice these groups and/or organisations are not separate. On the contrary, under the banner of UAI, any group or organisation that supports more than a single case can request to be affiliated to UAI with full meeting and voting rights.

In terms of structure, at the foundation of UAI are the single case miscarriage of justice campaign groups, generally comprised of the alleged victims’ family and friends. For example, the Justice for Colin James Campaign (see Scandals in Justice, 2002); Justice for John Taft Campaign (see Justice for John Taft Campaign, 2002); and the Friends of Susan May Campaign (see Inside and Innocent, 2002). Above these, (in terms of organisational structure, but not importance), are umbrella organisations that support more than a single miscarriage of justice campaign group
within their geographical area. The main geographical umbrella organisations of UAI are:

- **INNOCENT**: perhaps the largest miscarriage of justice organisation, INNOCENT, based in Manchester, founded in June 1993, was an outgrowth of sister organisation Conviction, the Sheffield-based miscarriage of justice organisation, which had been inundated by prisoners from the Manchester area alleging their innocence (see INNOCENT, 2002);\(^\text{16}\)

- **Merseyside Against Injustice (MAI)**: set up in early 1999, in line with the aims of UAI, MAI aims to promote and encourage co-operation and exchange of information including advice and assistance to other organisations and individual campaigns (Merseyside Against Injustice, 2002);

- **Kent Against Injustice (KAI)**: a sister organisation to MAI with the same aims;

- **Gloucester Against Injustice (GAI)**: another sister organisation to MAI and KAI with the same aims;

- **South Wales Liberty (SWL)**: based in Cardiff, Wales, SWL is a local group of the London based civil rights organisation LIBERTY. SWL’s main area of work locally is concerned with actively campaigning on a number of cases that they believe to be miscarriages (see South Wales Liberty, 2002).

At the top of the federal organisational structure is UAI, to which the main umbrella organisations are affiliated. In practical terms, in addition to being a banner under

\(^{16}\) In many respects, although Conviction still maintains a website, and will support campaign groups in the Sheffield area, it has been merged with INNOCENT with Andrew Green (the originator and sole remaining member of Conviction) working as a case worker in the Manchester area for INNOCENT (Green, 2002).
which organisations can come together, UAI is very keen to assist in setting up new
organisations to support single case groups. In terms of operation, UAI is hosted by
one of the geographically located organisations on a rotational basis.\(^{17}\)

The main groups and geographically located organisations associated with UCAFAA
are:

- **Action Against False Accusations of Abuse (AAFAA):** a group which campaigns
to raise awareness of the large number of people who are falsely accused of sexual
abuse and wrongly convicted (see Action Against False Accusations of Abuse,
2002b);

- **Bryn Estyn Staff Support Team (BESST):** supports and campaigns on behalf of all
those that might be falsely accused and wrongly convicted as a result of the
concern surrounding carers and teachers who worked in the North Wales
Children’s Homes in the 1960s and 70s (see Bryn Estyn Staff Support Team,
2002);

- **Falsely Accused Carers and Teachers (FACT):** a group based in Merseyside and
Yorkshire which campaigns against police trawls of former care home residents
touting for allegations of sexual abuse using compensation as a lure (see Falsely
Accused Cares and Teachers, 2002a);

In addition to the federal miscarriage of justice organisations, there are a host of
national miscarriage of justice organisations including:

\(^{17}\) Although UAI has been in operational existence since 2001 it was formally launched in October
Miscarriages of Justice UK (MOJUK): provides details of a large number of miscarriages of justice cases, works closely with prisoners and produces daily bulletins and monthly newsletters which disseminate and co-ordinate information to and between campaign groups/organisations (see Miscarriages of Justice UK, 2002b);

The Portia Campaign: a particular specialism of the Portia Campaign is a focus upon cases in which mothers are accused or jailed for murder or manslaughter of their children in doubtful circumstances (see The Portia Campaign, 2002);

Miscarriage of Justice Organisation UK (MOJO): founded in 1999 to support miscarriage of justice victims and their families, and to attempt to redress the lack of welfare and aftercare provision for the wrongly imprisoned (Miscarriage of Justice Organisation UK, 2000);

False Allegations Support Organisation (FASO): an organisation dedicated to providing support to anyone affected by a false allegation of abuse (False Allegations Support Organisation, 2002);

The Five Percenters: a cause specific organisation that was established in January 1998 to campaign on behalf of people wrongly accused and/or convicted of 'shaken baby syndrome' (causing brain injury by shaking their baby) (The Five Percenters, 2002);

JUSTICE: the first all-party legal reform organisation against miscarriages of justice.\(^{18}\)

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\(^{18}\) Prior to the establishment of the CCRC in 1997, JUSTICE was the main organisation for the investigation of alleged or suspected miscarriages of justice cases in England and Wales at the post-appeal stage. It could be argued, however, that JUSTICE was so 'successful' that it has rendered itself unnecessary and obsolete. With the establishment of the CCRC, something that JUSTICE had been campaigning for, for many years, the investigative function that JUSTICE provided to alleged victims of miscarriages of justice who had exhausted their existing appeal rights was taken over and formalised by the CCRC. For, prior to the establishment of the CCRC, JUSTICE investigated an annual average of
In addition to the groups and organisations that specifically campaign against miscarriages of justice, whether on a general or cause related basis, there are a number of civil rights, anti-racist and feminist organisations that campaign against specific miscarriage of justice cases that occur in England and Wales. These include:

- Amnesty International: the world-wide human rights organisation, which campaigns against miscarriages of justice that derive from human rights abuses (see Amnesty International, 2002; 2002a; 2002b);
- Statewatch: which extensively reports on miscarriages of justice (see, for example, Statewatch, 2000);
- Campaign Against Racism and Fascism (CARF): which supports miscarriage of justice campaigns where the possible cause is 'racism' (Campaign Against Racism and Fascism, 2002);
- The National Civil Rights Movement (NCRM): which supports cases of injustice that are caused by an infringement of civil liberties (National Civil Rights Movement, 2002); and,
- Justice For Women (JFW): a feminist organisation that campaigns to reveal miscarriages of justice that are caused through what they term 'the gendered limitations of existing legal defences to a charge of murder for women who have fought back against or killed violent male partners'. JFW was established in 1990 in Leeds, there are now groups in London, Leeds, Norwich and Manchester (see Justice For Women, 2002);

50 cases (JUSTICE, 1989, pp. 1-2). As things currently stand, however, JUSTICE supports two cases that pre-date the CCRC. Both of these cases are currently under review at the CCRC and JUSTICE is seeking new cases that they might investigate.
Southall Black Sisters (SBS): an Asian women’s organisation based in Southall, London, SBS are concerned with miscarriages of justice that might affect black and Asian women in the areas of domestic violence and racism (see Benn, 2000; Dunne, 1997); and,

The range and diversity of the campaign organisations against miscarriages renders any attempt to discern a universal underpinning identity profoundly problematic. Moreover, within and between the various, and sometimes competing and conflicting, organisations that campaign against miscarriages there are ostensibly different affiliations and/or motivations. As such, any attempt to construct a single campaign identity would almost inevitably produce a ‘straw’ construction that would not be representative of any particular group or organisation and with which none of the groups or organisations would be likely to identify. In this context, this section analyses the identities of the various organisations that campaign against miscarriages. This illustrates both their ostensible differences, and the way that such differences are ultimately, and pragmatically, resolved in the interests of concentrating on the most important aspect of the campaigns – a successful appeal for the alleged innocent exceptional victims of post-appeal wrongful convictions.

The conventional perception of the affiliations of campaign organisations, generally, might be to perceive them on the ‘left’ of politics and, perhaps, to be ‘subversive’ critics of the state (see, for example, Hardy, 1998; Cowe, 2001). Against this,

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19 Confidentiality dictates that I cannot elaborate upon this point and give specific examples. In the course of researching this chapter, however, I discovered that it is not uncommon for campaign groups and/or organisations to quarrel over the course of action to take and how it should be taken, sometimes resulting in an inability to continue campaigning together. Moreover, there are sometimes ‘personality clashes’ between members of the single case groups and members of the most appropriate or convenient geographically located organisation with the result that the single case group is supported
campaigns against miscarriages of justice can be said to cut through such conventional political rivalries and divides where the reduction of miscarriages is just as likely to be a concern of campaigners on the ‘right’ of politics, albeit for different reasons. As Huff et al (1996, p. xxiii) stated: ‘a common but fallacious, assumption about this topic is that wrongful conviction is an issue that should inherently interest “liberals” more than “conservatives” (who are presumed to be more interested in “law and order” and “public safety”).’ In refuting this notion, Huff et al (1996, p. xxiii) emphasised the fact that every time an innocent person is wrongly convicted in the US, the actual offender typically remains free to continue victimising the public (see also Royal Commission on Criminal Justice, 1993, p. 2). Thus, as Huff et al noted, miscarriages of justice are not only about an individual’s right to due process and a fair trial, they are also a serious public safety concern.

Within the specific context and jurisdiction of England and Wales’ CJS, the political consensus on the need to reduce miscarriages of justice was most recently apparent in the parliamentary debate about the government’s White Paper ‘Justice for All’ (Home Office, 2002). Essentially, the debate was couched in a discourse of protecting the innocent, to which the main political parties attempted to align themselves. For the Government that drafted the White Paper the emphasis on the protection of the innocent was expressed in the following terms: ‘We have an absolute determination to create a system that meets the needs of society and wins the trust of citizens, by...acquitting the innocent’ (Home Office, 2002, p. 13 my emphasis). For the Government’s Opposition, the need to protect the innocent victims of the CJS was expressed by the Shadow Home Secretary as follows: ‘Any proposal to adjust the
rules...of the criminal justice system...should carry safeguards to protect the *innocent* (Letwin, 2002 my emphasis). This is not to suggest that the major political parties with a stake in England and Wales’ CJS perceive the problem and the solution of miscarriages of justice in the same way. As indicated by Huff et al (1996), there are also different reasons on the ‘left’ and ‘right’ of politics in England and Wales for wanting to reduce miscarriages. But, what is agreed, at least on a stated level, is that the legislative framework of the CJS should be such that it does not victimise the innocent.

As affiliations specifically relate to UAI, any overt affiliations, attachments or ‘identity politics’, whether they be grounded in religion, racism, sexuality, disability or, indeed, party politics, are regarded as a potentially dangerous irrelevance. They can often be an unhelpful distraction in the representation of miscarriage of justice victims and to the primary goal obtaining a quashed conviction for the innocent victims of wrongful conviction (discussed further below). In addition, overt identity politics can also be destructive of the relations within and between the groups and/or organisations that campaign on behalf of alleged and/or suspected miscarriage of justice victims. Accordingly, overt political views and/or other strongly held opinions are discouraged in the interests of maintaining the focus on the release of the innocent. This is expressed in the following quotation from Merseyside Against Injustice (MAI), an organisation affiliated to UAI:

> ‘MAI is not dominated by any political organisation or other group or any particular campaign or individual. MAI operates an Equal Opportunities Policy, which means that *all* victim’s, their families or supporters will receive equal advice, help and support regardless
of their gender, sexuality, race, religious belief or disability' (Merseyside Against Injustice, 2002 my emphases).

But, the avoidance of getting caught up in identity politics is not only a characteristic of UAI and the organisations that choose or are invited to be affiliated to UAI, it is also overtly expressed by every other major campaign organisation, whatever their particular focus of concern. For example, The Portia Campaign (2002), a national organisation ostensibly concerned with the miscarriages that derive from mistakes about ‘cot death’\textsuperscript{20}, SIDS (Sudden Infant Death Syndrome)\textsuperscript{21} and MSbP (Munchausen’s Syndrome by Proxy)\textsuperscript{22} states that they ‘aim to help anyone who is...in trouble with the law’ (my emphasis). Similarly, False Allegations Support Organisation (FASO) (2002b), an organisation ostensibly concerned with miscarriages that derive from false allegations of sexual abuse, assert that ‘whenever anyone (is) falsely accused of such an iniquitous crime Faso offers clear information, practical advice and emotional support...[to] anyone affected by a false allegation of abuse’ (my emphases). Likewise, Campaign Against Racism and Fascism (CARF) (2002a), an organisation ostensibly concerned with the effect that racism might have as a cause of wrongful convictions, stress that they are ‘not aligned to any political party or tendency’. Each of the above quotations, then, would seem to expresses the inclusiveness of the organisations that campaign against miscarriages of justice. For they emphasise that anyone, irrespective of things such as ethnicity, sexual


\textsuperscript{22} MSbP can be defined as creating illnesses or disorders in someone else to gain medical attention. For a critical discussion see Johnston, L. & Calvert, J. (2000) ‘Doctors’ child abuse theory that is tearing families apart’ The Daily Express July 20.
orientation, religious or other belief and/or political affiliation is assisted to overturn wrongful convictions within the specific area of the various campaign organisations.

However, whilst the organisations that campaign against miscarriages of justice can, indeed, be collectively conceived to assist anyone irrespective of ethnicity, sexual orientation, disability and so on, a mere cursory reading of such a stated consensual commitment might give a false impression of the kind of people to which this might apply. The actual generic commitment of the campaign organisations is not to campaign in support of anyone who might be a victim of a wrongful criminal conviction. On the contrary, campaign organisations are not at all interested in victims who may have been wrongly convicted for 'technical' reasons, such as poorly presented defence cases, if the alleged victim actually committed the criminal offences for which they were convicted (see, for example, Green, 2000b). Rather, the consensual primary aim that is collectively expressed among and between campaign organisations is to campaign only in support of the factually innocent. Thus, whilst it is correct to say that campaign organisations are concerned to help anyone in trouble with the law irrespective of gender, social class, ethnicity and so on, the proviso is that such persons must be innocent to qualify (see, for example, The Portia Campaign, 2002; Action against False Allegations of Abuse, 2002a; Merseyside Against Injustice, 2002; INNOCENT, 2002; National Civil Rights Movement, 2002a).

Following the success of the primary aim to achieve a successful appeal for the alleged innocent miscarriage of justice victim, the organisations that campaign against miscarriages each express a similarly consensual secondary aim to effect reform of the CJS. Taking another quotation from MAI to provide a textual feel for a specific
campaign voice, MAI state that it "is dedicated to bringing about change in the current criminal justice system" by campaigning against improper practices by the judiciary and the police (Merseyside Against Injustice, 2002 my emphasis). 23

The surface differences, then, between the various organisations that campaign against miscarriages do not determine the primary and/or the secondary campaign aims. Whether organisations are concerned with the general causes of miscarriages, are human rights orientated, are anti-racist or are concerned with the plight of mothers who might be wrongly convicted for the murder of their children, an analysis of their stated aims indicates a generic commonality. In generic terms, all campaign organisations against miscarriages of justice in England and Wales, whatever their specific and ostensible differences, can be conceived as having a primary aim to secure a quashed conviction/the release for the alleged or suspected innocent miscarriage of justice victim. Once this has been achieved, the secondary interrelated aim is to effect corrective reform of the CJS’s procedural framework in the hope that the identifiable cause of the exceptional miscarriage of justice is not a cause of miscarriages in the future. Hence, an organisation ostensibly concerned with racism can be said to be concerned with racism only in a secondary sense, a secondary sense that can only come into play following the successful outcome of the primary aim of a successful appeal for an innocent victim of an exceptional wrongful conviction. In the same way, an organisation that is ostensibly concerned with sexual abuse as a cause of miscarriages of justice, can be conceived to be concerned with sexual abuse in a

23 For other examples of this secondary concern to reform the CJS following a successful appeal that is displayed by all other groups/organisations see The Portia Campaign, 2002; Action Against False Allegations of Abuse, 2002c; Merseyside Against Injustice, 2002; United Campaign Against False Allegations of Abuse, 2000a; National Civil Rights Movement, 2002a; Campaign Against Racism and Fascism, 2002a; Falsely Accused Carers and Teachers, 2002a; Justice For Women, 2002).
secondary sense, the primary concern being the innocent victim of a false accusation of sexual abuse. This is because racism, false allegations of sexual abuse, sexism, denial of human rights and so on can only come into play once the truth (knowledge) of such causes of miscarriages of justice can be proven. For without a successful appeal in an exceptional miscarriage of justice case that alleges racism, for example, there is no proof (knowledge) that ‘racism’ was indeed the cause of the wrongful conviction. Put simply, the system cannot be challenged and/or reformed for being ‘racist’, producing false convictions of sexual abuse, or be said to be denying fundamental human rights, for example, unless and until there is evidence that such errors and/or failings are occurring and causing wrongful convictions (discussed further below).

A major flaw with the emphasis on the support of the factually innocent is that such a condition can never be proven. As discussed in Chapters 1 and 2, the quashing of a previous criminal conviction by the CACD cannot be uncritically accepted as prima facie evidence of factual innocence. For the judicial pronouncements of the appeal courts are framed entirely within the parameters of the rules, procedures and/or practices of the CJS, within which, the judgement of the Crown Court is whether a criminal defendant is ‘guilty’ or ‘not guilty’. As this relates to the CACD, it, too, is not an attempt to determine the guilt or innocence of the appellant, but rather to determine whether the previously obtained criminal conviction is ‘safe’ or ‘unsafe’. This does not provide the kind of factual objective knowledge required to prove or state the factual innocence of the wrongfully criminally convicted that is both, generally, assumed and claimed by organisations that campaign against exceptional miscarriages of justice. Accordingly, any attempt to determine factual or truthful
innocence in a system where even the ‘guilt’ of a criminal suspect can be conceptualised as a legal technicality can be conceived as an entirely erroneous pursuit. For the discursive rules and practices that together comprise England and Wales’ current criminal justice arrangements can be conceived to technologise the innocence of criminal defendants beyond such reach.

As indicated, the various organisations that campaign against miscarriages also display a diverse range of motivations. There are organisations that are concerned with the general problem of miscarriages whatever the specific cause, and provide a support network for the families and friends of victims (essentially the organisations affiliated to UAI - INNOCENT, MAI, Kent Against Injustice (KAI), Gloucester Against Injustice (GAI)). There are organisations that are concerned with false allegations of sexual abuse (FASO, Action Against False Allegations of Abuse (AAFAA). There are organisations specifically concerned with the vulnerability of teachers and/or care workers to be falsely accused and/or convicted of sexual abuse (for example, Falsely Accused Cares and Teachers (FACT)). There is an organisation that campaigns for the provision of welfare upon the release of the wrongfully imprisoned (Miscarriage of Justice Organisation (MOJO)). There is an organisation that is specifically concerned with the associated problems of infant mortality and its potential to be a mistaken cause of miscarriages (The Portia Campaign). There are organisations that are concerned with the effect that ‘racism’ might have in causing miscarriages (for example, CARF). There are organisations concerned with human rights abuses and miscarriages (Amnesty International, South Wales Liberty (SWL)). There are organisations concerned with abuses of civil rights and miscarriages (National Civil Rights Movement (NCRM); Statewatch). There are organisations that
are concerned with the miscarriages that might derive from the sexual discrimination of women (Justice For Women (JFW); Southall Black Sisters (SBS)). And, there is an organisation concerned with miscarriages that accompany mistaken diagnoses of ‘Shaken Baby Syndrome’ (The Five Percenters).

Taken together, these groups and/or organisations that campaign against exceptional wrongful convictions can be conceived as representing the most problematic aspects of the existing CJS that are in need of corrective legislative reform. What I mean by this is that campaigns are the discoverers of the causes of wrongful convictions in the sense that already acknowledged causes of wrongful convictions are accounted for by the existing procedures that produce routine and mundane successful appeals. Alternatively, campaigns search for causes of wrongful convictions that are not acknowledged. To be sure, exceptional miscarriages of justice are precisely not about working within the legal agenda. Rather, they are about working outside of the general confines of the ‘letter of the law’ in attempts to ascertain the causes and/or the reasons why innocent victims of wrongful criminal conviction are unsuccessful in their appellate attempts to prove their innocence. Following which, campaigns can then turn their attention towards the secondary aim of attempting to effect corrective legislative reform of the CJS in the hope that such identifiable causes are not (or are at least less of) a cause in the future (discussed further below).

In such a context, an attempt to understand the motivations of the organisations that campaign against miscarriages should not merely view them from the perspective of their ostensible differences. Such differences are important in terms of the production of different images of miscarriages of justice and the different audiences that they
represent. However, for my purposes it is also appropriate to conceive the way that campaign organisations aggregately or collectively deal with miscarriages of justice as intrinsically related to forms of knowledge of the most likely causes of wrongful conviction that the system has not yet formally acknowledged. In response to which, campaign organisations engage in a power struggle to reform the CJS by mirroring the major identified causes of miscarriages of justice at any particular historical moment. Indeed, it was not a coincidence that there was not a campaign against ‘racism’ or false allegations of sexual abuse as a cause of miscarriages of justice in the nineteenth century. At the time the state of knowledge of the most significant cause of miscarriages was centred around the absence of appeals in criminal cases, a facility that was available in civil cases since the mid-seventeenth century (Pattenden, 1996, p. 6). Accordingly, the predominant campaign at the time was directed towards the establishment of a Court of Appeal in criminal cases. The belief being that once such a court was in place wrongful convictions would, at the very least, be greatly reduced. When a court capable of hearing criminal appeals was established, however, and routine and/or mundane successful appeals could be produced, the campaign was dissolved and campaigners against miscarriages turned their attention to the production of counter-discourse on other identified ‘errors’ in the CJS’s legislative framework, such as the campaign against capital punishment. In the same way, when the campaign against capital punishment successfully achieved its aim in the 1960s, that campaign, too, was dissolved and campaigners against injustice once again re-focused their attention and efforts (counter-discourse) towards other aspects of the CJS identified as causes of miscarriages of justice and, hence, in need of reform. What each of these campaigns required were alleged miscarriage of justice cases to be successful in appeal to confirm the reality of the campaign focus, e.g. that people
were being killed in error. Accordingly, campaign organisations can be conceived as inherently and intrinsically about the production of forms of knowledge of the most likely causes of wrongful convictions at any particular historical moment. Such knowledge being expressly produced as part of a struggle for power to effect reforms of the CJS to reduce and remedy miscarriages of justice in the future. As Foucault (1977, pp. 27-28) noted: ‘power-knowledge, the processes and struggles that traverse it and of which it is made up...determines the forms and possible domains of knowledge.’

In terms of the focus of campaign organisations, the tradition of criminal justice system reform highlighted the extent to which all debates on miscarriages of justice have hitherto been very firmly focused towards an historically specific, exceptional case or small group of exceptional cases of successful appeal. In accordance with this trend, an analysis of the focus of organisations that campaign against miscarriages in England and Wales shows that they, too, are also only overwhelmingly concerned with individual cases of alleged or suspected wrongful conviction (see, for example, Merseyside Against Injustice, 2002a; INNOCENT, 2002a; South Wales Liberty, 2002a; Falsely Accused Carers and Teachers, 2002b). Such cases are generally for serious criminal offences – murder, rape, armed robbery, and so on. They have often already failed in their routine and/or mundane appeals.24 And, they continue to present concerns that innocent people continue to suffer the injustice of wrongful imprisonment. To be sure, Green (2002a) confirmed that campaign organisations are generally in line with the following criteria applied by JUSTICE (1989, pp. 1-2):

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24 In saying this it must be noted that many alleged miscarriage of justice victims do not contact a
• lengthy terms of imprisonment of four years or more were being served;
• no other legal help was available to the prisoner;
• the allegation is of actual, rather than technical, innocence;
• an investigation might achieve something, given the present operation of the appellate courts; and,
• a complaint about sentence involves an important point of principle; assistance is not given where the sole complaint is that the sentence is too long.

This is because the length of time needed to investigate cases along with the delays in getting potentially meritorious cases back to the CACD enforces the need to focus on serious criminal convictions with substantial prison sentences. There are a number of other interrelated reasons for this.

First and foremost, as indicated above, under England and Wales’ case-law system, the release of individuals that are wrongly imprisoned and/or corrective reform of the CJS is not effected though speculative generalisation. Rather, such aims are effected through real individual cases in which real individual people can be shown to have been denied their rights and/or be innocent victims of the existing judicial regime: ‘The law must be seen to be done’. Within such constraints, campaigns have found it necessary on procedural grounds to focus on individual cases and work within the given legal agenda. Moreover, because of such parameters, it is not so much that campaigns against miscarriages are not interested in routine or mundane successful appeals. Rather, campaign organisations can be said to be less concerned with, perhaps, less serious cases that can be remedied by existing appellate procedures in campaign organisation until after their mundane and/or routine appeal has been unsuccessful.
the pragmatic interests of directing their efforts and priorities into those cases in which innocent people have exhausted their appeal rights and remain wrongly imprisoned.

Another factor in the campaign focus on exceptional cases of wrongful imprisonment for serious criminal offences relates to the moral commitment of campaign organisations (further discussed below). Victims of exceptional miscarriages of justice, who have previously failed in their routine or mundane appeals and who also experience wrongful imprisonment and denial of liberty, are of the greatest priority to campaign organisations as they are thought to have suffered the greatest wrong and/or the most harm. Accordingly, it is, perhaps, not surprising that campaigns do not look at the phenomenon of miscarriages of justice as a statistical whole and include routine and mundane successful appeals into their analyses. For such cases are routinely and/or mundanely taken care of and accounted for. Moreover, it might conceivably be thought that if campaigns paid attention to already achieved successful appeals then attention would be diverted away from the exceptional cases that they assist. Against this, a consideration of the scale of successful appeals could serve to enhance the counter-discursive force of attempts to produce exceptional successful appeals by grounding them within the broader context of a judiciary that produces thousands of wrongful convictions each year.

There is also a temporal aspect whereby campaigns focus on serious cases of alleged wrongful convictions that involve substantial prison sentences. In the same way that JUSTICE decided which cases it could assist, the voluntary nature of campaign organisations, their lack of staff and resources has meant that the volume of requests
to investigate alleged miscarriages of justice has also had to be limited to those cases that carry substantial prison sentences.

A further possible factor that might account for the campaign focus on exceptional cases probably relates to economic realities. Campaign organisations are run on a voluntary basis with meagre budgets. They rely upon the contributions of supporters and upon fundraising activities. In such a context, and in the context of the other procedural, pragmatic, moral and temporal reasons for the focus on exceptional cases, exceptional cases in which the innocent are wrongly imprisoned must remain the primary focus.

There are, however, profound limitations with the focus on exceptional cases. Firstly, it is not always the case that the victims of exceptional cases suffer the most ‘serious’ harm. As previously discussed, even some of the most seemingly mundane cases (e.g. wrongful conviction for drink-driving) can contain a significant and often comparable amount of harm for the individual victims concerned (attempted suicide, mental health problems, imprisonment). Secondly, the tendency for campaign organisations to focus on individual cases, whether successful or not, will tend to be less successful in the broader context of the exercise and functioning of power in the criminal justice sphere. For they exclude all cases in summary courts where currently over 98% of all criminal cases are dealt with. Thus, campaign organisations provide no real sense of the everyday nature of wrongful convictions; of their routine and/or mundane occurrence. Moreover, by focusing entirely upon exceptional cases, organisations against miscarriages actually reinforce the perception that miscarriages of justice are an intermittent, high profile phenomenon that affects only a small number of victims
which serves to conceal the harm experienced by the thousands of routine and/or mundane victims each year.

The production of the raw material for the reform of the CJS

In Chapter 2, routine miscarriages of justice were discerned as those appeals against criminal conviction that are routinely quashed by the CACD and mundane miscarriages as those appeals against criminal conviction given in magistrates’ courts that are quashed upon appeal at the Crown Court. These routine and/or mundane miscarriages can be conceived as the successful products of the appeal courts; an aspect of the routine and/or mundane ‘carriage of justice’ or process of the CJS; an official indicator of the scale of the miscarriage of justice problem; which may or may not be an indicator of the scale of the wrongful conviction of the innocent. Against this, contested cases of criminal conviction that are unsuccessful in their routine and/or mundane appeals are exceptional cases of alleged or suspected miscarriages of justice, which can be conceived in an altogether different way. This is because those who allege to be victims of miscarriages have already been found guilty in a court of law, and they are likely to have also been unsuccessful in their routine and/or mundane appeal. Accordingly, the production of exceptional miscarriages of justice can be conceived as entirely extra-judicial. They are not produced by the internal mechanisms of the system, but, rather, by the external (outside) endeavours of those that campaign on behalf of individual victims that continue to allege their innocence. In an attempt to understand the logic behind the production of exceptional
miscarriages of justice, this section analyses the construction and deployment of the counter-discourse that is successful in producing an exceptional successful appeal.

There is a tradition for critical legalists and/or critical socio-legalists to construct a scenario-based counter-discourse of the potential problems that particular criminal legislation and proposed criminal legislation may contain and/or the potential harmful consequences that it may engender. For example, when the HRA was announced Liberty (1998) produced a briefing detailing a range of existing judicial procedures and/or police investigative practices that might be conceived to contravene the HRA and the possible challenges that could be made under the various Articles of the Act. At this stage, despite the intellectual validity of the various critiques, Liberty’s (1998) analysis, as are all such counter-discursive productions, was regarded by the legal system as entirely speculative or fictitious. What were needed were real cases with real people who could demonstrate that they as individuals had really been denied their ascribed rights and/or freedoms. CJS discourse is not concerned with speculation of potential (or even inevitable) future causes of wrongful convictions and/or harm. Indeed, the CJS requires that this fictitious speculation to be proven by campaign organisations, whereupon what was formally considered as fictitious from a CJS perspective is transformed into CJS fact.

For example, throughout the 150-year campaign to abolish capital punishment25 there were many allegations and/or suspicions that lives had been taken in judicial error. Despite the fact that any human system can make mistakes, and that miscarriages do

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25 The campaign to abolish capital punishment can be traced to the early 1800s. For a discussion see Capital Punishment UK (2002) ‘The Abolition of hanging in Britain’ website: http://www.richard.clark32.btinternet.co.uk/contents.html retrieved February 12.
occur, and that, therefore some victims will have inevitably suffered capital punishment in error, this was treated by the CJS as fictitious speculation. What was required to abolish the death penalty was a case in which it was indisputable that such a judicial 'error' had occurred and that a real person had really lost his/her life. That case turned out to be that of Timothy Evans which transformed the fiction that some people could have been killed in error into the CJS fact that people really were being killed because of CJS 'error'. This provided the necessary force required to induce a counter-discursive public crisis of confidence in the continued validity of the law of capital punishment. It effected the abolition of capital punishment. And, it brought a conclusion to the campaign against capital punishment.

Similarly, prior to the introduction of PACE (1984) there were many criticisms of police practice and investigations. Once again, however, what were required were 'hard' cases which provided the necessary evidence that real people were really being subjected to police mal or bad practice, or were victims of poor police investigations. Until which, such critical discourse was generally regarded as speculative, as fictitious. With the Confait Affair, however, the necessary evidence (knowledge) that the police were indeed routinely in breach of the informal Judges' Rules was presented in an indisputable way with the necessary force (power) to effect the changes that so many had campaigned for and for so long.

This indicates, as well as emphasises, the moral dimension of legislative reform of the CJS, as the injustice or wrong must be proven. At the same time, it also calls into question the morality of the CJS. For, despite knowing that the system can sometimes get it wrong, and that as a consequence innocent people will inevitably be wrongly
convicted and/or harmed, it allows such a system to continue. The fundamental difference between the morality of CJS discourse and that of campaign discourse is evident in the following quotations, the first is representative of the System’s stance, the second illustrative of the campaign stance:

'It is better to keep innocent men (sic) in prison, than to let them go free and bring the system into disrepute' (Lord Denning, Former Master of the Rolls cited Miscarriages of Justice UK, 2002c).

'We campaign...on...cases that we believe to be miscarriages of justice' (South Wales Liberty, 2002 my emphasis).

In assessing the above quotations it is acknowledged that the CJS operates on the assumption that without the formalised rule of law itself there is no such thing as 'justice'. However, the above quotations emphasise that CJS morality can be conceived as the adherence to the rules of law without question, whether or not those rules are just or fair, and without regard to the harmful consequences that law might engender. In such a context, miscarriages of justice and the harmful consequences that derive from previous mistakes or which emerge from hindsight cause little concern to the System, nor those wedded to it. A pertinent example is the Birmingham Six’s attempt to sue the West Midlands Serious Crime Squad for the beatings that they had suffered before five of them ‘confessed’ (see, for example, Sedley, 1999). In hindsight it has since transpired that the West Midlands Serious Crime Squad were responsible for dozens of exceptional wrongful convictions (see, for example, Burrell and Bennetto, 1999). In his judgement, however, in which he refused their application, Lord Denning ('the people's judge') appeared to be more concerned with the
consequences for the government and the police than with the due process of law and
the possible validity of the allegations:

'Just consider the course of events if this action is allowed to proceed to trial...If the six men
win, it will mean that the police were guilty of perjury, that they were guilty of violence and
threats, that the confessions were involuntary and were improperly admitted in evidence and
that the convictions were erroneous. That would mean that the Home Secretary would either
have to recommend they be pardoned or he would have to remit the case to the Court of
Appeal. This is such an appalling vista that every sensible person in the land would say: It
cannot be right that these actions should go any further' (Denning cited Mullin, 1986, p.
216).

To give Denning the benefit of the doubt, the above, now notorious judicial assertion,
may, perhaps, be read as meaning that a criminal case could not be settled in a civil
court. However, there can be no such confusion with a later remark by Denning about
the Birmingham Six, who by this time were looking increasingly likely to overturn
their previous wrongful convictions: 'We shouldn't have all these campaigns to get
the Birmingham Six released if they'd been hanged. They'd have been forgotten and
the whole community would have been satisfied' (Denning cited Dyer, 1999g).
Whether or not the 'whole community would have been satisfied' the hanging of the
Birmingham Six would have been a judicial error. An error that, apparently, would not
have 'troubled' Lord Denning as 'donning his black cap to pass a death sentence had
never troubled him' (Denning cited Dyer, 1999g), for such a judicial error would have
been entirely legal.

Against this, the morality of campaigns against miscarriages of justice is expressed on
a number of different levels and in a number of different ways. At a semantic level the
names of the campaign organisations can be said to be *moral signifiers*. For example, the word ‘injustice’ in ‘United Against Injustice’, the overarching federal system of organisations, is by definition synonymous with ‘unfair’ or ‘wrong’. So, the explicit message is that those affiliated to UAI are ‘United Against Unfairness’, or, ‘United Against Wrong’. Similarly, the campaign organisation ‘Conviction’, which helped to establish ‘Innocent’ and UAI, can be read as synonymous with the act of being ‘convinced’ or holding a firmly held ‘belief’. Being ‘convinced’ and having a ‘belief’ in this context meaning, being convinced and/or believing in the innocence of the alleged victims of wrongful conviction that are the focus of the campaigns. Likewise, the campaign organisation ‘INNOCENT’, one of the longest standing and most influential organisations affiliated to UAI, can be read as synonymous with the absence of ‘evil’, ‘sinless’, ‘blameless’ and/or ‘pure’. This again emphasises the moral foundations of campaign organisations against miscarriages, as well as further emphasising their approach and attitude to the people that they represent.

Another aspect of the moral nature the organisations that campaign against miscarriages emerges in an analysis of the initial processes involved in the production of exceptional successful appeals when organisations agree to support single case groups. One of the primary steps before the larger geographically located umbrella organisations affiliated to UAI, for example, agree to support single cases where there is an allegation of wrongful imprisonment is for one of the representatives of the organisations to visit the alleged victim in prison to hear their story. At this point, the representative from the campaign organisation is dealing with a person who has already been found guilty in a criminal trial and may also have failed in an appeal. Accordingly, attempts to overturn exceptional wrongful convictions can be conceived
as working under an inversion of the normal principles of criminal justice. Under normal conditions the law states that suspects and/or defendants are considered to be innocent of the charges against them until they are proven to be guilty. However, because victims of exceptional wrongful convictions have previously been convicted of a criminal offence they are presumed to be guilty until they are proven to be innocent. To be sure, in a recent statement the Home Secretary (Blunkett) argued that a miscarriage of justice denoted only cases where the accused had proved he (sic) had not committed the crime (cited Hopkins, 2002a).

This raises added difficulties for the wrongly convicted that continue to protest their innocence following an unsuccessful appeal. At the trial stage the decision by the courts was whether the defendant was guilty or not guilty according to a legal criteria that the judge determined to have been satisfied. At the appeal and post-appeal stage(s), however, the alleged innocent victim must prove their innocence through the criteria of fresh factual evidence. In such a context, a crucial first step in overturning exceptional wrongful convictions is for the representatives of the larger campaign organisations to identify a person who is innocent of the criminal offences for which they have been convicted. This is often easier said than done and, depending on the particular case worker, can involve, to a greater or lesser degree, a leap of moral faith on the part of the campaign organisations. For in essence they are making a decision to believe those persons who allege that they have been the innocent victims of a wrongful conviction that has also failed in appeal before such a fact has been proven.26

26 As a strategy to reduce the degree to which campaign support is a ‘leap of faith’ some case workers have adopted a formalistic and/or contractual approach to their preliminary investigation as a precursor to a face to face meeting with an alleged miscarriage of justice victim in prison. For example, in an attempt to systematise the process Andrew Green requests the case papers from the alleged victims’
Along with the morality of campaign organisations is a form of integrity that also differs from the form of integrity evident in CJS discourse. Integrity within CJS discourse can be conceived as the attainment of the operational goals of the agencies of the CJS (police, CPS) in the context of the logic of an adversarial system. Often this can mean an attempt to prove the guilt and/or obtain the conviction of criminal defendants, whether or not they are actually guilty of the offences with which they have been charged or tried (JUSTICE, 1989, pp. 23-41). This is evident in the degree to which the police or CPS can break the stated rules of the CJS without a detrimental effect on the ‘truth’ produced by the agents of the CJS and the ability of such ‘truth’ to secure the conviction of the innocent. For example, the rules that govern how to obtain confession evidence are routinely transgressed, but this does not generally disqualify what are essentially illegitimately obtained ‘confessions’. On the contrary, Green’s (1997, pp. 8-12) researches would indicate that the working premise of those charged with the job of obtaining confession evidence is that criminal suspects are inevitably not telling the truth; that when they deny their alleged part in the criminal offences for which they are being questioned they (suspects) are, in fact, employing strategies of resistance to conceal the truth, i.e. their guilt. In such a context, counter-strategies are employed to overcome the suspects’ resistance and reveal the concealed solicitors and sends a fact-finding questionnaire to the alleged victim prior to any meeting. Following which he often sends a letter of ‘contract’ to the prisoner confirming the prisoner’s stated position in writing for the prisoner to sign and spelling out the assistance and/or support that he (the organisations that he represents) is able to offer. This being stated, there is no ‘industry standard’ or recommended working method for the investigation of alleged or suspected miscarriages for the organisations that campaign against them in England and Wales. Accordingly, there is an inevitable element of chance, both in terms of the possibility of organisations campaigning for guilty offenders (which is apparent in the disclaimers that appear on miscarriage of justice campaign literature below), and for desperate victims of miscarriages to be poorly served by campaign organisations. At the time of writing, in acknowledgement of these issues, one of the principle aims of UAI is to hold a series of seminars and workshops on good practice and the methodology of miscarriage of justice investigation (Green, 2002a).
truth of their guilt. This often results in the transgression of the safeguards that were
designed to protect innocent suspects from inappropriate pressure or inducement (e.g.
beaten confessions, charge, plea and sentence bargains), but the evidence so obtained
is often regarded by the courts as the most truthful. The reasoning is: Why would
someone admit to something that they didn’t do, whatever their treatment or
inducement?

Against this, campaign integrity dictates that campaigns are not just about ‘winning’ a
quashed criminal conviction for the alleged innocent victims that they represent. On
the contrary, integrity in campaign discourse is about ensuring that only truly innocent
people are successful as a consequence of the support provided by the campaign
organisations. This is most evident in the following quotation that can be read as a
disclaimer to the continued support of those who might allege to be innocent victims
of wrongful conviction, but who might in reality be guilty, or at the least, highly
suspect:

‘F.A.C.T. is against ALL forms of child abuse, however, in the interests of justice and truth,
we must ensure that our legal system protects both the falsely accused and innocent, as well
as punishing the guilty’ (Falsely Accused Carers and Teachers, 2002a my emphasis).

The integrity displayed in the above quotation is also displayed by all of the various
campaign organisations (see, for example, False Allegations Support Organisation,
2002; False Allegations Support Organisation, 2002b; Green, 2000b, p. 1; The Five
Percenters, 2002b; United Campaign Against False Allegations of Abuse, 2000;
Justice for Sion Jenkins, 2002). This is highly understandable, perhaps even morally
pragmatic. For when a campaign organisation or a campaigning individual, especially
an organisation or an individual that has previously been successful in overturning an exceptional miscarriage, agrees to support an alleged or suspected miscarriage of justice case, that case is immediately afforded a kind of moral endorsement. For example, following his expositions of the Evans-Christie Affair and the eventual posthumous pardon of Timothy Evans, Ludovic Kennedy established a reputation for correcting miscarriages of justice that adds weight to any cause to which he becomes involved with (see, for example, Kennedy, 2002; Berlins, 2002a; Ingrams, 2001; Greenslade, 1998; Hardy, 1999). Similarly, the Rough Justice team (see Hill, Young and Sargant, 1985) and David Jessel’s Trial and Error series (see Jessel, 1994) were widely regarded as emblematic of the innocence of the alleged miscarriage of justice victims in the cases that they chose to investigate27 (see also Gibson, 1999). More recently, following his success in the case of Stephen Downing (Hale, 2002), Don Hale’s recent pledge of support for the Graham Huckerby campaign not only gives the campaign a moral boost, it is also regarded as an indicator he is, indeed, likely to be innocent (see Editorial, 2002b).

As this relates to the important issue of legal representation, campaign organisations are keen to use previously successful solicitors and barristers that have confirmed their moral stance and integrity in overturning exceptional miscarriages of justice. In terms of solicitors, Gareth Pierce (Judith Ward; Guildford Four; Birmingham Six; Cardiff Newsagent Three; Frank Johnson; Satpal Ram), Campbell Malone (Stefan Kiszco; Kevin Callan; John Brannan) and Jim Nichol (Bridgewater Four, Colin Wallace, Peter Fell) stand out. In terms of Barristers, Michael Mansfield QC (Judith

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27 Of the 24 cases taken up by Rough Justice between 1982 and 1997 13 were referred back to the CACD with 8 of those being quashed after appeal (see Rough Justice, 1997). Between 1993 and 1999 4 of the 15 cases in the Trial and Error series resulted in successful appeals and the others were in the appeals process (see Gibson, 1999).
Ward, Birmingham Six; Tottenham Three; Bridgewater Four; Gurnos Three) would be right at the top of most campaign organisations' wish list. As Matheisen (1974) noted, 'grass roots' campaigns can be effective for direct victims of injustice when they establish what he termed 'horizontal contacts' among like-minded individuals in a variety of key positions in the power nexus.

In such a context, the moral stakes of campaigns against miscarriages of justice can be conceived of as extremely high. For if a campaign organisation or campaign individual with a reputation for overturning miscarriages were to continue to support an alleged victim no longer believed to be innocent, or perhaps discovered to be actually guilty, then the integrity of the organisation would be immediately called into question. As a consequence, other cases supported by the campaign organisation/campaigning individual would be brought into disrepute.

This emphasises another crucial difference between CJS discourse and campaign discourse. As indicated, CJS discourse is adversarial, within which miscarriages of justice, mundane, routine and exceptional, are inevitable as defenders 'succeed' in the acquittal of the factually guilty and prosecutors 'succeed' in convicting the innocent. Against this, campaign organisations can be conceived as not adversarial at all; as entirely about truth, about social justice, fairness and harm avoidance, including an attempt to avoid even the most apparently speculative or fictitious harm. From such a standpoint, whether or not the analysis of future harm is highly speculative, campaign organisations regard it as yet to be proven fact, their task then being to set about proving it through real cases. Once proved, the aim then is to campaign to effect
reform of the CJS to ensure that such causes of injustice are not future causes of miscarriages of justice.

Achievements and limitations

On a qualitative and fairly straightforward level, successful campaigns achieve successful appeals for individuals in cases that had previously been unsuccessful in their mundane or routine appeals. In so doing, campaign organisations secure the release from prison of victims of wrongful conviction for serious criminal offences that might otherwise not be acknowledged nor remedied; they reunite families and friends; they contribute to the restoration of damaged reputations; and, they achieve financial compensation for exceptional victims of wrongful imprisonment. In addition, if the particular exceptional miscarriage of justice case is one that identifies a previously unacknowledged 'error' with the CJS, then campaign organisations also contribute to the achievement of procedural reforms of the CJS. For example, the exceptional case of Adolf Beck provided the exemplary counter-discourse of the errors or failings of a criminal justice system without a court of criminal appeal and effected the establishment of the Court of Criminal Appeal. Similarly, the cases of Evans, Bentley and Ellis exemplified the errors of capital punishment and effected its abolition. The cases of Lattimore, Leighton and Salih in the Conflat Affair (see Price and Caplan, 1976; Fisher, 1977; Price, 1985) provided the exemplary counter-discourse of false confessions that was able to effect the replacement of the Judges' Rules with the formalised codes of police conduct under PACE (1984). And, the exceptional cases of the Guildford Four and the Birmingham Six provided the
exemplary counter-discourse of the inherent problems of the existing post-appeal system, which effected the establishment of the CCRC.

When campaigns are successful in producing exceptional miscarriages of justice that would otherwise have gone unacknowledged and/or unremedied they can be conceived from a certain perspective as contributing to the legitimacy of the very system that they are in programmatic opposition to (see, for example, Hillyard and Tombs, 1999, p. 21). Moreover, on an intellectual, anthropological level, it is widely accepted within Western societies that no human system can ever be perfect (Evans-Pritchard, 1963). Accordingly, and implicitly, then, it is also widely accepted that it is inevitable that some miscarriages will occur, and that some innocent people will inevitably suffer the consequences of justice in 'error'. As this translates to the issue of the legitimacy of the CJS, it could be argued that if there were no exceptional miscarriages of justice, no formal or official admissions that the system does indeed sometimes get it wrong, then the legitimacy of the CJS could, possibly, called into doubt. To be sure, if the System never appeared to get it wrong, then it would, arguably, be viewed with the greatest of suspicion. It is in such a context that, perhaps paradoxically, the time that the system can be conceived to be most just and/or truthful is when it admits that it previously got it wrong. By the same token, the campaign focus on exceptional cases can be said to feed into and reinforce the intellectual requirement that underscores the notion that 'justice must be seen to be done'. On the contrary, it would seem that an official admission to a certain amount of injustice must be seen to be able to state that justice has been done.
Another possible argument that campaign voices actually legitimise the system that they purport to stand against relates to the extent to which they work within the given legal agenda. Miscarriages of justice, exceptional or otherwise, are entirely legalistically defined. For an alleged or suspected miscarriage is always provisional unless and/or until the appeal courts quash a criminal conviction that was previously obtained. Accordingly, campaigns inherently work within the agenda of law, and they produce the vital knowledge of the most significant systemic errors and/or failings in the CJS's procedural framework in need of corrective reform, which from a certain perspective inevitably strengthens the system (see, for example, George, 1991).

A problem with the possible perception that campaign organisations actually or inadvertently contribute to the legitimacy of the CJS is that it is based on the number of exceptional miscarriages of justice that are successfully achieved through a referral back to the CACD by the CCRC - an annual average of about 7 cases (see Table 3 Chapter 2 above). In the context of all the criminal convictions this could, possibly, be perceived and/or conceived as fulfilling the legitimatory requirement that the judiciary only sometimes gets it wrong. At the very least, this could be seen as presenting little real concern to the continued legitimacy of the system. But, if all successful appeals are included in critical analyses, then, a fundamentally and profoundly different scenario is presented that indeed calls into question the continued legitimacy of the entire judiciary. To be sure, the official statistics of over 4,500 successful appeals each and every year from the Crown Court and CACD puts a completely different complexion on any notion that the system only sometimes gets it wrong. On the contrary, the official statistics on successful appeals are an official acknowledgement that the judiciary routinely and mundanely gets it wrong. They are an official
indicator or admission that, consequently, thousands of victims of wrongful conviction experience an extensive range of harmful consequences that is contrary to the stated aims of the CJS. In addition to this official acknowledgement of wrongful convictions, there are a whole range of other procedural causes and deterrents to a successful appeal (plea-bargaining, time loss rule, parole deal) that will never feature in the official statistics. In such a context, and in the context that exceptional miscarriages are not discrete from mundane and/or routine miscarriages because they determine the procedures through which they are successfully overturned, the neglect of mundane and routine successful appeals serves to underestimate the true scale of miscarriages of justice. It also renders the counter-discourse of campaign organisations in a profoundly and unnecessarily weak position. For if campaign organisations did not simply focus on individual cases but also made the connection that mundane and routine successful appeals are a procedural consequence of exceptional successful appeals there would be no mistake as to the effect of miscarriages of justice and the legitimacy of the CJS.

A further reason why campaign organisations do not legitimate the CJS is that campaigns that are successful in overturning previously unsuccessful cases through the identification of previously unrecognised faults in the system (or, more likely proving previously unacknowledged faults) in effect contribute to changing the system that they are against. In so doing, campaign organisations do not work inside the legal agenda, but on the outside. For when they take up cases that have previously been unsuccessful in their mundane and/or routine appeals, the legal agenda has been exhausted. For example, prior to the introduction of the Court of Criminal Appeal off the back of the Beck case, officially acknowledged miscarriages of justice simply did
not exist. Without an appeals system there were no successful appeals. With the establishment of a court capable of hearing appeals in criminal cases, then, a fundamentally different system of criminal justice was created that introduced miscarriages of justice into socio-legal reality as an official phenomenon. In the same way, the successful campaign to abolish capital punishment through the exemplary counter-discourse of the exceptional cases of Evans, Bentley and Ellis created a fundamentally different system of criminal justice than a system that contained capital punishment. In this sense, despite the fact that the system seems not only to survive exceptional miscarriages of justice, but the relations of power also appear to remain unchanged by the reform of the CJS, a new legislative regime of truth has been established (cf. Foucault, 1980, pp. 122-123).

Hence, campaigns that produce exceptional miscarriages of justice can also be conceived to be successful on a quantitative level. For campaigns that successfully overturn previously unsuccessful cases and then effect reforms to the CJS can also be conceived as providing the very procedures through which mundane and/or routine miscarriages of justice are determined in the future. Consequently, all appeals against criminal conviction that are successful, mundane, routine and exceptional, are rooted in the Beck case that provided the exemplary counter-discourse of the failings of a CJS without an appeal facility. Similarly, all of the mundane and/or routine successful appeals against police contraventions of codes of good conduct contained in PACE (1984) can be conceived to have their origins in the exceptional case of the Confait Affair and the interrogated false confessions of Lattimore, Leighton and Salih which effected PACE (1984). Therefore, exceptional miscarriages of justice should not be conceived as distinct or discrete from mundane and/or routine ones. Mundane, routine
and exceptional successful appeals against criminal conviction are inextricably linked – today’s exceptional miscarriage of justice case becomes the mundane and/or routine case of tomorrow.

Thus, any measurement of the reduction of miscarriages of justice and their harmful consequences must be attributed, at least in part, to the campaign organisations that achieve exceptional successful appeals and contribute to the corrective reform of the CJS. This, however, has not been recognised by campaign organisations who have, rather, continued in their counter-discursive struggle in the context of alleged cases of wrongful conviction that have already been through the appeals process and/or exceptional cases of successful appeal that were products of the post-appeal procedures of the CCRC. Both of these strategies are inevitably weak. For alleged cases of wrongful conviction that have failed in their existing appeal rights carry hardly any discursive force at all unless and until they achieve a successful appeal. Furthermore, exceptional successful appeals that are achieved through the post-appeal procedures of the CCRC are such a tiny aspect of all successful appeals that they, too, do not carry the discursive weight that they might if coupled with forms of counter-discourse of all successful appeals, which have their roots in the achievements of campaigns.

Conclusion

The foregoing analysis has attempted to show that campaign voices against miscarriages of justice can be conceived as intrinsically engaged in the production of
exceptional successful appeals as part of a broader struggle to reform the criminal justice system to reduce the future occurrence of miscarriages of justice. For campaigns that produce successful appeals that emphasise new or previously unacknowledged errors or failings in the CJS's procedural framework provide the raw material that is required to effect corrective reform of the CJS and provide the procedural infrastructure through which all wrongful convictions are successfully appealed and remedied.

Despite this, in their critiques of the CJS, campaign voices have, hitherto, not been very forceful, as they have primarily concentrated upon exceptional cases of wrongful imprisonment. Accordingly, they have not been able to comment more broadly on the procedures of the CJS that produce wrongful convictions so mundanely and/or routinely (plea bargaining, parole deal, time loss rule) which might not feature in the official statistics of successful appeals. Nor has previous campaign counter-discourse commented upon the forms of harm that accompanies mundane and/or routine wrongful conviction. Hence, whilst the exceptional case of the Confait Affair induced a public crisis of confidence on the methods by which the police produced confession evidence and effected PACE (1984), for example, the thousands of mundane and routine cases that are successful in appeal against PACE each year are neglected by the critical campaign gaze. As are the routine successful appeals that occur in the CACD which owes its existence to the exceptional case of Adolf Beck. This renders critical voices against miscarriages of justice unnecessarily weak.
The critical academic voice

Introduction

This chapter turns the analysis of critical voices against miscarriages of justice to the academic sphere. It conducts a general assessment of the forms of academic discourse that were produced about the RCCJ, showing that academic voices are generally activated following successful appeals in exceptional cases. At such times, however, academic discourse is expressed in one of two general voices. For example, on the one hand there were academic voices that responded to the RCCJ by fully participating in the attempted reform of the system by recommending legislative solutions for the governmental correction of erroneous procedures of the CJS that were of public concern. These academic voices against miscarriages of justice can be conceived as taking up the baton from campaign voices that produce the discourse of exceptional successful appeals and closing the circle of the tradition of criminal justice system reform. On the other hand, more critical academic voices on the RCCJ generally conceived it as a ‘failed’ ‘damage limitation exercise’. It is argued that this indicates a serious theoretical misconception of the intrinsic interrelations of power and knowledge and the governmental process. Furthermore, this chapter maintains that corrective legislative reform of the CJS need not be conceived in entirely ‘negative’ terms. On the contrary, the more counter-discourse that is produced about exceptional successful appeals then, potentially, the more ‘crises’ of public confidence in the CJS will be induced. And, the more problematic aspects of the
procedures of the CJS will have to be subjected to the tradition of criminal justice system reform to improve the CJS through corrective legislative reform.

The chapter proceeds in three parts. Firstly, the general academic response to miscarriages of justice is explicated. Second, a closer analysis of the forms of critical academic discourse that collectively responded to the RCCJ is conducted, and a shared conception of power discerned. In particular, this part seeks to demonstrate the misconception at the heart of the forms of critical academic discourse that responded to the RCCJ, both in terms of the role and rationality of the Government in the interplay of CJS discursive forces and the disposal of public crises of confidence in the CJS. Finally, a reflexive analysis of the forms of critical academic counter-discourse that responded to the RCCJ (1993) is undertaken to locate such forms of counter-discourse themselves within the processes of CJS governmental reform.

The academic response

Academic discourse on the subject of miscarriages of justice is not generally produced in any sustained or systematic way. Rather, academic discourse on miscarriages is very much a by-product of researches in particular areas of the CJS or the process of criminal justice. For instance, academic analyses of the limits or the weaknesses of criminal defence provision (for example Cape, 1994) are inherently and intrinsically dealing with the potential miscarriages that occur when defence provision is inadequate. Similarly, analyses of PACE (1984) (for example, Coleman et al, 1993) are inherently concerned with the injustices (miscarriages) that occur when PACE’s
(1984) codes of conduct are contravened. As for specific academic discourse on miscarriages of justice, however, this has tended to be almost entirely bound up in the exceptionality approach. It has been intermittently produced in response to the public crises of confidence that were induced by particular cases of successful appeal that exemplified unaccounted for ‘errors’ in the legislative framework of the CJS. Hence, whilst the RCCP was sitting a number of academic responses were presented (see, for example, Baldwin and McConville, 1980; Irving and Hilgendorf, 1980). However, specific academic discourse on miscarriages of justice did not appear again until the establishment and Report of the RCCJ over a decade later. As Hillyard (1994a, p. 69) in his response to the RCCJ commented, ‘it is some thirteen years since many of us were burning the midnight oil expressing our profound dissatisfaction with the Royal Commission on Criminal Procedure (1981).’ Since the academic discourse that was produced in response to the RCCJ, academic voices on miscarriages of justice have generally been hushed (the notable exception to this general rule being a series of researches presented by Nobles and Schiff, for example, 1995; 1997; 2000).

A particular problem with this is that miscarriages of justice are not only an intermittent phenomenon that presents a problem every decade or so. On the contrary, as persistently underlined in this thesis so far, if miscarriages are defined in terms of successful appeals - the number of times that the system itself indicates a wrongful conviction - they can be conceived as a routine, even mundane features of criminal justice in England and Wales. As shown in Chapter 2 above, the LCD’s statistics on successful appeals show that in the decade 1988-1998 the CACD abated over 2,670 criminal convictions - a yearly average of 267. In addition, there are around 3,500 quashed criminal convictions a year at the Crown Court for convictions obtained at
the magistrates' courts. Contrary to this, when academic voices (discourses) on miscarriages of justice intermittently speak (are produced), they can be said to fall into one of two distinct categories: the 'justice in error' voice or the 'justice in crisis' voice. These phrases were the titles of the two main academic collections that contributed to the debate about the last major review of the CJS in response to perceptions of miscarriages of justice - the RCCJ. *Justice in Error*, edited by Walker and Starmer (1993), contained eleven contributions which included analyses of police investigative procedures (Coleman et al, 1993); the right to legal advice (Sanders and Bridges, 1993); the right to silence (McElree and Starmer, 1993); prosecution disclosure (O'Connor, 1993); and post-conviction procedures (Mansfield and Taylor, 1993). All of which can be conceived as primarily concerned with procedural reform of the criminal process in the interest of reducing inadvertent or unintended 'errors' that might cause miscarriages of justice and helping to resolve the identified public crisis of confidence in the CJS at the time. On the other hand, *Criminal Justice in Crisis*, edited by McConville and Bridges (1994), contained 28 contributions from prominent critical academic intellectuals that presented a more sustained collective assault upon the RCCJ in the interests of social justice. Most significantly, despite the ostensible differences in the contributions to *Criminal Justice in Crisis* in terms of subject area, all of the contributors shared a common voice that the RCCJ was a 'damage limitation exercise' that functioned in the interests of the Government of the day, thus reinforcing its 'control' of the CJS. Indeed, the Foreword to *Criminal Justice in Crisis* asserted: 'All the papers in this volume...reflect a common sense of...betrayal' (McConville and Bridges, 1994a, p. xv). Despite this, the RCCJ duly disposed of the public crisis of confidence in the CJS to which it was established. This raises key questions about:
the evaluative stance and function of critical academic discourse on miscarriages of justice;

the part of public crises of confidence in the reform of the CJS; and,

the position of the Government in response to public crises of confidence.

Without wishing to exaggerate the uniformity of the exponents of academic discourse generally, and the complex and contrasting political positioning of the specific intellectuals who contributed to Criminal Justice in Crisis, this chapter focuses on the more overtly critical collection of counter-discourses against miscarriages that were collectively presented in Criminal Justice in Crisis. For they did not merely call for procedural reform of the CJS to reduce ‘error’, but made a collective call for fundamental political change in the operations of criminal justice. The aim being to analyse the intentions and effects of the counter-discourses that were presented in Criminal Justice in Crisis and to assess the likely success of such forms of critical counter-voices.

Criminal Justice in Crisis and the RCCJ

In Criminal Justice in Crisis, miscarriages of justice were generally conceptualised as intrinsically linked to notions of the abuse of the Government’s power (see, for example, Lacey, 1994, p. 40). In a similar vein, extra-judicial inquiries such as the RCCJ (1993) were commonly conceptualised as devices that specifically function in the interests of whichever Government happens to be in office at the time of their
Report (see, Bridges and McConville, 1994, pp. 3-5). This view was also exemplified by Lacey (1994, p. 40) in the assertion that:

`...the very logic of such bod[ies as the RCCJ] is that [they] hope to be judged a success – and success, most obviously, is judged in terms of the acceptance and implementation of its reform proposals. Thus such bodies always have a clear incentive to “second-guess” what will find favour with the Government of the day (my emphasis).

Likewise, the legislative corrections to the CJS that flowed from the RCCJ, even if they were viewed ‘positively’ by Criminal Justice in Crisis, were conceived as ‘damage limitation exercises’, in the interests of reinforcing the Government’s ‘control’ of the CJS (see, for example, Bridges and McConville, 1994, pp. 22-23; Hillyard, 1994a, p. 74). Criminal Justice in Crisis’s conception of extra-judicial inquiries is succinctly summarised in the following quotation from Celia Wells’ (1994, pp. 53-54) contribution: ‘It is unarguable that the criminal justice system is a taken for granted part of the apparatus of the state, however defined...[it is] subject to government manipulation in support of its claim to authority’ (my emphases).

Against this, Foucault’s (1979, p. 85) research certainly provided an ‘argument’ against such a conception of the importance and centrality of the Government in the operations of CJS power which can be conceived as entirely ‘sovereign’ in form. To be sure, as was explicated in Chapter 4, Foucault (1979) offered a qualitatively different conception of the forms and operation of present forms of power to that expressed in Criminal Justice in Crisis. In fact, a polar distinction can be made between ‘sovereign’ forms of rule as contained within the critical academic discourse in Criminal Justice in Crisis and the governmental rationality that underpins present
exercises of power from a Foucauldian perspective. For, unlike 'sovereign' forms of authority wherein the 'sovereign' exercises absolute power over 'subjects', the defining feature of the mentalities of 'government' and the exercise of present forms of power need to be understood in terms of the interrelationships between ruler and ruled (Foucault, 1991, p. 100; Gordon, 1991, p. 3). This 'government', however, is not a conspiratorial, negative or coercive form of control or domination over a population or domain of government as expressed in *Criminal Justice in Crisis*. On the contrary, legitimate or 'good' government takes as its object the enhancement of the population or domain to which it is mandated to be responsible. As Foucault (cited Rose, 1996, p. 44) pointed out, 'legitimate government will not be arbitrary government, but will be based upon intelligence concerning those whose wellbeing it is mandated to enhance' (also Foucault, 1991, p. 100). This is achieved by new forms of statistical rationality that also emerged alongside the replacement of 'sovereignty' by 'government' that are intrinsically connected to the production and deployment of forms of knowledge, calculation, categorisation and expertise (see, for example, Hunt & Wickham, 1994, p. 27; Foucault, 1991, p. 96).

In such a context, governmental forms of power are exercised via the surveillance of aspects of the societal domains for which governmentality assumes responsibility. This is precisely not about domination but, rather, about the negotiated outcome of the interplay of dominant forms of discourse and their counter-discursive opposition. From such an approach, forms of power and resistance are conceived as inter-relational *force relations* that exist within the social body (cf. Foucault, 1979, pp. 93-94). Power's *conditions* of possibility actually consist of this moving substrate of force relations: the struggles, confrontations, contradictions, inequalities,
transformations and integrations of these force relations. Thus, individuals are 'positioned' within any struggle only as a consequence of the existence of a struggle for power (Foucault, 1979, p. 94). Accordingly, dominant forms of power and resistance to them involve the invention of 'tactics' and the co-ordination of these various tactics into coherent strategies. A strategic manoeuvre must be countered by an opposing manoeuvre. A set of tactics must be consciously invented in opposition to the setting in place of another. A different 'art' of criminal justice, for example, will oppose an historically given one (cf. Smart, 1988, p. 122). Moreover, whilst it is true to say that exercises of power are intentional, it is, simultaneously, nonsubjective (Foucault, 1979, p. 95). If power relations are intelligible, it is not necessarily due to the State's conspiratorial attempt to control the population but, rather, because they are imbued, through and through, with 'calculation'. For whilst there is no power that is exercised without a series of aims and objectives, this does not mean that it results from the choice or conspiratorial decision of an individual subject or group of individuals. As Foucault (1979, p. 95) famously remarked:

'...let us not look for the headquarters that presides over (power's) rationality...[For]...neither...the groups which control the state apparatus, [nor] those who make the most important economic decisions direct the entire network of power that functions in a society (and makes it function)...[Rather]...the rationality of power is characterized by tactics that are often quite explicit at the restricted level where they are inscribed...tactics which, becoming connected to one another, attracting and propagating one another, but finding their base of support and their condition elsewhere, end by forming comprehensive systems: the logic is perfectly clear, the aims decipherable, and yet it is often the case that no one is there to have invented them, and few who can be said to have formulated them: an implicit characteristic of the great anonymous, almost unspoken
strategies which coordinate the loquacious tactics whose "inventors" or decisionmakers are often without hypocrisy.'

From such a perspective on power, the conception of the Government as the central object or target of critical counter-discourse because it is an apparatus of State is displaced. For government (or even Government for that matter) is, precisely, not synonymous with the State 'whose importance is a lot more limited than many of us think' (Foucault, 1991, p. 103). However, this does not mean that the State is of no significance whatsoever in the discursive interplay of present forms of power. Rather, relations of power, and hence the analysis that must be made of them, necessarily extend beyond the limits of the State. This is because not only is it impossible for the State to occupy the whole field of power relations, the state can also only operate on the basis of other, already existing power relations. As Foucault asserted, it is better to view the state as 'superstructural in relation to a whole series of power networks that invest...knowledge, technology and so forth' (cited Smart, 1988, pp. 123-124 my emphasis).

If this Foucauldian approach is applied to Criminal Justice in Crisis, it is not that Government discourse is not a powerful force in the processes of the operations of CJS power. Nor is it that critical forms of academic discourse (in a generic sense) should cease in its critique of Government discourse or in its considerations of the Government in its analyses of CJS power. Rather, it is to acknowledge that the Government is neither critical academic discourse's only competing discursive force, or necessarily, its most powerful adversary. To be sure, in the interplay of competing CJS discourses, the Government has a stake and a discursive agenda. But, so, too, do other groups institutions and individuals. All of these various and competing
discourses need to be taken into account in analyses of the operations of CJS power – discourse must take account of other, competing, discourses. For example, in the Parliamentary campaign for the establishment of the Court of Criminal Appeal, it was not ‘The Government’ that presented neither the only, nor the greatest discursive barrier or obstacle to its introduction. On the contrary, the century-long struggle for a court capable of reviewing criminal convictions was attributable to the force (power) of competing anti-Court of Criminal Appeal discourse in the government of the CJS (see Pattenden, 1996, pp. 5-33).

Similarly, it was not ‘The Government’ that stood in the way of the campaign for the abolition of capital punishment. In fact, the abolition of capital punishment was largely achieved through the support of the Government of the day’s discourse that supported the campaign for abolition (see Callaghan, 1997). Indeed, it was not Government discourse, but, rather, the power of pro-capital punishment discourse that kept capital punishment firmly in place until the effective counter-discourse of the cases of Bentley, Evans and Ellis exemplified the inherent problematic nature of capital punishment (i.e. that certain hangings were mistaken and/or certainly inappropriate), was able to induce public support and eventually result in abolition. The same is the case for the introduction of PACE (1984) and the establishment of the CCRC. Government discourse did not object to the recommendation of the RCCP for the introduction for formalised codes of conduct on police conduct but duly translated it into PACE (1984). Nor did Government discourse resist the RCCJ’s recommendation to establish an extension to the appeals system. On the contrary, it was promptly translated by the Government into the CCRC.
It seems that the forms of critical academic discourse against miscarriages of justice that were collectively presented in *Criminal Justice in Crisis* misconceived the (admittedly) somewhat paradoxical *superstructural* role or position of the Government. For whilst the Government is the object of counter-discourse, because of its position as facilitator or arbiter in the disposal of public crises of confidence in the government of the CJS, it simultaneously contains its own discursive agenda and is, thus, a potential (often real) discursive opponent. *Criminal Justice in Crisis* conflates the two and conceptualises the Government, because it is an apparatus of the State, as its only and most powerful competing discursive opponent. If the outcomes of extra-judicial governmental devices such as the RCCJ (1993) are not of the form desired by the critical scholars that collectively produced *Criminal Justice in Crisis* this does not necessarily mean that they are ‘damage limitation exercises’ that merely function in the interests of the Government of the day (aka Lacey, 1994). It could, at least in part, be as much to do with the success of other competing discourses, including that of the Government, in the negotiated struggle to reform the CJS. For example, in the case of capital punishment, there still exists a campaign for its re-introduction (see Capital Punishment UK, 2001) to which the present New Labour Government discourse seems adamantly opposed, but which future Conservative Government discourse might not be opposed (see, for example, Editorial, 2001). Similarly, in the case of PACE (1984), it was police and pro-police discourse that was opposed to, and critical of its introduction, which it regarded as hampering police inquiries, providing too many rights to criminal suspects and was too expensive (see, for example, The Clerk’s Notes, 1984; Osoba, 1988). Furthermore, in the case of the CCRC, just because there was (to a greater or lesser degree) universal approval to its establishment, that does not imply that it can be simply read-off as a ‘successful’
'damage limitation exercise'. As the tradition of criminal justice system reform previously explicated demonstrates, legislative reforms to the CJS are not at all 'damage limitation exercises'. On the contrary, they are the product of historical struggle and the ability of critical counter-discourse that exemplifies particular and specific problematics in existing CJS procedural arrangements to induce public crises that ultimately yield legislative reforms of the CJS. Accordingly, the forms of counter-discourse that are able to induce public crises of confidence in the CJS should not be viewed as entirely 'negative', but should also be viewed 'positively' for the opportunities to reform the CJS that they provide. For, to paraphrase Foucault (1980, p. 52), it is not possible for CJS power to be exercised without knowledge; it is impossible for knowledge not to engender CJS power.

**Reflexivity**

The RCCJ can be conceived as a governmental device that produced the proper norms for the disposal of the public crisis of confidence in the CJS. This public crisis had been induced by the counter-discourse that exemplified the need for further criminal appellate opportunities once existing criminal appeal processes had been exhausted (Colvin, 1994). To demonstrate a collective misconception of extra-judicial governmental devices such as the RCCJ, and a lack of reflexivity in the interplay of CJS power, this section considers a number of disparate demands and criticisms of the Report of the RCCJ that were expressed in *Criminal Justice in Crisis*. Without wishing to present a 'straw' conception of the forms of counter-discourse that appeared in *Criminal Justice in Crisis*, the examples to be considered were fairly
arbitrarily selected and are representative of the general and collective approach to the relations of power to which all of the authors subscribed. To be sure, my intention is not to damn the intellectuals who contributed to *Criminal Justice in Crisis* on the basis of a number of stand-alone quotations or de-contextualised soundbites. On the contrary, the intention is not to damn anyone at all but, rather, to provide a more appropriate and reflexive understanding of the relations of power and resistance, of discourse and its counter-discursive opposition. The hope being that this can contribute to the future production and deployment of counter-tactics and strategies that might more effectively engage with predominant CJS discourse and bring about more satisfactory reforms of the CJS.

For Bridges and McConville (1994, p. 50), for example, the major problem of the Report of the RCCJ was that it ‘failed’: ‘to provide a clear statement of the basic values which the criminal justice system should seek to uphold and a consistent, comprehensive account of the workings of that system.’ Similarly, for Lacey (1994, p. 30), the RCCJ was a ‘missed opportunity’ to look critically at the: ‘structural factors which gave rise to many of the particular problems in the administration of criminal justice...and the basic assumptions, values and goals which ought to inform criminal justice practices.’ For Maher (1994, p. 59), the main problem with the RCCJ was that it did not consider: ‘concepts such as individual rights of suspects and other persons in the criminal process; or ideas such as process or intrinsic values.’ For Brogden (1994, p. 152), the major ‘failing’ of the RCCJ was it: ‘was not required to investigate what has been a major area of contention for two decades, police powers of stop-and-search.’ For Singh (1994, p. 172): ‘the RCCJ should have used the opportunity presented to it to reconsider the purpose of arrest and detention...by failing to
consider the variety of reasons which may underlie the police decision to arrest and
detain, the Commissioners have implicitly endorsed the police practice of using these
powers for the purpose of inflicting summary punishment.’ For Cape (1994, pp. 186-
187): ‘The failure [of the RCCJ] to take account of the structural imbalance between
the two parties [defence and prosecution] leads to a complete failure to deal with an
issue that is fundamental both to police detention and to the provision of defence
services at the police station; that is, what is the true purpose of police interrogation of
suspects.’ In addition, Hillyard (1994a; also 1994b) criticised the ‘failure’ of the
RCCJ to improve the treatment of the Irish community. Boothman (1994, p. 96)
argued that the Commission’s recommendations would actually serve to further
discrimination and more deeply institutionalise racism within the CJS. And, Hodgson
(1994, p. 200) was critical of the RCCJ’s ‘failure’ to thoroughly evaluate the function
of the criminal defence lawyer.

Such demands, despite the validity of their divergent critiques, misconceive the
conditions of governmental intervention into the CJS and the relations of power and
resistance within the governmental reform processes of the CJS. In particular, the
evaluative stance of such analyses is couched too much in terms of ‘success’ or
‘failure’, which produces a totalizing all or nothing feel. Governmentality, on the
other hand, is precisely not about ‘success’ or ‘failure’. On the contrary, government,
as a process of reform is always ongoing, ‘unfinished’ (cf. Mathiesen, 1974); in a
state of continual contestation, negotiation and re-negotiation in its management or
arbitration of competing discourses (cf. Foucault, 1980).

Moreover, the forms of critical counter-discourse against miscarriages of justice that
were produced in response to the RCCJ in *Criminal Justice in Crisis* tended to overlook and misconceive the historical struggle within which extra-judicial bodies are established. They served to trivialise the legislative achievements that such struggles obtain. They, generally, demanded far more in terms of corrective legislative recommendations than the RCCJ specifically, and extra-judicial inquiries generally, are able to deliver. As such, they can be conceived as an attempt to piggyback specific campaigns to push through disparate legislative reform agendas. Extra-judicial inquiries into the CJS have traditionally been established to address specific criminal justice problematics exemplified by forms of critical counter-discourse that were able to induce public crises of confidence in the CJS. The RCCJ was established primarily to address a failing in the appeal process. It was not a royal commission on the ‘basic values which the criminal justice system should seek to uphold’ aka Bridges and McConville; it was not a royal commission on the ‘basic assumptions, values and goals which ought to inform criminal justice practices’ aka Lacey; it was not a royal commission on ‘the individual rights of suspects and other persons in the criminal process’ aka Maher; it was not a royal commission on ‘police powers of stop-and-search’ aka Brogden; it was not a royal commission on ‘the purpose of arrest and detention’ aka Singh; it was not a royal commission on ‘the provision of defence services at the police station’ aka Cape; it was not about the treatment of Irish criminal suspects aka Hillyard; it was not about the treatment of suspects from ethnic minorities aka Boothman; and, it was not about the ‘function of the defence lawyer’ aka Hodgson. Accordingly, the demands of the RCCJ expressed in *Criminal Justice in Crisis* were not only inappropriate and, largely, irrelevant, they inevitably floundered. The RCCJ was specifically established in governmental response to the cases of the *Guildford Four, Birmingham Six*, et al. The discursive agenda on the need for a royal
commission to investigate these cases was framed in the context that these cases exemplified the need for further appellate procedures once existing appeal processes had been exhausted. The 'terms of reference' of the RCCJ was not framed in terms of the need to improve the underlying values which the CJS should seek to uphold, or the goals of CJS practices. Nor any the other aforementioned conceptualised 'failings' of the RCCJ that were called for by Criminal Justice in Crisis. The RCCJ's recommendation to establish the CCRC was successful in disposing of the public crisis of confidence in CJS appeal procedures precisely because it was addressed to the reason for its establishment.

From this it follows that if the object is the improvement of Irish criminal suspects, for example, critical counter-discourse needs to be produced that specifically exemplifies the mistreatment of Irish suspects and is able to induce a public crisis of confidence in this aspect of the CJS. Once this crisis has been induced the remit or 'terms' of the extra-judicial inquiry that will be established in governmental response need to be framed to address this particular and specific CJS problematic. In this process of agenda setting, other discursive forces will come into play with their own competing, and, in many instances, conflicting discursive agendas. This stage in the disposal of public crises is crucially important, as the public perception of the problem to be addressed and, hence, in need of legislative correction will determine the possible success of the governmental process. As George (1991, p. 76) has argued, a way to 'guarantee a debate':

'...is to shift the framework of debate in such a way that any conclusion reached within it is in accord with one's views. Whether one wins or loses particular debates conducted within
such a shrewdly chosen framework is then largely irrelevant, since the very act of debating
will strengthen those presuppositions that are ultimately of greatest concern.’

If an extra-judicial inquiry were to be established in response to a public crisis in the
appeals procedure and it, instead, focused upon the treatment of Irish suspects, to
follow the same example, it would not be able to dispose of that crisis. Accordingly,
the RCCJ did not address the issue of the treatment of Irish suspects in the criminal
process. Such governmental devices as the RCCJ are not about the resolution of all
problematic aspects of the CJS. If critical counter-discourse is to be successful in
terms of its programmatic aims, it needs to more appropriately understand the
rationale of such extra-judicial inquiries as the RCCJ and the conditions of the
establishment of such governmental devices. Such an understanding can assist in the
invention of more effective counter-discursive-strategies in attempts to produce the
prerequisite public crises of confidence in specific aspects of the CJS and effect
governmental corrective legislative reform.

An example of this thesis can be derived from an analysis of Winter’s (1994)
contribution to Criminal Justice in Crisis’s critique of the RCCJ. In particular, Winter
(1994, p. 80) stated that when the RCCJ was announced ‘we’ (the Britain and Ireland
Human Rights Project (BIHRP)):

‘...wrote to the then Home Secretary asking him to extend the Commission’s terms of
reference to include Northern Ireland...The terms of reference would not be expanded, we
were informed...We went ahead and submitted evidence to the Commission anyway,
convinced that the fact that so many miscarriages of justice involved cases concerned with
the conflict in Northern Ireland.’
Winter (1994) is almost certainly correct on the significance of the high profile Irish cases and the establishment of the RCCJ. At the same time, she demonstrates well the importance of the terms of reference of such governmental devices for the subsequent disposal of public crises of confidence. This raises the question of the strategy of the BIHRP to submit their evidence ‘anyway’, despite being informed that the ‘terms’ would not be expanded. At this stage, once the terms had been established, it might have been more tactical for such researchers to shift their focus to research that exemplified the failings in the criminal appeals procedure in the interests of more fruitful corrective recommendations on the criminal appellate framework. As it was, researchers continued with their own disparate research and legislative reform agendas, which inevitably failed, and which, ultimately, served to weaken critical academia’s counter-discourse’s overall position. It is within this context that the forms of critical academic discourse that responded to the establishment of the CCRC should be assessed. Criticisms that the recommendation to establish the CCRC was met with ‘virtually universal approval’ but that ‘the proposal is not entirely unproblematic’ (Bridges and McConville, 1994, p. 22) say as much about the misunderstandings of the forms of critical counter-discourse that were collectively presented in Criminal Justice in Crisis in terms of the processes of governmental legislative reform of the CJS as they do about the success of other competing discourses – discourse not only has to take account of other discourse, it must also take account of itself.

A final example of this thesis can be derived from Boothman’s (1994) contribution. Boothman (1994, p. 91) noted that the Institute of Race Relations (IRR) was
‘disturbed’ that:

‘...race did not gain a mention in the Royal Commission’s terms of reference...Yet...there
was a considerable body of research on race and criminal justice which at the very least
suggested a serious problem...and a number of the most serious miscarriages of justice that
had lead to the Commission being established had in fact involved black defendants.’

As with Winter (1994), Boothman (1994) is undoubtedly correct on the significance
of ‘race’ and discrimination in the criminal justice process. So much has been more
recently acknowledged as a consequence of the Stephen Lawrence Affair.28 But, how
was such acknowledgement achieved? It was certainly not achieved by submitting
critical counter-discourse on racial discrimination to an extra-judicial governmental
inquiry with a remit of a review of the law on criminal appeals. On the contrary, it
was achieved through a specific case that exemplified structural racism within the CJS
that was able to induce a public crisis of confidence in the government of the CJS in
its treatment of suspects, defendants and victims in the context or ‘terms’ of ‘race’. In
keeping with the discursive rules of the tradition of criminal justice system reform the
Stephen Lawrence Inquiry was established in response, and the legislative
recommendations of the Macpherson Report are currently being debated (see, The

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28 For an archive of all The Guardian’s reportage of the Lawrence case see The Guardian Unlimited
Conclusion

This chapter considered the academic response to the most recent governmental overhaul of the CJS – the RCCJ. In so doing, it discerned two types of academic voice in response to miscarriages of justice: a reform orientated voice that closes the circle on the tradition of criminal justice system reform by fully participating in the recommendation of corrective procedural reforms and a voice that is essentially critical of reforms. In focusing on this latter more overtly critical expression of the academic voice, it was demonstrated that the critical academic counter-discourses that were presented in *Criminal Justice in Crisis*, the primary critical academic text on miscarriages of justice in collective response to the RCCJ, generally misconceived the relations of power and resistance in the governmental processes of the disposal of public crises of confidence in the CJS. The reflexive part that such critical counter-discourse itself fulfils in those processes was also shown, highlighting not only the inherent problems of exceptionality but also the specificity of CJS reform. Phenomena such as exceptional successful appeals are discursive productions that are intrinsically connected to specific forms of critical knowledge that exemplify problematic aspects in the legislative framework of the CJS. If such counter-discourse is able to induce a public crisis of confidence in the CJS then it signifies a problematic moment in the government of the CJS. In this process, the utility of the public crisis of confidence is to identify and to prioritise the most problematic aspects of the existing CJS legislative framework as part of the broader governmental surveillance or visualisation of the CJS. This provides the necessary force to counter-discourse required to operationalise governmental intervention. In response, 'governmentality' domesticates the crisis and transforms a ‘negative’ public crisis of confidence in the
governmental authority of the management or rule of the CJS into a ‘positive’ reaffirmation of such governmental rationality. This governmental management, however, is not a conspiratorial, abusive, control of the CJS for its own ends, as conceived by the forms of critical academic discourse in *Criminal Justice in Crisis*, but a rationality that seeks to improve the CJS when the appropriate conditions for governmental intervention are present. Accordingly, public crises of confidence in particular aspects of the CJS need not be seen as entirely negative events, nor, necessarily, as a sign of a Government in terminal ‘crisis’. On the contrary, they can be conceived as necessary prerequisite conditions for the reform of the CJS that provide opportunities to force through fundamental changes to problematic aspects of the CJS that should not be squandered but exploited. This, to be sure, seems an entirely functionalist analysis of legislative reform of the CJS. Such a form of analysis, however, not only seems wholly appropriate, it is necessary to capture what Nobles and Schiff’s researches have shown to be the ‘autopietic’ internal logic and ‘self-referential communications’ of the CJS (see, Nobles and Schiff, 1995, p. 300; 1997; 2001). This form of systems analysis, however, is not the conservative analysis normally attributed to such analyses. On the contrary, it is founded in the critical and material realities of the governmental disposal of continual conflict or struggle. Moreover, it is a form of critical analysis that attempts to understand such processes in the interests of the production and deployment of more effective counter-discursive tactics and strategies. For if relations of power and resistance are misconceived then inappropriate and, hence, inadequate tactical strategies will be developed and deployed.
The human rights voice

Introduction

In addition to the voices caught up in the tradition of criminal justice system reform, with the primary focus of the reform of the procedural framework of the CJS, a further discernible voice has spoken about miscarriages of justice and the harm that they engender from the human rights approach. In Chapter 1, the human rights approach was cited as a possible way out of the limitations of prevalent definitions of miscarriages of justice. In particular, the human rights voice is not confined to a pursuit of factual innocence of victims of wrongful convictions but, rather, is grounded in a notion that any breach of rights causes harm to individuals and is unlawful. This can contribute to the re-orientation of miscarriages of justice away from exceptionalist understandings to include all successful appeals whatever their cause. Furthermore, when the estimated and/or claimed number of prisoners who should not be in prison is also taken into critical consideration a fundamentally different set of implications for critical analyses of human rights and victims of wrongful conviction is presented. For example, it is widely estimated that as many as 3000 people are currently imprisoned in England and Wales with a legitimate grievance about their conviction. This estimate was reported in a HO bulletin, appeared in Prison News, was confirmed by a prison governor and broadcast as
accurate on several occasions by the British Broadcasting Company (BBC) (The Portia Campaign, 2001; Watkins, 2001).

Clearly these are matters that are appropriate for human rights discourse. To be sure, in February 2001, the then chief inspector of prisons, Sir David Ramsbotham, claimed that there were as many as 20,000 people in UK prisons that he believed should not be there. These included children, the mentally ill, asylum seekers and those in prison for trivial shoplifting or drug offences (see Hattenstone, 2001). Nevertheless, at this stage in its articulations, the existing human rights voice has not capitalised on the promise of the HRA and problematised routine and/or mundane successful appeals as wrongful convictions. On the contrary, successful appeals have tended to be seen as an indication that legal rights and freedoms are being upheld, and that the system is actually fulfilling its human rights obligations against miscarriages of justice by providing mechanisms for overturning wrongful convictions as and when they occur. Nor has the existing rights voice more systematically questioned the general appropriateness of imprisonment. Accordingly, the existing human rights voice can be conceived to suffer the same definitional limitations as the voices bound up with the reform of problematic procedures of the CJS. It is also primarily directed towards victims in exceptional cases of successful appeal that were not successful in their routine and/or mundane appeal attempts. Hence, the number of victims of wrongful convictions and the harm that they experience that can be calculated from the existing human rights voice is also extremely limited.

This chapter acknowledges that no system of criminal justice can work from an assumption that it mundanely and/or routinely gets it wrong, and that the system (any
system) *must* operate on the basis that its verdicts are for the most part sound. Moreover, it is accepted that otherwise there would be a bizarre situation in which all prisoners would have to be treated as if they were or, at least, potentially innocent. Despite this, the sheer number of successful appeals that are currently occurring indicates a scale of wrongful convictions that is at odds with the general spirit of the HRA and the Articles therein, which limit the lawful restrictions and/or abuses from the Act. From such a qualified frame of reference, this analysis proceeds by firstly drawing out from the recent literature on the HRA an image of the limited scope of the current human rights voice. Secondly, extending previous arguments, a more adequate application of the HRA is envisaged to show, in a provocative and illustrative fashion, how the current scale of victims of wrongful convictions that can be inferred from the official statistics on successful appeals could be said to contravene almost every Article. This exposes the limits of existing forms of human rights counter-discourse and calls for the system to be more reflexive in respect of wrongful convictions. In this sense, there is a requirement to at least consider the conditions for performing the unperformable.

**Existing invocations of the HRA**

As the HRA was passed by Parliament in 1998, and came into force in October 2000, during the five-year period of this research the notion of the human rights of individuals caught-up in the criminal justice system and the HRA have been increasingly invoked in one of two distinct ways. On the one hand the human rights voice has referred to the HRA and spoken in the interests of overturning potential
exceptional miscarriages of justice in the narrow confines of already convicted prisoners. Alternatively, the human rights voice has used the HRA in the general interests of the welfare of the prison population.

In terms of the human rights voice's invocation of the HRA in attempts to overturn possible exceptional miscarriages of justices, in July 1999, for example, five law lords were called upon to decide whether prison inmates had the right to talk to the media. Under Article 10 of the ECHR, Freedom of Expression, Ian Simms and Michael O'Brien (who would later achieve a successful appeal as one of the Cardiff Newsagent Three) challenged The Prison Rules' stipulation that journalists should be allowed to visit prisoners only on condition that they sign an undertaking not to disclose or publish any information obtained during the visit. Finding in favour of Simms and O'Brien the judges invoked the human rights voice and said that prisoners who protested their innocence often had no other means of searching out the fresh evidence needed to have their cases reconsidered by the CACD. As such the Home Secretary's ban on journalists was determined to be 'an unlawful interference with free speech' (see Dyer, 1999f; Editorial, 1999d). This would seem to indicate that the treatment of prisoners within England and Wales, whether legitimately imprisoned or victims of wrongful convictions, currently complies with Article 10 of the ECHR/HRA. In March 2002, however, John Hirst had to win a further legal challenge under Article 10 for the right to speak to journalists on the telephone (see Cozens, 2002). In a similar vein to the earlier ruling, Mr Justice Elias invoked the human rights voice and gave the reason for the judgement on the following grounds:

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29 This challenge predates the introduction of the HRA in October 2000 and, hence, was made under Article 10 of the ECHR, which provided exactly the same rights and freedoms that are currently provided by Article 10 of the HRA.
'News is perishable and news stories have to be put together within a very short space of time...[in such a context]...concern over certain aspects of prison conditions, for example, will often arise from some specific event. The journalist must catch the tide or the impact of the story will be lost. It will frequently be too late for information to be obtained by written communications' (cited Dodd, 2002).

It would seem, then, that the matter of a prisoners' right to freedom of expression is a multifaceted one, where each of those facets must be obtained individually through successful legal challenge. Moreover, it would seem that the right of prisoners to express themselves to the media, either by written communication or by telephone is deemed to be lawful if it serves the general interests of overturning wrongful criminal convictions. In this context, it is interesting that convicted prisoners are not allowed to vote. This was reported in April 2001 when the high court upheld a ban on convicted prisoners having the right to vote which had been also challenged under Article 10 of the HRA, and had the support of Martin Narey, the director general of the prison service (see Dodd and Milne, 2001). In the judgement, Lord Justice Kennedy reiterated the Government's policy as follows: 'As the home secretary said, parliament has taken the view that for the period during which they are in custody convicted prisoners have forfeited their right to have a say in the way the country is governed' (cited Dodd and Milne, 2001). This indicates that the wrongly imprisoned are indeed denied a crucial aspect of the freedom of expression, which can be conceived as an intrinsic element of Article 10 in a liberal democratic society. It also goes against the judgements in the two successful challenges brought under Article 10 which emphasised the importance of the rights of communication and democratic participation of prisoners who might be innocent for the contribution that they might
make in the interests of justice. In another case in which the human rights voice was called upon to speak, John Hirst, cited above for his successful challenge under Article 10 of the HRA for the right to communicate with the media by telephone, was punished following telephone interviews with BBC Radio about the setting up of an Association of Prisoners, a ‘trade union’ for inmates (Dodd, 2002). At the time of writing, Hirst’s challenge for an Association continues under Article 11 of the HRA, Freedom of Assembly and Association, the argument being that he is not asking for prisoners to have the right to comment on the single currency, but about prisons and prisoners rights (Ofer cited Dodd, 2002). Thus, unless Hirst’s challenge is successful, wrongfully convicted prisoners will continue to be denied the full rights and freedoms contained in Article 11. Most recently, in November 2002, Richard Roy Allan was successful in a challenge against the United Kingdom in the European Court of Human Rights at Strasbourg under Articles 8 (Privacy), and 6 (Fair Trial) of the HRA. It was ruled that the police had acted unlawfully in recording his conversations by audiotape and on video and in using a police informant as a means of conducting ‘surreptitious interrogation, circumventing the protections for a suspect who has availed himself (sic) of legal advice and exercised the right to silence’ (see European Court of Human Rights, 2002; also Miscarriages of Justice UK, 2002f). On this issue, there has been widespread condemnation that the police practice of ‘bugging’ conversations between suspects and their solicitors is a breach of Article 8 of the HRA, which provides for the right to consult a lawyer in private, and could be a cause of miscarriages (see Gibb, 2002).

In terms of attempts to ensure the welfare of convicted prisoners, in July 2002 the European Court of Human Rights ruled that the human rights of Lawrence Conners
and Okechukwiw Ezeh, for example, had been breached in contravention of Article 6 of the HRA (Fair Trial) after both had extra days added to their sentences in disciplinary hearings. The effect of the ruling is that prison governors are likely to lose the authority to act as 'judge and jury' in internal hearings relating to alleged breaches of prison disciplinary regimes and prisoners will be allowed the right of legal representation (see Ford, 2002a; Ford, 2002b). In addition, it has been widely speculated that overcrowded prisons due to record numbers of inmates in prisons in England and Wales along with reported squalid conditions of many institutions (see, for example, Ford, 2002) may be a breach of prisoners' human rights (see, for example, Morris, 2002). The HRA was also invoked in the setting-up of the first independent inquiry into the 'death in custody' of Paul Wright who suffered a fatal asthma attack whilst in prison (see Miscarriages of Justice UK, 2002e). The HRA was invoked in an application for a judicial review following claims that the 2,900 teenagers aged between 15 and 17 in prison in England and Wales is 'brutal, inhuman and illegal' (see Leppard, 2002). And, the HRA was invoked by Roger Zoppola in August 2002 in a claim against the Home Secretary for the lack of disabled facilities in Pentonville prison where he is serving an eight-year sentence for possession and supply of drugs (see Prasad, 2002).

What the above examples indicate is that the human rights voice has liberally invoked the HRA, but only in one of two limited contexts. On the one hand, the HRA has been invoked in the name of allowing convicted prisoners the rights and freedoms to overturn possible injustices/miscarriages. Alternatively, the HRA has been invoked in the context of ensuring the legal welfare of prisoners who may be denied the rights and or freedoms that are available to the citizenry as a whole. The above examples
also illustrate the force of the human rights voice when it speaks. For when successful rulings are achieved under the HRA individual victims of wrongful convictions or injustice generally in the treatment of convicted prisoners it is officially acknowledged that they have been illegally harmed in some way. The effect also induces reform of the problematic aspect of the system to reduce the possibility of others being harmed in the same way.

However, the human rights voice has not been invoked to speak about the current scale of successful appeals in England and Wales, nor the extent of harm to victims of wrongful criminal convictions that such a scale of successful appeals implies. Indeed, from a conventional human rights perspective successful appeals are not wrongful convictions at all. On the contrary, as Pattenden (1996, p. 57) in the most extensive existing research on appeals against conviction and sentence in England and Wales (see Nobles and Schiff, 1997, p. 293) asserted, the foremost function of an appeal against criminal conviction is to satisfy the guaranteed right in signed-up-for national and international human rights legislation open to everyone convicted of a criminal offence the right to appeal against that conviction to provide redress to the victims of miscarriages of justice. From such a perspective, successful appeals are not viewed negatively as indicators of a systemic failure, but positively as a sign that the appeals system is fulfilling its 'function'. The problem with this is not that successful appeals per se indicate judicial 'failure'. On the contrary, to repeat, it is inevitable that there will be judicial mistakes and/or errors and that there will be some wrongful convictions. The problem is that the current scale of wrongful convictions that the official statistics on successful appeals infers can be conceived as in contravention, not only with the spirit of the HRA, but also with almost every Article of the Act.
The unlawfulness of the current scale of successful appeals

In addition to stating the rights and freedoms provided to individuals in England and Wales, the Articles of the HRA also provide for occasions of lawful contravention. Essentially, these lawful contraventions relate to the lawful arrest and/or detention of persons guilty or suspected of criminal offences, to the maintenance of order, and the general promotion of the rule of law. At the same time, however, the HRA determines the limits upon what might constitute a possible lawful contravention of the Act. These limits are spelt out in Articles 17 Prohibition of Abuse of Rights, and 18 Limitation on use of Restrictions on Rights, which state that:

‘Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention’ (HRA, 1998, Article 17).

And, that:

‘The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed’ (HRA, 1998, Article 18).

From such a frame of reference, the current scale of victims of wrongful conviction that can be inferred from the official statistics on successful appeals can be conceived
as excessive and, therefore, in direct contravention of Article 17 and Article 18 of the HRA. In direct contravention of Article 17, the scale of successful appeals indicates that those engaged in the conviction of wrongful conviction victims and their treatment thereafter, whether intentionally or unintentionally, are engaged in activities that might act to 'destruct' the rights and freedoms set forth in the HRA. They also limit the rights and freedoms of victims of wrongful convictions to a greater extent than is provided for in the HRA. In direct contravention of Article 18, the official statistics on successful appeals indicates a scale of victims of wrongful convictions that can be conceived as violations to the rights and freedoms of the HRA that are not permitted. Furthermore, such violations are currently being applied for purposes other than those for which they have been prescribed. To illustrate this, I draw from the recent literature on successful appeals and consider the lawful restrictions to the various remaining Articles of the HRA in chronological order.

The rights and freedoms provided by the HRA commence with Article 2, The Right to Life, with the following statement:

‘Everyone’s right to life shall be protected by law. ‘No one shall be deprived of his (sic) life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law’ (s(1) my emphases).

In terms of lawful restriction or contravention of the right to life, Article 2 s(2) states that:

‘Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary’ (my emphasis)
There are a number of issues here that need to be unpacked. Firstly, the HRA would seem to intrinsically assume that law in England and Wales serves only, and always, in the interests of the *protection of life*. This assumption entirely attunes with, and might seem completely credible from, the standpoint of popular perceptions of wrongful convictions in England and Wales, i.e. that they are exceptional and small in number and that safeguards exist to remedy them should they occur. But, as the foregoing analyses have sought to show, the various laws in England and Wales that govern the treatment and resolution of miscarriages of justice do not take appropriate or adequate account of the extensive scale of wrongful convictions that can be inferred from the official statistics on successful appeals and their harmful consequences. Nor, therefore, the possible harm to the life of victims of wrongful convictions that law can, itself, pose.

This leads into a second and related point pertaining to the precise meaning of 'deprivation of life'. Conventional readings of Article 2 s(1) and s(2) of the HRA would, probably, assume that 'deprivation of life' refers to execution and, hence, to acknowledged historical miscarriage of justice victims such as *Timothy Evans* and *Derek Bentley* who were deprived of any further life when they were hanged either in error or inappropriate circumstances. Indeed, the notion in s(2) that deprivation of life is not unlawful 'when it results from the use of force which is no more than absolutely necessary' would support such an interpretation of the termination of life. In this context, the case could be made that since the abolition of capital punishment in the 1960s such deprivation is no longer a consequence of England and Wales' CJS. But, by definition, 'deprivation' of life can also refer more generally to any action that
might ‘prevent’, ‘hinder’ or interfere with the fulfilment or ‘enjoyment’ of an individual’s life (Collins, 2000, p. 300). As such, any wrongful conviction that might serve to dispossess or detrimentally impact upon an individual’s life can be conceived as being in contravention of Article 2. It is in this context that victims of wrongful convictions bear testimony that law can be conceived as a threat to their lives. In the context of exceptional miscarriage of justice cases, this can be illustrated in the high profile wrongful imprisonment cases of the Birmingham Six, Guildford Four, Maguire Seven and Bridgewater Four, who together spent over 100 years of wrongful imprisonment. A more mundane example is the case of David Jones who was wrongly accused and charged, but not convicted of, a paedophile offence. What these examples show is that a range of harm is caused to victims of wrongful convictions from whichever appeal court they derive that has a detrimental effect upon the enjoyment and/or fulfilment of their lives, however defined.

In the recent literature on successful appeals there are various examples in which there were judicial declarations, and, therefore, official acknowledgement, that the convicting evidence in certain cases of wrongful conviction was unlawfully obtained through treatment that amounted to torture, thus, in direct contravention of Article 3 of the HRA, Freedom from Torture, Inhuman and Degrading Treatment. For example, quashing Keith Twitchell’s conviction in the CACD Lord Justice Rose said that the case was:

30 This combined total for these four high profile cases of wrongful imprisonment would have been substantially greater had Patrick Molloy of the Bridgewater Four and Guiseppe Conlon of the Maguire Seven had served their full sentences and not died in prison in 1981 and 1980 respectively.
...yet another appeal arising from the lamentable history of the West Midlands serious crime squad (within which) a significant number of police officers...some of whom rose to very senior rank, behaved outrageously, and in particular extracted confessions by grossly improper means, amounting in some cases to torture' (Lord Justice Rose cited Pallister, 1999b).

Other examples of recent successful appeals that all aptly demonstrate the contravention of Article 3 in the conviction of exceptional victims of wrongful convictions within England and Wales include those of Patrick Molloy (see Regan, 1997b), Derek Treadaway (see Johnston, 1997) and George Lewis (see Weaver, 1998).

But, this too, is not only an exceptional matter. For, in addition to these exceptional examples of successful appeals, there is evidence to suggest that Article 3 of the HRA is also routinely and/or mundanely contravened within the jurisdiction of England and Wales’ CJS. This most recently emerged following an inspection of a range of places of detention in England and Wales in April 2002 by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).31

The CPT’s delegation, which was the first to visit Wales and to examine the treatment of persons held in a military establishment in the United Kingdom, inspected 12 places of detention in England and Wales (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2002).

Following its inspections, the CPT reported that whilst the establishments that were visited in London were found to be ‘satisfactory’, all of those visited in Wales were

found to be in contravention of Article 3. It transpired that a number of those interviewed separately at both Parc Prison (in Bridgend) and Hillside Secure Centre (at Neath) informed the CPT that they had been ill-treated by police officers. Allegations included abuse at the time of arrest and in police cells, including being punched and kicked. Moreover, the CPT’s inspection of Cardiff Central Police Station found its cells were "dirty and poorly ventilated", with the effect that the people held there were also being treated in contravention of Article 3 (see Eden, 2002).

In a consideration of the CPT’s visit to England and Wales, however, it must also be noted that the CPT only inspected a very small sample of all the places of detention within England and Wales. Taking prison establishments as an example they inspected only 4 prisons (3 in England and 1 in Wales) out of a total of 13832 prison establishments in England and Wales (HM Prison Service, 2002). As such, even the CPT’s finding of ‘satisfactory’ treatment in establishments in London must be treated with extreme caution, as not all London establishments were visited. There is also the possibility that the establishments that were visited in London by the CPT could have been ‘staged’ to present a ‘satisfactory’ image to the visitors. Such a phenomenon is widely acknowledged to occur in other areas of social life which encounter periodic public scrutiny or review, such as the field of education with its Ofsted inspections and reports on school performance (see, for example, Carvel, 1999; Younge, 2000). In such a context, it is possible to argue that as it was the CPT’s first visit to Wales, the establishments that were visited might have been unprepared or not known what to expect, and hence failed to present the required image. In saying this, however, it must be emphasised that there is no real value in separating England and Wales in

32 This figure also includes privately operated prison establishments in England and Wales.
terms of the treatment of those held in places of detention, as all of the establishments, whether in England or Wales come under, and are covered by and subject to the same penal and governmental guidelines, Standards and Performance Indicators (see, for example, Prison Service Standards Manual, 2000). Accordingly, whether a particular establishment that is identified to be in contravention of Article 3 of the HRA is geographically located in England or in Wales it represents an unlawful violation of the Act by the CJS that collectively governs England and Wales. In such a context the CPT’s finding that Article 3 of the HRA was being contravened in terms of the general treatment of prisoners within the jurisdiction of England and Wales is highly relevant to the specific issue of the treatment of victims of wrongful convictions who are wrongly imprisoned. For, it indicates that victims of wrongful conviction who are wrongly imprisoned within England and Wales are also likely to be specifically denied Article 3 of the HRA during their wrongful imprisonment.

The rights and freedoms provided by Article 4 of the HRA, Freedom from Forced Labour, are also particularly relevant to an analysis of the 3000 victims who are currently estimated to be wrongly imprisoned in England and Wales. As the law currently stands, Rule 31(1) of The Prison Rules (1999) requires that convicted prisoners, male and female, do ‘useful’ work for up to 10 hours a day. This work can take a variety of forms in industrial workshops and/or agricultural units, and includes the production of goods and services needed by prisons, as well as for sale in the local community. Alternatively, prisoners can work within the prison in cleaning, catering, and general building and maintenance work. In return prisoners receive around £7 per week, depending upon resources, the amount and type of work available and the level that the prisoner has reached on the ‘Incentives and Earned Privileges Scheme’ (IEPS)
(for how this applies to male and young male convicted prisoners see Prisoners Information Book, 1999a, pp. 100-102; for women and young females see Prisoners’ Information Book, 1999b, pp. 100-102).

Significantly, any non-compliance by a convicted prisoner with the requirement to work invokes disciplinary procedures under Rule 51 (21-23) against the offending prisoner (The Prison Rules, 1999, Rule 51(21-23)). If found to be guilty of an offence against discipline the governor may impose a range of punishments including: a caution; loss of facilities (privileges) for up to 42 days (21 for prisoners under 21); stoppage of up to 42 days earnings (21 for prisoners under 21); cellular confinement for up to 14 days (7 days for prisoners under 21); and, up to an additional 42 days in custody The Prison Rules, 1999, Rule 55).

Crucially, if a prisoner is found guilty of more than one disciplinary offence they can be punished for each one with punishments running consecutively (except that the total number of additional days added to a prisoners sentence must not exceed 28 for any one incident) (for male prisoners and young male offenders see Prisoners’ Information Book, 1999a, p. 59; for female prisoners and young female offenders see Prisoners’ Information Book, 1999b, p. 60).

As the law stands for unconvicted prisoners awaiting trail, The Prison Rules provides the following ‘Statement of Principle’: ‘Unconvicted prisoners are presumed to be innocent. Subject to the duty to hold them and deliver them to court securely and to

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33 For details of punishments see also Prisoners’ Information Book, 1999a, pp. 59-60; Prisoners’ Information Book, 1999b, pp. 60-61.
the need to maintain order in establishments, they will be treated accordingly’ (for how this applies to male prisoners and young male offenders see Prisoners’ Information Book, 1999a, p. 17; for how this applies to female prisoners and young female offenders see Prisoners’ Information Book, 1999b, p. 17). In other words, it is not compulsory for unconvicted prisoners to labour. Nonetheless, the unconvicted are still subject to the discourse to labour through the following incentive:

‘As an unconvicted prisoner you do not have to work in prison. If you are willing to work but there is no work available, you will be given a small amount of money each week to cover basic things you may need to buy from the prison shop. If you are offered work and you refuse it, you may not get any money from the prison, and the prison does not have to offer you any more work’ (for how this applies to male prisoners and young male offenders see Prisoners’ Information Book, 1999a, p. 27; for how this applies to female prisoners and young female offenders see Prisoners’ Information Book, 1999b, p. 27).

In such context, it is not difficult to argue that prisoners, whether male or female, young or ‘old’, whether convicted or unconvicted, and/or whether actually guilty of the criminal offences for which they were convicted are, in effect, forced to labour. For, a failure to comply with the compulsory requirement to labour does not only engender extra punishment, it prevents prisoners the ability to purchase the necessary items that might provide some basic quality of life. The question is, does this forced labour of convicted prisoners constitute the contravention of Article 4 of the HRA? On this matter, s3(a) of Article 4 states that:

For the purpose of this Article the term “forced or compulsory labour” shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the
provisions of Article 5 of this Convention or during conditional release from such
detention.'

This lawful restriction to Article 4 seems entirely reasonable from the common-sense perspective of popular perceptions of the scale of the miscarriage of justice phenomenon. From such a perspective there is a certain accepted inevitability that any human system will produce some wrongful convictions. Accordingly, there is a corresponding accepted inevitability that some wrongful conviction victims will consequentially suffer a denial of their rights and freedoms. The legitimacy of such a perspective is grounded in the belief that only very few people will inevitably be denied the rights and freedoms that are provided for the citizenry of England and Wales. It is also grounded in a belief that when such a denial is known about the situation will be speedily rectified and the miscarriage of justice victim will be appropriately and adequately compensated for the harm caused. So much is also an explicit requirement of the HRA, manifest in the mechanisms for the fast-track remedy of miscarriages of justice (s4 and s5) and their compensation (s8) should they occur. However, the denial of rights and freedoms on the current scale within England and Wales as indicated by the estimated 3000 victims of wrongful imprisonment can be conceived to present new dilemmas to the continued legitimacy of current criminal conviction practices. It can also, therefore, be conceived as an indicator that Article 4 is also contravened by England and Wales’ CJS. Because, if the present legislative provision is incompatible with the stated aims of the CJS, it can, therefore, be said to be ‘unlawful’ on its own terms, and, therefore, incompatible with the HRA (1998, s4) (cf. Green, 2002b, p. 76).
Under Article 5 of the HRA, Right to Liberty and Security, s(1) it is stated that: ‘Everyone has the right to liberty and security of person. No one shall be deprived of his (sic) liberty.’ The HRA, however, does provide a number of possible lawful restrictions to Article 5 including: ‘(a) the lawful detention of a person after conviction by a competent court... (c) the lawful arrest or detention of a person effected for the purpose of bringing him (sic) before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so’ (HRA, 1998, s(1) my emphases). A dominant theme of England and Wales’ lawful non-compliance with Article 5, then, relates to the twin notions of the ‘reasonable’ suspicion of a suspect’s criminality and, then, the ‘competence’ of the judicial proceedings against the suspect. As this relates to miscarriages of justice, the notion of reasonable suspicion is immediately called into doubt. For if the suspicion and subsequent conviction of a suspect of a criminal offence was entirely ‘reasonable’ then wrongful convictions would, indeed, be in line with popular perceptions, i.e. exceptional and small in number.

As for the ‘competence’ of England and Wales’ legal authority, this too has, arguably, been undermined by exceptional wrongful conviction cases that highlight the very incompetence of many criminal trials to decipher and decide upon, for example, competing and opposing expert scientific evidence. The cases of the Birmingham Six, the Guildford Four, the Maguire Seven, the Bridgewater Four are relevant to this discussion, as are the cases of Judith Ward and Stefan Kiszko. All of which not only called into question the reliability of scientific evidence in criminal trials, but also the competence of criminal trials by jury in determining cases which hinge upon expert
scientific evidence. In addition, the mundane successful appeal case that was cited in which 48 motorists were successful in their joint-appeal against Greater Manchester Police also cast doubt upon the reliability of the scientific evidence that was influential in obtaining their convictions. In response to the challenge such exceptional and/or non-exceptional cases presented to the forensic science community, two inquiries into the state of forensic science in England and Wales that have reported in the last decade - the RCCJ (1993) and the House of Lords Select Committee on Science and Technology (1993) (CST). The general conclusion of both the RCCJ and the CST was that, although forensic science had experienced a bad press following the success of the aforementioned exceptional cases, these were exceptions to the general rule of reliable (truthful) forensic practice.

Against this, Erzinclioglu's (1998; 2001) researches drew from over 20 years as a practising forensic scientist. In them he argued that the debate about forensic science has been concerned mainly with individual cases of miscarriages of justice, when the real problem lies with a system that allows such injustice to occur in the first place and with such frequency. For Erzinclioglu (1998), there are several interrelated problems, which, in combination, produce a system that invites malpractice, with the inevitable consequence that miscarriages of justice will occur. In addition to Erzinclioglu's (1998; 2001) critique of expert forensic science evidence, the recent literature on successful appeals also contains a range of critical researchers on other aspects of expert scientific evidence and their potential to cause wrongful convictions. For example, Norman's (2001; 2001a) and Norman and Fryer's (2002) researches cast doubt upon the scientific evidence upon which dozens of criminal convictions were obtained against women for the murder of their children, when the most likely cause,
and which counter-scientific evidence suggests, seems to be 'cot death' or Sudden Infant Death Syndrome (SIDS) (see also Sweeney and Law, 2001; Arthur, 2002; Morgan, 1992). In a similar vein, Robins (2000), Burrell (2000), Mega and Syal (2001) and Panorama (2001) all reported a series of cases that revealed serious flaws in the fingerprint system which have led to unsafe criminal convictions. In addition, Ingrams (2002) was critical of the supposed 'incontrovertible' proof of DNA evidence when presented in court, despite the lack of public and judicial understanding of what he termed the 'mysteries of DNA'. Thus, despite the fact that expert scientific evidence is intended to resolve adversarial disputes in the interests of justice (a truthful judicial outcome), miscarriages of justice that are caused by expert scientific evidence are not only commonplace they are currently inevitable.

In addition to the notions of reasonable suspicion and judicial competence, Article 5 s(4) of the HRA further contains the following important right of appeal for those who might be wrongly imprisoned of criminal offences: 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful' (my emphases). At first sight, s(4) of Article 5 seems acutely circular in that the lawfulness of a criminal conviction will be determined by the same law that delivered the previous prison sentence and if that previous prison sentence is determined to be unlawful then the person who was unlawfully imprisoned will be released according to law. Despite this, s(4) of Article 5 presents a number of possible challenges to existing appeal practices and procedures. For example, a recent precedent that was established by a challenge under s(4) of Article 5 of the HRA by patients compulsorily detained in psychiatric hospitals
under the Mental Health Act (1983) (MHA) might also be highly relevant to the current post-appeal procedures of the CCRC, and the continued legislative viability of the CAA (1995) which established the CCRC. In one of the most significant rulings to emerge under the HRA, it was declared that patients had the right to *speedy* appeal hearings against their detention under the MHA (1983) to protect their liberty in case they were being unfairly detained. Moreover, that the government had, indeed, breached the human rights of thousands of people by not providing prompt reviews of their detention by independent tribunals (see Wilson, 2002; Editorial, 2002). In such a context, there is the potential that a corresponding challenge could also be made Under Article 5 s(4) of the HRA against the delays in the procedures of the CCRC in referring cases back to the CACD. For, as James (2002a, p. 5) noted, when assessing an appellate procedure, it is essential to do so in the context of its ability to grant fast and fair resolutions to those cases where justice ‘failed’ the first time around. In attempting such a challenge, however, an immediate problem that emerges in that neither the LCD, nor the Court’s Service collect or publish information for the average time taken from an application to the CCRC to a hearing of the appeal in the CACD.\(^{34}\) Accordingly, in an attempt to arrive at an estimate of the average time taken for miscarriages to be quashed at the post-appeal stage of the process, Table 6 draws from the CCRC’s published results of cases referred back to the CACD and their outcomes. It provides an analysis of a sample of 10 cases which were randomly considered out of the 36 cases that were successfully quashed following a referral back to the CACD by the CCRC between April 1997, when the CCRC started handling case work, and October 2001 (see Table 1). And, it determines an average

\(^{34}\) This was confirmed in a series of telephone conversations that took place on the 2 May 2002 with staff at the LCD and the Court’s Service.
time of almost 4 years (3 years and 9 months) for meritorious cases to be quashed through the post-appeal procedures of the CCRC.

Table 6: Average time taken from application to Home Office or Criminal Cases Review Commission to quash criminal conviction in meritorious cases

<table>
<thead>
<tr>
<th>Name</th>
<th>Date Convicted</th>
<th>Appeal History</th>
<th>Date applied to Home Office or CCRC*</th>
<th>Date referred by CCRC</th>
<th>Date conviction quashed by CACD</th>
<th>Time from application to Home Office or CCRC to quashed conviction</th>
<th>Average time from application to Home Office or CCRC to quashed conviction</th>
</tr>
</thead>
</table>


* Prior to the establishment of the CCRC under the Criminal Appeal Act (1995) the decision of whether to refer a case that had exhausted its appeal rights back to the CACD lay with the Home Secretary, and C3 Division, the Criminal Cases Unit in the Home Office. Following a recommendation by the Royal Commission on Criminal Justice (1993) the CCRC was established on 1 January 1997 and started handling casework on 31 March 1997. In April 1997, all the cases under review by C3 were transferred from the Home Office to the CCRC.

** The calculation for the case of John Kamara is a minimum calculation from April 1997 when transferred to the CCRC from the Home Office to 31 March 2000 when his conviction was quashed, as the date of his application to the Home Office was not provided.
The delays represented in Table 6 can be conceived to serve to compound the subjective harmful consequences of victims of exceptional wrongful convictions. They also compound the more objective harmful consequences of miscarriages of justice to society as a whole by, for example, increasing the financial burden of justice in ‘error’ (explicated in the next chapter). Moreover, as James et al’s (2000, pp. 143-146) research showed, as the CCRC deal with a daily intake of around four applications against a best disposal rate of two this has resulted in delays and backlogs in the post-appeal processes of the CCRC which can be conceived to be in contravention of Article 5 s(4) of the HRA, and also, possibly, Article 6, as the CCRC is failing in its task of providing fast and fair resolution to victims of exceptional wrongful convictions.

Under Article 6 of the HRA, Right to a Fair Trial: ‘Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal’ (s(1)). The conventional trend to focus on exceptional cases of wrongful convictions serves to support the notion that, on the whole, England and Wales’ criminal process is fair in that it supports the impression (perception) that miscarriages are uncommon. But, if the critical gaze also considers routine and/or mundane successful appeals, as well as exceptional ones, any notion of ‘fairness’ quickly evaporates, in a system where there are thousands of successful appeals which are overwhelmingly determined on points of law (see, RCCJ, 1993; Brandon and Davies, 1973). In this context, James’s (2002) research into the possible implications of the HRA for potential applicants at the post-appeal stage of the CCRC is highly significant. In particular, James (2002, pp. 7-8) distinguished two roles for the CCRC. On the one hand, the CCRC can be regarded as a preliminary or advisory stage of the CACD, a
gateway to the CACD which can be conceived to make no legally binding decisions as it is the CACD that is the ultimate arbiter of rights under Strasbourg jurisprudence. On the other hand, however, when the CCRC makes the decision to reject applications, it is, in fact, determinative of the applicants' rights, and should thus be considered in the role of tribunal. At such times, a range of current practices of the CCRC can be conceived to undermine the 'fairness' of the criminal process, and, therefore, as a contravention of Article 6 of the HRA. For example, the CCRC's lack of effective mechanisms for the reception and reconsideration of fresh evidence could be conceived as a breach of Article 6 on the grounds that it does not provide a suitable forum for the hearing of fresh evidence. Further, the CCRC's act of appointing the same police force to reinvestigate complaints against it could be said to conflict with the notions of independence and impartiality under Article 6. Moreover, the current availability and limits of post-appeal funding present a situation within which applicants cannot prepare a proper post-appeal defence case to the CCRC or put their case forward in person, which can also be conceived as contrary to Article 6 (for details of these examples see James, 2002, pp. 6-7).

A further important feature of Article 6 of the HRA to this analysis is stated at s(2): 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty.' Against this, there is widespread evidence within the recent critical literature that many victims of miscarriages within England and Wales were the victims of a criminal process that can be conceived as one which very much reverses s(2) of Article 6 by regarding them as guilty until proven innocent (see, for example, Norton-Taylor, 2001; Woffinden, 2000a; Hinsliff and Bright, 2000; Wadham, 2001; Hopkins, 2001). Indeed, from the critical literature on miscarriages of justice the very raison
d'être of many criminal prosecution cases within England and Wales’ adversarial system of criminal justice can be conceived as the construction of cases upon a working assumption of guilt (see, for example, Hopkins, 2001; Green, 1997; McConville et al, 1991; Woffinden, 1987).

Under Article 7 of the HRA, No Retrospective Penalties s(1) states:

‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.’

On the face of it, a right or freedom that revolves around the relative justness of law and the limitation of retrospective criminal punishment seems entirely reasonable and consistent with the judicial rationale and existing practices of England and Wales’ criminal process. Once again, however, in the context of the official statistics on successful appeals this right, arguably, calls into question the continued legitimacy of a range of legislation that underpins existing criminal conviction practices. For the legitimacy of such legislation is, arguably, grounded in an assumption and perception that the CJS is a human system that can sometimes get it wrong. It is not grounded in an assumption that the system routinely and mundanely gets it wrong, with the consequences that thousands (possibly tens of thousands) of people directly suffer, and many millions more (the rest of the population) suffer indirectly in numerous ways (discussed in detail in the next chapter). As stated, it is acknowledged that the CJS and penal system’s have to work under a presumption that court verdicts are on the whole correct. The current scale of wrongful convictions does, however, at the
very least, raise the question: Is it legitimate to continue with a criminal process and a form of punishment that routinely and mundanely gets it wrong every day, month and year?

An analysis of victims of wrongful convictions whether wrongly imprisoned or not, also verifies that Article 8, Right to Respect for Private and Family Life, is not only contravened in exceptional circumstances, but, on the contrary, it is also routinely and mundanely contravened within England and Wales’ CJS. For it is stated that ‘everyone has the right to respect for his private and family life, his home and his correspondence’ (HRA, 1998, Article 8 s(1) and s(2)). Against this, every person who is successful in their appeal against their criminal conviction is testimony to the fact that, to a greater or lesser degree, the ‘privacy’ of his/her family life, however defined, was, in effect, disrespected. In the case of the wrongly imprisoned, this can take the form of many years of wrongful imprisonment with the consequence of absence from a partner and/or during a child’s upbringing can damage family and friendship relations. An example is the exemplary case of Frank Johnson (Bird, 2002; Hopkins, 2002; 1999), who was wrongly imprisoned for 26 years, during which his life was ‘ruined’, his wife left him, he did not see his children and he lost all contact with his past life (see Hill, 2002c).

In the case of victims of wrongful conviction who are not imprisoned this can take the form of harming the wrongly convicted person’s family relations, reputation and/or standing within his/her community. In addition, a case reported in April 2001 highlighted an issue relating to the right provided by Article 8 that is generally denied to prisoners within England and Wales, which by association is also specifically
denied to thousands of victims currently estimated to be wrongly imprisoned. The case concerned *Gavin Mellor* who lost a challenge under Article 8 of the HRA to donate his sperm for the artificial insemination of his wife in the hope she might become pregnant and they could start a family (see Dodd and Milne, 2001). This relates to the specific issue of the estimated thousands of victims of wrongful imprisonment because they, too, will be denied the right to start a family during their wrongful imprisonment, further compounding the potential harmful consequences.

Article 12 of the HRA, *Freedom to Marry and Found a Family*, would seem to be closely related to those provided under Article 8 – respect for private and family life. To show that Article 8 was denied to convicted prisoners, including those wrongly convicted, the case of *Gavin Mellor* who was not allowed to donate the necessary sperm for his wife” IVF treatment was cited. *Mellor’s* case is also evidence of the contravention of Article 12 for all prisoners including wrongly convicted prisoners ‘to found a family’.

As for the right to marry, a feature of many exceptional wrongful imprisonment cases is that the victims who were married at the time of their wrongful imprisonment experienced a detrimental impact upon their marriages. For example, it is widely reported that the marriages of *Paddy Hill* (see Hattenstone, 2002) and *Gerry Hunter* (see Geffen, 1999) (both *Birmingham Six*), *Michael O’Brien* (*Cardiff Newsagent Three*) (see Hill, 2001a) and *Eddie Browning* (see Linder, 1997) all broke-down either during or as a direct consequence of their wrongful imprisonment. An additional consequence of wrongful imprisonment is that during their time spent in prison many victims are denied the opportunity to meet a prospective partner whom they may wish
to marry and found a family. Indeed, an analysis of exceptional victims of successful appeal shows that victims of wrongful conviction who were not married at the time of their wrongful imprisonment do not, as a rule, marry during their wrongful imprisonment. For example, *Andrew Evans* did not marry during his 25 years of wrongful imprisonment; nor did *Michael Hickey* marry during his 17 years of wrongful imprisonment; nor did *Vincent Hickey* during his 17 years of wrongful imprisonment; nor did *Stephen Downing* during his 27 years of wrongful imprisonment; nor did *John Kamara* during his 20 years of wrongful imprisonment. Accordingly, the contravention of Article 12 can be conceived as a profound feature of wrongful imprisonment, as it either detrimentally impacts upon the victims who are married or denies many the opportunity to meet a potential spouse to marry and found a family whilst wrongly imprisoned.

According to *Article 14 of the HRA, Prohibition of Discrimination*:

‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

In assessing Article 14, Box’s (1983) classic analysis of the composition of England and Wales’ prison population is highly insightful. Of particular relevance Box (1983, p. 2) revealed that:
'For every 100 persons convicted of...serious crimes, 85 are male. Amongst this convicted male population, those aged less than 30 years, and particularly those aged between 15 and 21 years are over-represented. Similarly, the educational non-achievers are over-represented – at the other end of the educational achievement ladder there appears to be hardly any criminals, since only 0.05 per cent of people received into prison have obtained a university degree. The unemployed are currently only (sic) 14 per cent of the available labour force, but they constitute approximately 40 per cent of those convicted. Only 4 per cent of the population are black, but nearly one-third of the convicted and imprisoned population are black. Urban dwellers, particularly inner-city residents, are over-represented.'

More recently, Pantazis (1998) drew from a national survey of prisons conducted by the Home Office in 1991 and confirmed Box’s (1983) findings on the inequality of the prison population as it consists mainly of young poorly educated males, within which those from ethnic minority backgrounds were over-represented. In particular, the main findings of the national survey were that:

- 96% of the prison population were men, whereas within the general population the number of men and women are roughly equal;
- approximately 40% of the prison population were under 25, compared to 16% of the general population;
- 41% of male prisoners were from partly or unskilled occupations, against 18% of the general male population;
- 15% of male prisoners identified themselves as either black or Asian, when less than 5% of the total general population come from those ethnic groups; and,
• 40% of male prisoners under the age of 25 left school before the age of 16, compared with 11% of the general male population (see Walmsley et al, 1992).

From such research findings, it would be possible to conceive that Article 14 of the HRA is routinely contravened within England and Wales' CJS, as the prison population is not comprised of a representative cross-section of the population as a whole. On the contrary, people from a certain 'sex' – male – with a certain 'property status' or 'social origin' – working class – within which people – men – and from 'national minority' groups of 'race', 'colour', 'language' and/or 'religion' are all over-represented. In an attempt to determine the extent to which the inherent discrimination that is evident in the general prison population is applicable to victims of wrongful imprisonment, Table 7 presents details of 20 of the most prominent wrongful imprisonment cases between 1997-2002.
Table 7: Composition of wrongful imprisonment victims by Sex, Age, Occupation and Ethnic Status/Appearance* in 20 of the most prominent cases between 1997-2002

<table>
<thead>
<tr>
<th>Name</th>
<th>Sex</th>
<th>Age when wrongly convicted</th>
<th>Occupational</th>
<th>Ethnic Status/ Appearance*</th>
<th>Years spent wrongly imprisoned</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Alex Allan</td>
<td>Male</td>
<td>29</td>
<td>Welder</td>
<td></td>
<td>7</td>
</tr>
<tr>
<td>2. James Reith</td>
<td>Male</td>
<td>27</td>
<td>Unemployed</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>3. Andrew Evans</td>
<td>Male</td>
<td>17</td>
<td>Unemployed</td>
<td></td>
<td>25</td>
</tr>
<tr>
<td>4. Peter Fell</td>
<td>Male</td>
<td>21</td>
<td>Hospital Porter</td>
<td></td>
<td>17</td>
</tr>
<tr>
<td>5. John Robert</td>
<td>Male</td>
<td>19</td>
<td></td>
<td></td>
<td>15</td>
</tr>
<tr>
<td>6. Jeremy Bamber</td>
<td>Male</td>
<td>23</td>
<td>P/T Farm Worker</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7. John Kamara</td>
<td>Male</td>
<td>24</td>
<td>Described as ‘Black’</td>
<td></td>
<td>20</td>
</tr>
<tr>
<td>8. Michael O’ Brien (Cardiff three)</td>
<td>Male</td>
<td>22</td>
<td></td>
<td></td>
<td>10</td>
</tr>
<tr>
<td>9. Ellis Sherwood (Cardiff three)</td>
<td>Male</td>
<td>20</td>
<td></td>
<td></td>
<td>10</td>
</tr>
<tr>
<td>10. Darren Hall (Cardiff three)</td>
<td>Male</td>
<td>20</td>
<td></td>
<td></td>
<td>10</td>
</tr>
<tr>
<td>11. Raphael Rowe (M25 three)</td>
<td>Male</td>
<td>19</td>
<td>Described as ‘Black’</td>
<td></td>
<td>10</td>
</tr>
<tr>
<td>12. Randolph Johnson (M25 three)</td>
<td>Male</td>
<td>Described as ‘Black’</td>
<td></td>
<td></td>
<td>10</td>
</tr>
<tr>
<td>13. Michael Davis</td>
<td>Male</td>
<td>Described as ‘Black’</td>
<td></td>
<td></td>
<td>10</td>
</tr>
<tr>
<td>14. Michael Hickey (Bridgewater four)</td>
<td>Male</td>
<td>17</td>
<td></td>
<td></td>
<td>17</td>
</tr>
<tr>
<td>15. Vincent Hickey (Bridgewater four)</td>
<td>Male</td>
<td>24</td>
<td></td>
<td></td>
<td>17</td>
</tr>
<tr>
<td>16. James Robinson (Bridgewater four)</td>
<td>Male</td>
<td>46</td>
<td></td>
<td></td>
<td>17</td>
</tr>
<tr>
<td>17. George Lewis</td>
<td>Male</td>
<td>21</td>
<td>Described as ‘Black’</td>
<td></td>
<td>5</td>
</tr>
<tr>
<td>18. Sheila Bowler</td>
<td>Female</td>
<td>62</td>
<td>Piano Teacher</td>
<td></td>
<td>4</td>
</tr>
<tr>
<td>19. Stephen Downing</td>
<td>Male</td>
<td>17</td>
<td>Cemetery Worker</td>
<td></td>
<td>27</td>
</tr>
<tr>
<td>20. Mohammed Patel</td>
<td>Male</td>
<td>31</td>
<td>Accountant Indian</td>
<td></td>
<td>2 Years 4 Months</td>
</tr>
</tbody>
</table>

Source: Compiled from the archives of the miscarriage of justice campaign group Innocent. Website: [http://www.innocent.org.uk](http://www.innocent.org.uk)

* The analysis of 'Ethnic Status/Appearance' is a crude one based on the description of 'colour' or ethnicity of the wrongly imprisoned victims as reported in the case study literature. Hence, it takes no account of the possible ethnic minority groups that might feature who might be white, e.g. Irish. This serves the illustrative purposes here, however, as 6 out of 20 (30%) were described other than 'white'. Thus, indicating the overrepresentation of those from ethnic minority groups.
Table 7, then, demonstrates that victims of wrongful imprisonment are generally men who were under 30 at the time of their wrongful conviction, were either unemployed or in manual or low skill occupations, within which men from ethnic minority groups are vastly over-represented. Thus, Article 14 of the HRA would seem to be also routinely contravened by England and Wales' CJS in terms of the specific context of wrongful imprisonment.

**Conclusion**

The foregoing analysis has attempted to illustrate in a provocative mode that the current scale of wrongful convictions, as inferred from the number of successful appeals, can re-orientate the existing human rights voice to cover a scale of denial of legal rights and freedoms that has not previously been acknowledged and/or articulated. For, from the perspective of the limitations of the restriction of rights and the prohibition of abuse of rights contained in the HRA, the current scale of wrongful convictions is incompatible with almost every Article of the HRA.\(^{35}\) This presents not only a challenge to existing perceptions of the scale of the harm to victims of wrongful convictions, it also presents a different set of moral and ethical implications for analyses of human rights and victims of injustice. To be sure, the sheer number of victims of wrongful conviction, whether imprisoned or not, would seem to indicate

\(^{35}\) The only Article of the HRA that this chapter did not assess was Article 16: Restriction on Political Activity of Aliens. This being stated a case that was reported in July 2002 would indicate that even this was being routinely contravened in England and Wales when the special immigration appeals commission ruled that the government had acted unlawfully by discriminating against foreign nationals when it arrested 11 terrorist suspects and imprisoned them in high security jails without charge (for details see Gillan, 2002).
that a judiciary that produces so many wrongful convictions as indicated by the number of successful appeals and the estimated number of cases of wrongful imprisonment is incompatible with, even in unlawful violation of, the HRA. For although the HRA recognises that miscarriages can occur and provides for their speedy remedy and compensation, it also limits and prohibits the abuse of the lawful transgressions or contraventions from the Act. In such a context, the number of victims in cases of successful appeals can be conceived as excessive excursions from, and, hence, contrary to the HRA, and an indication of an excessive amount of harm to victims of wrongful convictions. The forcefulness of this critique is further strengthened in the context of the estimated 3000 victims of wrongful imprisonment in England and Wales.

The object of this analysis is not to require or demand that the CJS proceed on the basis that its findings are unsound and that convicted criminals and/or prisoners are innocent. For sure, that would indeed be an absurd logic. However, the current scale of wrongful convictions does raise human rights issues for the judiciary and the penal system, which despite the difficult nature of the analysis cannot be ignored. For these matters not only need to be considered in depictions of the scale and consequences of wrongful convictions they also need to be addressed by a system that so mundanely produces wrongful convictions.
The zemiological voice

Introduction

In the last chapter, the human rights voice was re-orientated to include all successful appeals and to more fully capitalise upon the promise of the limitations of the lawful restriction of rights and the prohibition of the lawful abuse of rights as proscribed by the HRA. In so doing, a qualified construction of the human rights voice was shown to extend existing voices on the harmful consequences of victims of wrongful convictions to cover a scale of denial of individual rights and freedoms not previously conceived. However, even such an enhanced human rights voice would still entail significant limitations. For even if the human rights voice did capitalise on the full potential of the HRA it would still only construct the harmful consequences of wrongful convictions at the level of the individual and in terms of the denial of legally defined rights and freedoms. From such a frame of reference, even if an individual suffered loss of life, which would appear to be in moral contravention of Article 2 of the HRA, if that loss of life were legally proscribed then the human rights voice would not conceptualise harm. Another major limitation with any voice constructed from the perspective of the HRA would be that it would be silent about many other forms of harm that are engendered by wrongful convictions that impact upon the citizenry as a whole. For example, the human rights voice cannot include broader forms of social and/or psychological harm to husbands/wives and/or partners of the
victims of miscarriages of justice. Nor can any constituted or qualified human rights voice speak of the forms of harm experienced by the children and/or parents of victims of miscarriages of justice. In addition, the inherent economic consequences of excessive public expenditure on wrongful convictions, that take away from other areas of need (NHS, education, housing, and so on), that also need to be included for an adequate depiction of the consequences of wrongful convictions, would also be omitted by a conventional human rights voice.

To extend the depictions of the harmful consequences of wrongful convictions still further, this chapter attempts to provide an even more adequate depiction of the *trails of harm* that wrongful convictions leave behind, not only to the direct victims but also forms of harm more holistically conceived. In so doing, this chapter considers the potential of the emerging *zemiological* perspective on questions of crime and punishment. Whilst welcoming this voice, and indeed seeking to contribute to it, I also want to flag up the deficits in the zemiological account, in particular, its tendency to shift notions of ‘crime’ and ‘harm’ entirely outside legal parameters. It is argued that such a move would only deprive the zemiological voice of the discursive force to impact upon effective reforms of the systems with which it finds fault.

**Conceptual and methodological issues**

Zemiology (from the Greek, *zemia*, harm or damage) is an emerging academic perspective within critical criminology and socio-legal studies that was born out of a frustration with criminology’s failure to challenge state definitions of ‘crime’ and
'victim' (Sanders, 1999, p. 5). In essence, zemiology is an outgrowth of the research program outlined by Schwendinger and Schwendinger (1975, pp. 132-138) which argued that criminologists should concern themselves with ‘social injury’ and/or ‘public wrong’, and that definitions of ‘crime’ should revolve around violations of human rights; indeed, that critical criminologists should be ‘defenders of human rights’ (see also Green and Ward, 2000, p. 104). The zemiological approach attempts to attain a more holistic understanding than is available in conventional criminological discourses of the range of serious harms (social, psychological, physical and/or financial), that are engendered by social and political decisions and/or structures in the interests of social justice (Gordon et al, 1999). In particular, zemiology argues that undue attention is given to many events and incidents that are defined as ‘crime’, which serves to distract attention from other events and incidents which often involve a comparable and even increased amount of serious harm to victims. For example, whilst there is an annual average of over one million recorded workplace injuries in Britain, a restriction to the term ‘crime’ means that only one thousand or so that are successfully prosecuted each year are available to critical analysis. These are enormous differences that minimise and marginalise the extent of the harm caused by injuries at work, and reveal profound implications in terms of what can be done with such data conceptually, theoretically and politically (Tombs cited Hillyard and Tombs, 2001, p. 5; see also Pearce and Tombs, 1992).

Accordingly, there is a utility in the zemiological approach in this attempt to re-orientate definitions of miscarriages of justice to include all successful appeals and provide a more adequate depiction of wrongful convictions and the harm that they engender. For in a similar way to the zemiological analysis of workplace injuries, this
thesis is specifically concerned to demonstrate that existing conceptions of miscarriages as exceptional occurrences that amount to a handful of cases each year are similarly inadequate. To be sure, existing analyses of the harmful consequences of miscarriages have largely derived from autobiographical and/or biographical accounts of single cases of high profile exceptional successful appeals that were the products of post-appeal procedures (for example, Kee, 1986; Mullin, 1986; Callaghan and Mulready, (1995); Hill and Hunt, 1995; Hale, 2002). From such sources the harmful experiences and/or consequences are constructed as highly individualised accounts, which can be conceived to be not sufficiently zemiological. For they do not include the recorded statistics of successful appeals in England and Wales that amount to many thousands of cases each year. They, therefore, also omit the harmful consequences that occur in the most apparently mundane of successful appeals at the Crown Court from magistrates' courts and the routine appeals that are successful at the CACD that often entail a comparative amount of harm with exceptional cases. Moreover, where existing analyses have considered the harmful consequences of miscarriages of justice they have generally done so in the very narrow confines of the individual victims. This, in turn, illustrates the need for a re-orientation of how miscarriages and the victims of miscarriages are conceptualised and defined, and how the harm of miscarriages is quantified: 'what one measures, and how one measures it, makes an awful lot of difference to what one finds and the range of...responses that then appear to be “feasible”' (Hillyard and Tombs, 2001, p. 13). In such a context, a zemiological approach can be applied to the terrain of miscarriages of justice to produce a more comprehensive voice and/or set of analyses of the harm that accompanies the possible scale of miscarriages that can be inferred from the official statistics of successful appeals. This will provide a more accurate picture of the
vicissitudes of wrongful convictions and, hence, represent the constitution of a more forceful counter-discourse.

Before proceeding with the application of a qualified zemiological voice to the terrain of successful appeals, however, it is important to consider the unique methodological issues that the zemiological approach raises. This is because the fundamental notion behind zemiology, namely ‘harm’, inevitably carries a certain degree of vagueness, subjectiveness, and/or a possible multiplicity of reference. For instance, in the most obvious reference, the ‘physical harm’ of wrongful conviction can be fairly straightforwardly defined, demonstrated and quantified. A black eye (without complications) can be conceived as qualitatively and quantitatively less harmful than the loss of an eye, a bruised arm (to a person who is not haemophilic) is less harmful than a fractured one, and so on. Similarly, the financial harm of wrongful convictions can be relatively unproblematically analysed in the cost/benefit mode, presenting methodological issues that are fairly well recognised and able to be accounted for.

However, the forms of social and psychological harm that are engendered by wrongful convictions present an entirely different set of methodological concerns. For whilst an extensive range of social and psychological harms can be conceptualised in the abstract, few harms apply equally to all wrongful conviction victims. Wrongful convictions are qualitatively and quantitatively different, as are the social circumstances and psychological dispositions of wrongful conviction victims. Single men who are wrongful conviction victims, for example, are likely to experience harm in very different ways, and possibly to a lesser extent than, say, a married father of two children, whose wife and children will also experience a whole range of social,
psychological and/or financial harms. Similarly, a wrongful conviction for drink driving which incurs a penalty of 12 month’s loss of driving licence can be conceived as qualitatively and quantitatively less harmful than a wrongful conviction for a paedophile offence which incurs a custodial sentence and potentially permanent damage to reputation. For even if such an offence is successfully appealed there is the potential that the appellant will always be perceived as a paedophile – for some ‘there is no smoke without fire’.

This indicates the need for a zemiological continuum of harm, whereby it needs to be acknowledged that the associated social and/or psychological harm(s) experienced by victims of wrongful convictions, for example, may differ from person to person, i.e. different people may experience the psychological harm of 10 years wrongful imprisonment differently. To follow the same example, the psychological harm of a wrongful conviction for drink driving can, probably, (but not necessarily), be conceived as qualitatively and quantitatively less harmful than a wrongful conviction for paedophilia. Accordingly, what follows does not claim that the social and psychological harmful consequences unearthed by this chapter are universally valid and/or representative for all victims of wrongful conviction. Rather, examples of social and/or psychological harm are provided to give some indication (insights) of likely forms of harm that might be experienced as a consequence of wrongful conviction in the interests of extending existing understandings.
The wider harms of miscarriages of justice

The newness of the zemiological approach means that the most significant attempt to date to provide a definitional framework for zemiology was presented in two conference papers by Hillyard and Tombs (1999; 2001).\(^3\) For them, a developed understanding of social harm ‘would encompass notions of autonomy, development and growth’ (Hillyard and Tombs, 1999, p. 9). In terms of psychological harm, it ‘would cover any psychological or emotional distress arising from events and behaviours outside of an individual’s...control’ (Hillyard and Tombs, 2001, p. 11). With regard to physical harm, a zemiological perspective ‘would include...torture and brutality by state officials’ (Hillyard and Tombs, 1999, p. 9). And, financial harm, from a zemiological voice, would incorporate ‘mis-appropriation of funds by government’ (Hillyard and Tombs, 1999, p. 9). In the specific context of successful appeals, each of the types of harm conceptualised by Hillyard and Tombs (1999; 2001) have a resonance. To illustrate some of the various forms that each of the types of harm can take, the remainder of this section draws from the recent literature on successful appeals. This analysis, however, will not be exhaustive. Rather, the theoretical and methodological strategy is to provide insights of some of the more prominent forms of harm that victims of wrongful conviction might experience to further the conceptions available in existing voices.

\(^3\) Pluto Press will publish an edited book on the possibilities and limits of zemiology in 2003.
A range of forms of *social harm* to the direct victims of wrongful convictions was accounted for in the previous chapter that re-orientated the human rights voice to speak of the widespread contraventions of the HRA. In addition to the forms of socio-legal harm, a zemiological voice would emphasise additional forms of social harm felt by the individual victims of wrongful convictions as it can also relate to being deprived of a partner’s support. Social harm from such a perspective can relate to a parent’s absence during a child’s upbringing, which can have associated impacts upon both the absent parent and the child’s health and life-chances. Symmetrically, it can also have profound impacts upon the families and friends of the wrongfully convicted. Furthermore, it can also relate to the victims of the criminal offences for which the wrongfully convicted were wrongfully convicted, and to their families and friends too.

Examples of all of these various aspects of these additional forms of social harm that wrongful convictions engender can be found throughout the counter-discourse against miscarriages of justice, but has, hitherto, not been emphasised and, hence, has had little impact. For instance, many of the exceptional cases of successful appeal often entailed *victims of serious criminal offences* such as murder, rape or serious assault, the social harm to whom can be said to be the greatest of all. For example, as Broughton (cited Campbell, 1998) said as Derek Bentley’s conviction was quashed by the CACD in July 1998: ‘Our thoughts are with the family of PC Sidney Miles, who gave his life in the line of duty and whose death is often forgotten.’
In addition to the possible social harm to the actual victims of the criminal offences in cases of wrongful conviction, there are also significant forms of social harm to the families and friends of those victims when wrongful convictions are overturned and justice is revealed to have miscarried. For example, with the release of the three surviving members of the Bridgewater Four an issue that had long since been regarded as domesticated within the public consciousness re-emerged, with the pertinent question being re-stated: Who, then, did murder Carl Bridgewater? (Graves, 1997). Prior to the release of cousins Michael Hickey and Vincent Hickey and James Robinson there had been a general belief and conviction, particularly among Carl Bridgewater’s former community, that justice had been done. Even after a Rough Justice television programme, that was helpful in the final referral of the case back to the CACD, Carl Bridgewater’s father had asserted: ‘I am firmly convinced that those men killed our son and are serving just sentences’ (Brian Bridgewater cited Editorial, 1996). With the quashing of the Bridgewater Four’s convictions, however, this position was called into question and it now seemed that someone else might have been responsible for Carl’s murder.

Almost inevitably attention was returned to Hubert Spencer, a man linked with the Bridgewater case since he shot and murdered Hubert Wilkes, an elderly farmer, in December 1979, 14 months after Carl was killed less than half a mile away on the same farm. Spencer was jailed for life for the shooting of Wilkes, which was described during the trial as a drunken, motiveless murder. Since that time campaigners for the Bridgewater Four have persistently pointed the finger of blame at Spencer, publicly describing him as the real killer. Spencer, who was released from prison in 1994, has

37 Pat Molloy the ‘fourth’ member died in prison in 1981.
always denied any involvement in Carl Bridgewater’s murder. As yet, the case of who killed Carl Bridgewater remains officially unsolved. As Paul Tongue said: ‘memories of the killing will fester like an open wound unless the case of who killed Carl is solved (Canon Paul Tongue, the Rural Dean of Stourbridge cited Weaver, 1997).

Such examples are commonplace in the literature on successful appeals. They emphasise both the general fear of crime and the re-emergence of forms of social harm to the families and friends of the victims of criminal offences in consequence to the public knowledge of exceptional wrongful convictions (see, for example, Leonard, 1997; Editorial, 2000b; Buncombe, 1999; Steele, 1995; Shaw, 1998; Roberts, 1999; Hale, 2002; Graves, 1997).

This indicates an important consequence of the zemiological approach. For the failure to convict those persons guilty of serious offences can be conceived as of as much concern from the perspective of harm reduction as the conviction of the innocent. For just as when an innocent person is wrongly convicted, if a perpetrator of a serious crime is not convicted and they remain at liberty, then there is the potential for them to commit more serious crime, and, hence, cause more harm.

As indicated, a zemiological voice of the forms of social harm to the direct victims of wrongful convictions would extend existing notions of the denial of legally provided human rights and freedoms. For such legally grounded analyses do not provide an appropriate or adequate depiction of the range of the social harmful consequences that victims of wrongful conviction experience. For married victims with children the
social harm of wrongful imprisonment can be conceived as the most socially harmful in the sense that the impacts are more widely felt. For example, almost a decade after his successful appeal Paddy Hill (Birmingham Six) declared: 'Me, I died in prison, inside' (cited Hattenstone, 2002), thus indicating that he will probably never get over the social harmful effects of his 16 years of wrongful imprisonment, during which his wife divorced him and his children grew up in children’s homes without him. Similarly, during Gerry Hunter's (Birmingham Six) arrest he was violently and brutally assaulted and his home was vandalised. And, during his 16 years of wrongful imprisonment he also had no chance to take part in the care of his children, the youngest of whom was four years old when he was arrested, and his wife and children had to live at subsistence level supported by state benefits because he was unable to provide for them (see Geffen, 1999). When Michael O’ Brien (Cardiff Newsagent Three) was wrongly imprisoned his son was three years old and his wife was 8-months pregnant with their second child and he had recently renewed a relationship with his alcoholic father after years of conflict. In terms of social harm, during his 10-years of wrongful imprisonment, he was also absent from his son’s life, his second child, a daughter suffered a ‘cot-death’ when she was two months old, his wife left him and his father, reported to have been broken by his son’s wrongful imprisonment, drank himself to death (see Hill, 2001a).

In addition to forms of social harm in terms of what might be termed immediate social familial loss, another form of social harm experienced by many victims of wrongful conviction is the stain on their reputations despite a successful appeal. As Annette Hewins, who was successful in a routine appeal in the CACD in February 1999 for an arson attack that killed three people, asserted: ‘I was exonerated by the courts but not
in the community in which I live. That won’t happen until the investigation is officially reopened and the killer is caught...until...[the] murderer is found...I will carry the stigma. Injustice doesn’t cease just because you walk free from the court of appeal’ (cited Roberts, 1999). To be sure, a feature of many wrongful convictions are the ‘whispering campaigns’ about the guilt of the victims that continue long after the victims have achieved a successful appeal (for further examples see Dyer, 1997; White, 1997; Editorial, 1998d; Editorial, 1998e). These brief examples give an insight into the likely forms of social harm to victims of wrongful convictions. One form of social harm that almost all victims of wrongful imprisonment are likely to share was summed up by Peirce (cited Gillan 2001) in the following terms: ‘They [victims of wrongful imprisonment] come out with no money and no counselling. They have no references, it is difficult to open a bank account, and you can’t get a mortgage. They have no GP. You don’t belong’ (see also, for example, Dudley, 2002).

In addition to the social harms to the individual victims of wrongful convictions, a zemiological voice would also speak of the profound social effects upon the families and friends of the victims. In some cases the harm caused in terms of the anger, anguish, pain, suffering and sheer frustration of the family and friends of the wrongly convicted can be just as severe as the people they support, also having profound and long-lasting effects upon their own lives. For example, Ann Whelan, the mother of the Bridgewater Four’s Michael Hickey, was singled out following the successful appeal in the Bridgewater case for the 19 years that she had campaigned tirelessly and relentlessly for their release. Prior to the wrongful conviction of her son, for his alleged part in the murder of Carl Bridgewater, Ann Whelan had no interest in the matters of the CJS. But, her son’s wrongful conviction will probably define the
remainder of her life, as well as the life of her son. Taking about Ann Whelan’s efforts James Robinson said: ‘The problem for the West Midlands police force was that they happened to fit-up Ann Whelan’s son. They got a tiger by the tail’ (cited Leonard, 1997).

A letter to The Times that appeared in July 1998 would indicate that the ‘tiger’s’ (Ann Whelan’s) campaign is far from completed. In it she attacked the CJS on the grounds that in the 12 months since the quashing of the Bridgewater convictions nothing had been done to bring to account those responsible for the unjust convictions of the men. In particular, she pointed out that there had been no inquiry into how such a ‘horrendous’ miscarriage of justice could have been perpetrated and no effort made to find the real killer. She regarded this state of affairs as a terrible indictment of the law, the judicial system and the HO. She further asserted that the men and the public deserve to see immediate action by the HO, CPS and the police. She concluded that no doubt the authorities hoped that, following the successful appeals, the problem would go away. This, she said, will not happen. ‘In acquitting these innocent men they have completed only half the task and must be reminded of this in no uncertain terms’ (Whelan, 1998).

In October 2002, Whelan (2002) reported the on-going social harm that she experiences as a consequence of her son’s wrongful conviction. This relates to Michael Hickey’s continuing mental health problems and the financial burden that he still represents to her, as he has not as yet received compensation for his 17 years of wrongful imprisonment and survives on her financial support and £61 a week incapacity benefit. This story of the social consequences of wrongful convictions to
the lives of families and/or friends of victims is also a common theme of campaigns against miscarriages of justice (see also, for example, Hale, 2002 for an account of the social costs to Stephen Downing's family; Birnberg, 1998 for an account of the campaigning efforts of Derek Bentley's sister Iris Bentley).

In addition to these possible social harms of wrongful convictions there are also wider ranging or broader social harms that are felt by the society as a whole. For public perceptions of the legitimate operation of the CJS in accordance with its expressed aims ('justly', 'fairly' and 'efficiently') affect and have effects upon the citizenry as a whole. Simon Regan (1997a) articulated this position as follows: 'If a person is wrongly convicted it not only strikes at his or her personal liberty – serious enough by any standards – but at every last one of us. For, ultimately, it is we who have created the system and we who must live or die by it.' From such a perspective, the broader social harm of the scale of wrongful convictions that can be inferred from the statistics on successful appeals have profound and troubling effects upon each and every member of society, signalling a failure of CJS legitimacy that must urgently be addressed.38 As JUSTICE (1989, p. 6)) asserted:

'No criminal justice system is, or can be, perfect. Nevertheless, the manner in which a society concerns itself with persons who may have been wrongly convicted and imprisoned must be one of the yardsticks by which civilisation is measured. Quite apart from the damage to one's good standing in the community, wrongful conviction and imprisonment can (and frequently do) lead to the break-up of family, loss of reputation, home and job, as well as psychological harm. So seriously is the deprivation of liberty taken...that violation

38 See also, for example, Joseph, J. (1998) 'Sometimes justice may be seen to be undone' The Times June 3 p. 51 where he states possible miscarriages of justice are 'deeply troubling, not only for those wrongly imprisoned, but for democratic society as a whole.'
of the right to liberty is the only violation of human rights which must be compensated...Moreover, the imprisonment of an innocent person means that the real culprit is still at liberty [to offend] and this can [cause more damage and] undermine public confidence in the criminal justice system' (original emphasis).

Psychological harm

Perhaps the most serious and profound of the associated consequences to the direct victims of wrongful convictions is the psychological harm that they experience. This was highlighted, for example, in 1996 when Adrian Grounds', a psychiatrist at the Institute of Criminology at Cambridge, examined Gerry Conlon of the Guildford Four and four of the Birmingham Six. In so doing, he found that they were all suffering from irreversible, persistent and disabling post-traumatic stress syndrome. He compared their mental state with that of brain damaged accident victims or people who had suffered war crimes. He concluded that it often made them impossible to live with (cited Pallister, 1999).

Four years after Grounds' examinations there is evidence that the traumas continue for at least some of the members of the Guildford Four. In a newspaper article that appeared in June 2000, 11 years after his release, Gerry Conlon (one of the Guildford Four) claimed that he was 'still going through a terrible time, getting dreadful flashbacks' (cited Pallister, 2000). Adding support to Grounds's earlier findings he asserted that his 'psychiatrist (had told him) that he has never experienced a worse case of post-traumatic stress syndrome, worse even than the soldiers in the Falklands war' (cited Pallister, 2000).
As for Paul Hill (another member of the Guildford Four), he stated in a BBC television programme, also aired in June 2000, that he did not think there was ‘anybody alive who (could) come out of that experience and not be scarred’ (cited Pallister, 2000). He continued that the most poignant thing about his case for him was that the judge had ‘expressed regret that the death penalty was not an option’ (cited Pallister, 2000).

This pattern is repeated for the surviving members of the Bridgewater Four. For example, Michael Hickey suffered three nervous breakdowns (see Campbell, 1997) during his 19 years of wrongful imprisonment and has continued mental health problems since his release (see Ann Whelan talking about her son’s continued mental health problems cited Carter, 1998). As for the costs to Vincent Hickey, five of his close family died during his wrongful imprisonment and his psychological despair resulted in a failed suicide attempt (see Campbell, 1997). As for the label ‘child killers’ attached to the Bridgewater case, the following quotation from the remaining surviving member, James Robinson, sums up well its agonising socio-psychological cost: ‘For long, lonely years we have cried and been racked with despair. People have looked at us with hate in their eyes and called us child killers. We are not child killers’ (James Robinson cited Graves, 1997b).
Physical harm

The recent literature on successful appeals also contains many examples that relate to Hillyard and Tombs’ (1999, p. 9) definition of physical harm from a zemiological perspective as including ‘torture and brutality by state officials’. In the previous chapter, Article 3 of the HRA, (Freedom from Torture), was shown to be contravened in exceptional cases of successful appeal in terms of the police torture and brutality in obtaining wrongful convictions. Article 3 was also shown to be routinely contravened in the general treatment of the prison population.

A limitation with the preceding discussion of the physical harm caused to victims of wrongful convictions is that in confining the analysis to the legal sphere the details of that physical harm and broader questions of social justice are either marginalised, or entirely lost altogether in the legal jargon. A zemiological voice, however, would provide a more morally orientated detailed account of the precise forms and extent of the physical harms experienced. In so doing, a more adequate account of the physical harm of wrongful convictions is provided, and the ways in which such injustices and apparent contraventions from the HRA are dealt with.

For example, George Lewis was head-butted, punched in the head and threatened with a syringe as police officers from the now disbanded West Midland Serious Crime Squad questioned him after his wrongful arrest in 1987 for two armed robberies and a burglary that he did not commit. The officer who assaulted George Lewis was the late John Perkins, a detective constable with the West Midlands Serious Crime Squad.39

39 There is evidence that the West Midlands serious crime squad secured at least 49 prosecutions on the
He is also alleged to have fabricated evidence in 23 other cases. When Lewis later consulted with his solicitor he was informed that there were no grounds to appeal against his convictions. The case was only referred to the CACD after West Yorkshire Police began an investigation into the Serious Crime Squad’s activities. A retrial was set to take place but Lewis was released from custody in 1992 when the prosecution decided to offer no evidence against him.40 Reacting to the news of Lewis’s compensation award a spokesperson for the West Midlands Police said it regretted ‘the miscarriage of justice which occurred in this case’. He said that the four officers who fabricated the evidence against Lewis were no longer serving with the force. DC Perkins had died in 1992. DC Reynolds who arrested Lewis with DC Perkins and another officer, not named in court, had recently retired. The remaining officer, also not named, had retired the day before the CACD decision. As such none of the police officers involved in the George Lewis miscarriage of justice case will be held to account. On this matter, it was stated by the spokesperson that the retirement of this officer the previous day was a ‘coincidence an nothing more’ (see Ford, 1998a).

The case of Keith Twitchell is also connected to the former activities of the West Midlands Serious Crime Squad. In this case, Twitchell was tortured into signing a confession for his alleged part in an armed raid on a local factory in 1980 in which a security guard was killed and £11,500 stolen. When he was arrested, eight or nine police officers handcuffed Twitchell’s wrists to the back legs of the chair upon which

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40 It is quite common in many CACD appeals that result in CJS miscarriages that the prosecution offers no evidence. This has been described in terms of damage limitation whereby as little of the full story as possible is revealed in open court. For an example of this point see George Irving cited Graves, D. (1997d) ‘Bridgewater three set to be released’ Electronic Telegraph Issue 637: http://www.telegraph.co.uk retrieved 2 February 2000.
he was sitting. Next a plastic bag was placed over his head and pressed against his nose and mouth. This suffocation procedure was repeated until finally his resolve was totally dissolved and he agreed to sign the statement put in front of him. For his ‘confession’, Twitchell served 13 years of his 20-year conviction, being released in 1993. At the time of writing, Twitchell had received no compensation and none of the police officers involved had faced any charges, which also has implications for any notions or ‘aims’ of CJS fairness.

Another example is the case of the Bridgewater Four in which four wrongful convictions were obtained through physical harm to suspects. Throughout the Bridgewater case, no forensic evidence of any kind against the four was ever submitted to any court. No fingerprints of the men were found. No murder weapon ever turned up. And there were no witnesses. On the contrary, as stated above, the only forensic evidence and witnesses known to the police clearly indicated that it was someone else who might be guilty. The police suppressed this and the entire prosecution case was based solely on the confessions of Vincent Hickey and Patrick Molloy.

As for Vincent Hickey’s ‘confession’, only after the quashing of the convictions of the Bridgewater Four in 1997 was it was revealed that successive Home Secretaries had had ‘irrefutable’ evidence since 1990 that a serious malpractice had taken place but had refused to act. Electrostatic Definition Analysis (ESDA) had shown that the handwriting and signature on Vincent Hickey’s confession could not have been his (see Graves, 1997c).
As for Patrick Molloy’s ‘confession’, it was revealed that it occurred after days of violent interrogation, during which his teeth were broken and he was consistently hit around the face and head. For the first ten days he was denied access to a solicitor. During this time his food was heavily salted and he was denied liquids. In desperation he drank from the toilet. His sleep was interrupted regularly during the night. And he was shown Vincent Hickey’s forged ‘confession’ accusing him of the murder of Carl Bridgewater. In the end, when he was traumatised and weakened by the experience, he was offered immediate bail if he signed a confession linking the other three to the murder. This he signed as DC John Perkins held him by the hair and read his ‘confession’ in his ear whilst DC Graham Leeke wrote it down (see Regan, 1997b). When Patrick Molloy was allowed access to a solicitor he immediately retracted any statement that he had made, but to no avail. When the BridgewaterThree were freed on bail by the CACD in 1997 Lord Justice Roch made the assertion that: ‘It now seems that Mr Molloy was interviewed by officers who were prepared to deceive him into making confessions’ (Lord Justice Roch cited Graves, 1997c).

As a result of this, and other allegations that had arisen from the Bridgewater appeal, the CPS was asked to investigate three separate allegations against 10 Staffordshire police detectives for fabricating evidence. Merseyside police carried out the inquiry, after which the DPP announced that no charges would be brought against the accused detectives. The DPP ‘appreciated’ that the decision would be ‘difficult to understand’ but maintained that the CPS could only act if there was enough evidence to put before a court to make a conviction realistic (see Carter, 1998).
The above example emphasise an extreme asymmetry (one-sidedness) in the processes of criminal justice which has profound impacts for any notion of social justice and/or the fairness of the CJS, indicating that CJS is more about 'realistic criminal conviction', whether 'fair' or not. This might go some way in accounting for why routine allegations of police and/or prosecution misconduct in England and Wales are so rarely punished. Indeed, it is interesting to note that research undertaken into police complaint procedures shows that of the 35,820 complaints against the police to the Police Complaints Authority (PCA) in 1998, for example, only 847 were substantiated. And of those, only 113 resulted in any form of disciplinary action (Smith cited Mills, 1999).

Financial harm

Hillyard and Tombs' (1999, p. 9) notion of the 'mis-appropriation of funds by government' as a key theme of a zemiological definition of financial harm would also figure prominently in any broader zemiological analysis of the financial consequences of wrongful convictions. For as the government assumes responsibility for the management of the CJS, any public money that can be conceived to be excessively spent as a consequence of wrongful conviction and/or wrongful criminal imprisonment, for example, can, in part, be conceived as 'mis-appropriated' money.

Whether measured directly or indirectly, the financial costs of the current scale of successful appeals are both significant and substantial. For my purposes here, 'direct' costs relate to all those expenditures that are normally considered as such costs
including compensation paid out for wrongful convictions, judicial costs for court hearings and appeals and defence lawyers and barristers costs. But there are also a whole host of possible ‘indirect’ economic costs of wrongful convictions, described as such only because they are not normally considered. For example, there are the expert psychological or social services’ assessments, probation reports, and so on necessary in court hearings. There are the costs to the penal system of containing the wrongfully convicted in prison. There are also the potential costs to the benefit system in terms of support provided by the state that was previously provided by the wrongly convicted person. And, there are all manner of other ‘indirect’ medical costs incurred, such as the socio-psychological counselling that was evident in many of the high profile exceptional miscarriage of justice cases in helping to reintroduce those wrongly imprisoned into society, sometimes after decades of incarceration.

Other ‘indirect’ financial costs of wrongful convictions (in the sense that they are not normally considered) can also, arguably, include the costs of establishing and maintaining such governmental institutions as the CACD, the roots of which were a direct response to public pressure that was asserted by the case of Adolf Beck (see Editorial, 1904a – Editorial, 1904f; Editorial, 1907). They can include the costs of such governmental bodies as the CCRC, which, like the CACD was also created as a direct consequence of public knowledge of exceptional successful appeal cases. They can include the costs of establishing and maintaining extra-judicial governmental inquiries such as royal commissions into problematic aspects of the CJS. They can include the costs of the Police Complaints Authority (PCA). Moreover, they can, conceivably, include the costs of government policies designed at managing miscarriages of justice and all of their strategic implementations.
Additional financial costs of wrongful convictions spoken about from a zemiological voice would also include the costs in overturning the criminal convictions in exceptional cases of successful appeal. For example, there were six separate police inquires into the Bridgewater Four case, three CACD appeals, one of which, an eight-week appeal that was dismissed in 1989, was the longest in British legal history (see Graves, 1997d; North, & Wilson, 1996; Wilson, 1996). Similarly, the case of the Birmingham Six was referred back to the CACD three times. Furthermore, before the appeal judges were prepared to agree that a miscarriage of justice had occurred the chief prosecutor had to publicly admit that the forensic evidence, that was so influential in the original convictions, was ‘worthless’ (see Laframboise, 1993). More recently there was the case of the M25 Three. Previous CACD appeals also figured in this case that were dismissed in July 1993, with Lord Watkins stating that there was not ‘even a lurking doubt’ about the safety of their convictions (Lord Watkins cited Editorial, 2000a). Accordingly, Michael Davis, Randolph Johnson and Raphael Rowe – the M25 Three - spent a further seven years wrongfully convicted of a murder that they could not have committed. Witnesses had claimed that two of the gang were white – but the above named are all black - and forensic evidence and fingerprints found at the murder scene did not match any of the convicted men. This not only emphasises a profound judicial reluctance or inability to overturn meritorious wrongful convictions, it also demonstrates a profound financial inefficiency in the ability of the CJS to overturn meritorious post-appeal cases.

But, the question of the financial efficiency of justice does not only relate to exceptional cases of successful appeal that retrospectively show a failure to overturn
wrongful convictions. The sheer number of successful appeals each year, both in the CACD and the Crown Court, further undermines the notion of the efficiency of the present system. For if the system were efficient it would not make as many mundane and/or routine ‘mistakes’ as it does.

Any attempt to calculate such financial costs, however, can only be partial, as much of the information on such matters is not available. Indeed, the HO Statistical Bulletin collects statistical data only of ‘notifiable’ criminal offences. As miscarriages of justice are not regarded as notifiable criminal offences (to do so would be to define them under a general rubric of ‘state crime’) statistics on such matters are not collected. In addition, details of HO compensation in cases of miscarriages of justice is regarded as ‘confidential’ (see Editorial, 1998a) information, which only further obscures and obstructs any attempt at economic cost calculation. Despite these methodological problems, rough estimations can be determined from a variety of sources. For example, HO Research Studies (HORS) reports on research undertaken by or on behalf of the HO and published by RDS can prove a very fruitful source. For example, HO sponsored research on the comparative merits of public versus private prisons divulges much statistical information on the relative costs of the prisons compared and assessed. Other useful sources published by RDS include Research Findings, the Research Bulletin, Statistical Bulletins and Statistical Papers. They can provide official statistics that are produced as by-products of other inquiries that are applicable here. Investigative newspaper journalism and biographical accounts of some of the high profile exceptional miscarriages are also a rich source of information. From these sources a trickle of information pieced together can present some indication of the ‘bigger picture’. In an attempt to demonstrate, at least in part,
the existence of the bigger picture of the financial costs of wrongful convictions that are not normally taken into account, the remainder of this section will consider some of these costs in relation to four areas - compensation, legal fees, penal costs and the CCRC.

Popular perceptions of miscarriage of justice compensation, in line with popular perceptions of miscarriages generally, tend to think only about compensation paid out to exceptional high profile victims of wrongful imprisonment. In such a context, attention is focused upon individual cases such as the £1 million that was recently reported to have been offered to Paddy Hill of the Birmingham Six for his 17 years of wrongful imprisonment (see Bright and Hill, 2002). These cost seem significant enough, but they tend to give the impression that such compensation is uncommon. Indeed, Paddy Hill's offer comes over a quarter of a century after his wrongful conviction, and 11 years after his conviction was quashed by the CACD in 1991.

But, compensation to victims of miscarriages of justice is a routine feature of the CJS if the wrongful conviction derived from 'judicial error'. Over the last decade, for example, there have been over 150 successful applications for compensation for wrongful conviction or charge under the statutory or ex-gratia schemes. As this translates into economic terms, the HO paid out a record £6.65 million in compensation in 1997-98, compared with £1.54 million in 1994-95 (see Ford, 1998b).

In addition, according to a newspaper article published in December 1998, the Government faces the prospect of a future bill of up to £50 million in costs and compensation for miscarriages of justice uncovered by corruption investigators as part
of an anti-corruption drive in the Metropolitan Police. The Metropolitan Police Commissioner is said to have given the Home Secretary this figure after a confidential review of ‘Operation Stain’ into the problems of tackling corruption among London’s police force. The figures were said to be based on the possibility that 200 cases being investigated will all result in quashed convictions. The article concluded that whilst details of HO compensation in miscarriages of justice are ‘confidential’, they are believed to include awards of up to £20,000 for each year wrongly spent in jail (see Editorial, 1998a).

This figure for HO compensation awards of £20,000 for every year of wrongful imprisonment appears conservative in the context of a previous article that appeared in the same newspaper almost 12 months earlier. In that article it was revealed that in January 1998 George Lewis was awarded £40,000 compensation (£200,000 in total) for each of the five years that he had spent imprisoned for crimes that he did not commit (see Ford, 1998a). Further support for the current compensatory sum of £40,000 for each year spent wrongfully imprisoned stems from the Andrew Evans case. In June 2000, it was reported that Andrew Evans – a routine miscarriage of justice victim - received £1m for the 25 years that he spent wrongfully convicted of a murder that he did not commit – which also averages out at around £40,000 for each year he spent wrongly imprisoned (see Weir, 2000).

Most recently, it was estimated that Stephen Downing is expected to receive an £8 million Government ‘apology’ for his 27 years of wrongful imprisonment (see Hill, 2001b). If this estimation is achieved it will significantly increase the current estimate of between £20-£40,000 compensation for every year of wrongful imprisonment to
almost £300,000 per year. Consequently, the estimated £50 million future bill for miscarriage of justice compensation would seem to be in need of a significant revision.

To gain a purchase upon the likely financial costs of mundane and routine successful appeals, it is interesting to consider how legal fees for legally-aided defence work relates to Publicly Funded Legal Services. In 2001, for example, over 103,000 applications were made in magistrates’ courts for publicly funded defence representation in the Crown Court, almost all of which were granted. This resulted in a total net expenditure on criminal legal aid in 2001 of £1,750 million (see Lord Chancellor’s Department, 2001, pp. 101-104). If these costs are set against the average number of cases that were successful in appeal against criminal conviction each and every year over the last decade (represented in Table 2 and Table 5 above), we can reasonably assume that at least 5% of legal aid spending in 2001 was spent wrongly convicting and then successfully overturning those wrongful convictions. For the annual average of 267 cases that were successfully appealed in the CACD against criminal convictions given in the Crown Court (see Table 2 cited in chapter 3 above) and the annual average of 3,500 successful appeals in the Crown Court against criminal convictions given in the magistrates’ court (see Table 5 cited in chapter 3 above) would have been funded twice. This amounts to a sum in excess of £87 million in 2001 alone.

In addition to the financial costs of wrongful convictions so far calculated, the total costs of miscarriages of justice are increased still further if the costs to the penal

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41 The Legal Services Commission replaced the Legal Aid Board in April 2001.
system of containing the wrongfully convicted in prison are also included. For example, the average cost per prisoner place in all prison establishments between 1998 and 1999 was £22,649.42 If this figure is multiplied by the 3000 people who are currently estimated to be wrongly imprisoned in England and Wales with a legitimate grievance (Watkins, 2001), then a further £67.9 million can be added to the annual expenditure on miscarriages. This brings the likely annual running total of compensation, public legal assistance and prison costs to an amount of over £155 million.

Whether they are normally taken into account or normally omitted, the financial costs of establishing and running the Criminal Cases Review Commission are also directly attributable to exceptional successful appeals. For the CCRC was a legislative outgrowth of the RCCJ (1993) which was established in response to the public crisis of confidence that was induced by the repeated refusal of successive Home Secretaries to refer the cases of the Guildford Four, the Maguire Seven and the Birmingham Six back to the CACD. The CCRC, like the CACD and the royal commissions on miscarriages of justice exists only because miscarriages can and do occur. As the ‘Management Statement’ of the CCRC states it ‘will come to play a key role in enhancing public confidence in the integrity and effectiveness of the criminal justice system as a whole, as Parliament intended’ (Criminal Cases Review Commission, 2002c). Moreover, one of the CCRC’s five primary objectives also states that it will ‘enhance public confidence in the criminal justice system’ (Criminal Cases Review Commission, 2000). In this context, any notion of the theoretical ‘independence’ of the CCRC is difficult to sustain. In such a context, the economic

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costs of the CCRC can be conceived as political governmental expenditure to domesticate identified failings in the legislative framework of the CJS and, simultaneously, promote confidence in the rule of law. Accordingly the costs of the CCRC come into play. Table 8 shows a total of £9.7 million in terms of the employment costs of the CCRC between 1 January 1997 and 31 March 2000.

<table>
<thead>
<tr>
<th>Year</th>
<th>1997</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£'s millions</td>
<td>2.2*</td>
<td>2.2</td>
<td>2.5</td>
<td>2.8</td>
<td>9.7</td>
</tr>
</tbody>
</table>


Table 9 shows a total of £7.3 million in terms of the running costs of the CCRC between 1 January 1997 and 31 March 2000.

<table>
<thead>
<tr>
<th>Year</th>
<th>1997</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>Total</th>
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<tbody>
<tr>
<td>£'s millions</td>
<td>1.8*</td>
<td>1.8</td>
<td>1.8</td>
<td>1.9</td>
<td>7.3</td>
</tr>
</tbody>
</table>


If the £5 million or so per annum that it costs to run the CCRC is added to the running annual total of £155 per annum for likely costs of compensation, legal assistance and penal costs, then the annual costs of wrongful convictions in just these four areas increases to around £160 million a year. When the costs of establishing and running such things as the CACD, the PCA, governmental inquiries and/or the royal commissions into problematic aspects of the CJS are also added, the economic costs of wrongful convictions over the last decade probably run into many billions of pounds.
This analysis could be accused of stretching the argument too far. As no human system can be perfect, it is inevitable that some wrongful convictions will occur. Accordingly, it is also inevitable that the provision of safeguards to attempt to prevent and remedy wrongful convictions when they occur is a necessary requirement in a liberal democratic society that will incur a financial cost. The problem with this is that the system does not just sometimes get it wrong. Contrary to public perceptions, there are over 4,000 successful appeals every year in England and Wales. The present system gets it wrong everyday of every week of every year, then, with the consequence that an excessive amount of public expenditure can be conceived to be currently spent on wrongful convictions. Accordingly, it is not that any expenditure on wrongful convictions is entirely wasteful, more that the current expenditure is so excessive that it can legitimately be conceived to detract from public spending in other areas of desperate need.

So, from a zemiological voice, the excessive amount of money spent on wrongful imprisonment, for example, can be conceived to deprive innocent school children in terms of restricted educational resources. The excessive amount spent on compensation to victims of miscarriages of justice can be conceived as depriving countless scores of people from necessary hospital treatments. Moreover, the excessive amount spent on legal fees to wrongfully convict people and then support their successful appeals, for example, can be conceived to take away from the total governmental expenditure that could go to providing a decent minimum wage or more realistic pension. In this zemiological sense, wrongful convictions affect us all, which is why the reduction of the costs of injustice of the current system would be at the
foreground of the zemiological voice - justice might cost, but mis-justice, undoubtedly, costs more.

**Critical remarks**

The utility of the zemiological voice, then, is that it not only enhances the re-orientated human rights voice constructed in the previous chapter that invoked the limits and/or prohibitions of the lawful restriction and/or abuse of the HRA, it also further extends it. For the zemiological voices on forms of social and psychological harm further emphasise the effects of wrongful conviction on the enjoyment and/or fulfilment of the lives of victims, thus further illustrating the contravention of Article 2 of the HRA (Right to Life). The zemiological voice on the physical harm of wrongful convictions further enhances the human rights critique of the contravention of Article 3 of the HRA (Freedom from Torture). The zemiological voice on the financial harm of the current public expenditure on wrongful convictions extends all existing voices into an important area of harm which contains significant human rights issues for all members of the population. In addition, the zemiological voice can serve to extend notions of miscarriages of justice still further by bringing to light an extra dimension of harm when successful appeals are achieved, i.e. the broader harm that accompanies the knowledge that justice ‘failed’ and that the real perpetrator remains at liberty to cause more harm. In this sense, zemilogy can, indeed, be constructed as a ‘defender of human rights’ and can contribute to re-qualifying a variety of forms of anti-discourse about wrongful conviction that are currently an
extremely marginalised or even hidden aspect of the overall potential of counter-
discourse against miscarriages of justice.

There are, however, core questions and difficulties that need to be raised in appraising
the promise of the zemiological project. Not least, there is a central vagueness or all-
purposeness in the adoption of the ‘harm’ perspective. For instance, it is not obvious
whether the locus of harm lies at the level of the individual or more indirectly, in
some aspect of the social collectivity. The clarification of this issue, however, is of
major importance, in addressing, for example, issues around the ubiquitous, but
contested, idea of ‘victimless crimes’. On the one hand, zemiology would seem to
indicate that the only way to decide and assess the occurrence of injustice or ‘crime’
is to demonstrate some definite form of ‘harm’ or injury to an individual victim. On
the other hand, and possibly with no reference to any particular complaints of
individual harm, zemiology insists on highlighting indirect harms that may have an
impact on other aspects of society more collectively conceived. To date, zemiological
writings have not properly specified this kind of distinction.

There are also a range of issues relating to the inherent subjectivity and relativism of
zemiological analyses in the sense that ‘harm’ is an irreducibly value-laden norm.
Clearly, and most basically, some individuals will tend to get more easily upset
(psychological harm), or more easily hurt (physical harm), than others in the event of
experiencing very similar wrongdoings against them. This could play out to the effect
that the treatment of individuals by state agencies such as the police and prison
service, for example, that upset or hurt those individuals that are predisposed to
psychological anxiety or more vulnerable to physical harm would be defined as
harmful and, hence, ‘criminal’. By the same token, however, similar, or even the same treatment during police interviews and/or imprisonment would not be defined as harmful and, hence, not ‘criminal’, if they occurred to individuals not so predisposed. To give an almost caricatured sense of the problem, would the wrongful imprisonment of someone prone to claustrophobia represent a worse ‘crime’ than the wrongful imprisonment of someone who did not have that condition?

The serious point behind such a near-absurd scenario concerns the relationship between harm and injustice, a complex connection, which the logic of zemiology seems to oversimplify. This is an issue because the injustice of a wrongful conviction might have little to do with the exact amount of harm experienced. An individual would be no less unfairly treated because he/she did not complain about their psychological deterioration in prison whilst hoping for the repeal of their sentence. This emphasises an inevitable subjectivity/relativism in calculations of harm. For example, to take a case of economic harm, a £50 parking fine to a millionaire would cause little bother to that individual’s daily life. However, the same penalty dealt out to a person on state benefits would probably account for a week’s groceries, thus constituting a disproportionate amount of harm to the latter individual in relation to the same treatment. Whilst there would undoubtedly be some additional ‘justice’ in a kind of sliding scale of penalties according to harm, the effectiveness of the resulting system and the intrusive contestability of case-by-case relativities would be unlikely to create consistency of expectation, a prerequisite of any system of law/justice.

A further set of questions that could be levelled at zemiology relates to the conception of human nature that lies behind zemiological declarations of harm. What if it was
thought, for example, that international human rights were actually themselves harmful to either individual freedom or group subcultures? It could be argued that we cannot simply assume that the notions of 'human rights' as they were constructed in the Universal Declaration of Human Rights in the aftermath of the Second World War (see United Nation, 2002; Franklin and Eleanor Roosevelt Institute, 2002), and generally and unproblematically incorporated by the ECHR and the HRA, always serve in the best interests of all human beings, in all places, and for all time. It could even be argued that forms of human rights legislation, by advocating certain forms of human behaviour and conduct and restricting and actively sanctioning others, can be regarded as a form of *social control* and domination that limits the ability of individuals to act in self-determining ways. This is not necessarily to criticise or argue against signed-up-for human rights in England and Wales. Rather, it is to point up difficult matters such as the possible *eurocentricity* of their origins and question their applicability to states and societies that are not signatories to such legislation. A pertinent example of the difficulties faced by the universal and/or inalienable export of Western human rights ideals was the recent conflict in Afghanistan by the 'international community' that was sanctioned by the United Nations (see, for example, Woollacott, 2001). In particular, that conflict was partly legitimatized in the name of human rights and the liberation of Muslim women who, it was argued, were being oppressed, as they were not being afforded the rights and freedoms that are aspired to/signed-up-for in the West (see, for example, Viner, 2002). This took little, if any, account of the harm caused to the tens of thousands of human beings caught-up in the conflict that were defined as 'against us', as they were not in compliance with

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Western notions of ‘proper’ human conduct (see, for example, Scraton, 2002; 2002b; Chomsky, 2002; Green, 2002b; Mathiesen, 2002). A key conundrum for zemiology, then, is: Isn’t one person’s (group’s) injury another person’s justice?

More generally, what is the basis of zemiology’s implicitly assumed vantage point of moral superiority – something of which must be assumed if the adjudication of harm is to lead to real progressive change? A zemiological analysis of the psychological harm to a victim of a miscarriage of justice, for example, is not necessarily superior to a more legally grounded analysis of the harm caused by the denial of legal rights and freedoms. Following the same example, psychological harm can manifest itself precisely because legal rights and freedoms have been transgressed, and psychological equilibrium can possibly be restored once the denial of rights has been acknowledged by the state and remedied. As indicated, psychological harm can also be completely unrelated to external factors and could be a purely subjective mental state. Zemiological framing seems to take it for granted that there is an obvious and ‘progressive’ way of accounting for and dealing with harms, and that somehow those subscribing to zemiology will, in fact, be singing from the same moral hymn sheet. Not only is this very questionable in itself, the zemiological literature fails entirely to openly discuss such obvious lacunae.

Finally, there are a number of issues around the attitude of zemiology and the status of the existing CJS. If the primary object of zemiology is the reduction of harm, then, in the context of wrongful convictions, for example, zemiology could not reasonably be conceived as being entirely ‘against’ the System as such. On the contrary, a strict zemiological approach would be just as concerned with the harm caused by
perpetrators of serious crimes as they are already conceived by the CJS, for example, murder, rape, serious physical assault, and theft, for the harm that such occurrences cause to victims. From such a standpoint, zemiology would, logically, seek to ensure that such ‘criminals’ or ‘harm producers’, or whatever form of semantics one would care to use, were not at liberty to continue to produce harm/commit ‘crime’, and this, perhaps, could be thought to leave existing arguments for working in or against the CJS pretty much in the place they were prior to the zemiological ‘intervention’.

And, yet, it is manifestly the case that one of the key self-images of zemiology is that it does, precisely, intervene in such a way as to promote the ‘longer-term’ abandonment of conventional notions of ‘crime’, ‘law’ and ‘criminal justice’ altogether in favour of analyses of ‘harm’ (Hillyard and Tombs, 2001, p. 23). Where this is the implication, a critical counter can be made, for example, with the recent introduction of the HRA, that renders the actions of state agencies and the employees of state agencies ‘unlawful’ if they are incompatible with the letter and/or the ‘spirit’ of the Act. This, I believe, significantly improves the opportunities for successful legal challenge against the CJS for violations of the Act. Moreover, if zemiologists in the guise of ‘defenders of human rights’ can persuasively demonstrate violations of the HRA, then, the cause of such violation can be labelled as crime within a general rubric of definitions of state crime and legal redress can be effectively obtained. As Penny Green’s (2002b, p. 76) definition of state crime asserted: ‘If a state’s own actions depart from that state’s own rules or is unjustifiable in terms of the values the rules purport to serve, then those actions objectively are illegitimate.’
Accordingly, I do not see zemiology as necessarily different or distinct from the ‘state crime’ perspective that attempts to highlight the violation or contravention from signed-up-for human rights. On the contrary, the critical modes of thinking behind zemiology and the state crime approach ‘share a common appreciation of contradictory affairs in human affairs, a negative assessment of the status quo, and a belief in the need for fundamental change in productive and social relations’ (Barak, 1991, p. 11); they can both be conceived as logical extensions of the call by criminologists such as Sutherland (1940; 1983) in the 1930s to include the behaviours of ‘white-collar’ and corporate offenders – behaviours which may or may not be legally defined as against the law, but which nevertheless, cause harm, injury and violence – into what was then emerging as the precursor to the study of ‘the crimes of the powerful’; and, they are both direct outgrowths of the program outlined by Schwendinger and Schwendinger (1975). As Barak, (1991b, p. 273) asserted in his call for an expanded definition of crime to incorporate state criminality: [My call is a response to] ‘the call in the 1970s by two radical criminologists [Schwendinger and Schwendinger 1975] for the study of systems of exploitation and state crimogenic institutions [that] has not been seriously pursued by criminology.’ In this sense, I believe that zemiology should continue to proceed within the ‘short’ to ‘medium’ term view presented by the main advocates of zemiology that:

‘...whether or not a new discipline of zemiology is to emerge, we must accept that raising issues of social harm does not [necessarily] entail making a simple, once-and-for-all choice between representing these as either crimes or harms; each may form part of an effective political strategy’ (Hillyard and Tombs, 2001 p. 22 original emphasis).

For as Tombs (1999, p.6) elsewhere noted:
'It is difficult to conceive of over-riding advantages to organising our work around 'social harm' [i.e. zemiology]. A focus on law through the category crime may be more productive: law provides a site of struggle, and facilitates the development of focused political action in a way that it is not necessarily the case with reference to social harm. That we should restrict our work and political activity to law does not, of course, follow from this observation' (original emphasis).

To be sure, this undoubtedly creates a paradox for the architects of the zemiological paradigm, for how can you have an alternative based in zemiology, and yet say, we can retain a notion of crime/law in the present term? Despite this, I see the utility of the short to medium zemiological lens to critical analyses of miscarriages of justice as having the potential to contribute to, not detract from, the forms of critical criminology from within which the 'frustrated' notion of zemiology derives. It can contribute to the attempt to re-orientate definitions of miscarriages of justice to include all successful appeals precisely because it helps to illuminate, in a very persuasive way, the comparable forms of harm that occur in all successful appeals, whether they be exceptionally, routinely or mundanely determined. Hence, the human rights approach of zemiology can contribute to the incorporation of such events and behaviours that can be conceived to violate (contravene) domestic or international signed-up-for human rights legislation within the rubric of state crime in the struggle against forms of social injustice. Moreover, as Carlen, (1991, pp. 54-62) drawing from Bachelard (1940) and Derrida (1976) has noted:

Radical theorists can diminish their perennial fear of the discursive power of the empirical referent by adopting 'the methodological protocol...that systems of thought must say "No" to their own conventions and conditions of existence...there is no reason why they should
not both take seriously (that is, recognise) and deny the empirical referent's material and discursive effects...[for] the very task of theory is to engage in a struggle for power over the "meaning of things"...to produce new meanings which will empower’ (original emphasis).

For me, zemiology and the state crime perspectives are complementary expressions of the long tradition within critical criminology of saying ‘No’ to power; to dominant definitions and categories of ‘crime’ and ‘victim’; they are essentially a struggle for power over the ‘meanings’ of ‘crime’ and ‘victim’. In this sense, I do not think that one has to be an out-and-out zemiologist to find a utility with the approach. Nor does one have to be an out-and-out critic. In the same way that Foucault can be used as a resource to picture aspects of existing forms of social reality without the need to be a ‘Foucauldian’ (see Gane, 1986, p. 111; Osborne, 1994, pp. 493-499), zemiology, too, notwithstanding its difficulties/limitations, can be used as a resource, as a tool of analysis, a platform that can aid in the re-orientation of popular perceptions of miscarriages of justice. As Hillyard and Tombs (2001, p. 10) stated: ‘defining what constitutes harm is a productive...process...zemiology is partially to be defined in its very operationalisation, in its efforts to measure social harms.’ Defining what constitutes ‘crime’ and ‘victim’ is equally a productive process. Definitions of ‘crime’ and ‘victim’ change over time, in part, precisely because certain events and/or forms of behaviour that cause harm are promoted and demoted in the discursive struggle between the defenders of the existing CJS arrangements and critics who want to change/reform them. It is within such a context that this thesis sees the utility of a fusion of Foucauldian insights of the operations and exercise of prevailing forms of CJS knowledge-power with the perspectives of zemiology and state crime as tools to picture the real scale and the harmful effects of miscarriages of justice and to assess
the possibilities of resistance. The motivation being, that it will initiate a more fruitful debate about conventional 'meanings' of miscarriages in such a way as to question the management of the CJS, change public perceptions and contribute to struggles for change.

**Conclusion**

In an attempt to extend still further the existing depictions of the harmful consequences of wrongful convictions, this chapter constructed a new voice from the emerging zemiological approach. In essence, zemiology works within the general agenda of human rights discourse but extends forms of human rights critique into a more morally grounded domain. In this context, a qualified zemiological voice was constructed that did not stray too far outside of a focus on the categories of 'lawfulness' and 'unlawfulness' as contained in the HRA. In so doing, the zemiological voice was indeed shown to both enhance the extended human rights voice on the harmful consequences of wrongful convictions that was re-orientated in the previous chapter, and take the analysis into even newer territory. This provided a more detailed depiction of a range of forms of harm that are likely to be experienced by the direct victims of wrongful convictions. It provided an insight into a more appropriate depiction of some of the wider harmful consequences to others caught-up in justice in 'error' and the broader society. It built on, and enhanced, critiques about the contravention of Article 2 of the HRA, that were constructed in the previous chapter, by emphasising forms of social and psychological harm of wrongful convictions. It strengthened the notion of the contravention of Article 3 of the HRA,
also constructed in the previous chapter, through the provision of insights into the
details of forms of physical harm experienced by victims in cases of successful
appeal. Furthermore, the zemiological voice was applied to extend existing analyses
still further by indicating the staggering costs to the public purse of wrongful
convictions that have profound socio-economic and human rights impacts upon
society as a whole. In addition, a further consequence of the zemiological voice on
successful appeals from a symmetrical perspective is that the failure to convict those
persons guilty of serious offences is of as much concern as the conviction of the
innocent. For just as when an innocent person is wrongly convicted, if a perpetrator of
a serious crime is not convicted and they remain at liberty, then there is the potential
for them to commit more crime, and, hence, cause more harm.
Conclusion

Overall, this thesis has been trying to shift analyses of miscarriages of justice to a more inclusive perspective of successful appeals against criminal conviction. The point of this is three-fold: to provide a more adequate depiction of both the scale of wrongful convictions that are currently occurring and the possible harmful consequences of those wrongful convictions; to map a new terrain for miscarriages of justice as a field of empirical enquiry; and, to critically review the activity of counter-discourse. The first three chapters called for a re-orientation of existing definitions of miscarriages of justice to include all successful appeals on the grounds that the focus upon exceptional cases of successful appeal is limited in its depiction of the scale of wrongful convictions. Moreover, it was shown that even if all of the cases that appear in the official statistics of successful appeals were defined as miscarriages they would still not capture the total wrongful conviction phenomenon in England and Wales. For they do not include a whole variety of causes of wrongful convictions that will never feature in the official statistics. Accordingly, the scale of the victims of wrongful convictions and the harmful consequences that they experience is also potentially in excess of that which can be inferred from the official statistics of successful appeals.

Following this, the first three chapters of Part Two evoked the most significant existing voices on miscarriages of justice and pointed up both their strengths and their pitfalls. Whilst the existing voices against miscarriages of justice routinely assert that they are widespread, they are grounded in a definition from which wrongful convictions can only be conceived as rare occurrences and quantified as small in number. In consequence, attempted reforms of the system to remedy or avert
miscarriages of justice have attempted to impact only within the very limited scope of procedural problematics that are exemplified by specific post-appeal cases. As this relates to the harmful consequences of wrongful convictions, existing analyses have also been restricted to the denial of legal rights and freedoms and have only been conceived as rare occurrences involving a small number of individual victims.

In response, I attempted to shift critical academic theory about the production and deployment of counter-discourse against miscarriages of justice and the governmental processes through which competing discourse is dealt with. In particular, the relevance of public crises of confidence that accompany successful appeals that exemplify previously unacknowledged 'errors' in the legislative framework of the CJS was emphasised. Such events should not be viewed negatively. On the contrary, they represent moments when the conditions for reform of the CJS are right, and can be utilised to force through more effective changes. This has tended to be missed by critical academic analyses against miscarriages of justice, which have rather tended to gloat at the public crisis as if it were somehow evidence of a corresponding crisis in government. This indicates a deep theoretical misconception at the heart of the forms of critical academic counter-discourse that responded to the RCCJ. For 'government', in the Foucauldian sense, is precisely about the management of opposing discourses at critical moments and in response to problematic events. In such a context, a primary task of critical counter-discourse to the way things are should be to attempt to invoke as many public crises of confidence as possible, which should then be viewed as opportunities to be exploited and to force more effective changes.
Historically, the changes that have followed public crises of confidence in specific aspects of the CJS, such as the establishment of the CCRC as recommended by the RCCJ, have not met the expectations of the critical academic community. This has served to further the general misconceived conspiratorial tendency that government is no more than an authoritarian abuse of power, which dominates a citizenry or a population. If viewed differently, however, at least part of the problem can be attributed to the kinds of misconceived notions of power, resistance and government that were collectively expressed in the counter-discourse contained in *Criminal Justice in Crisis*. The RCCJ did not fail in the public’s eyes, for it resolved the public crisis of confidence that it was established to address. Rather, the critical academic discourse that responded to the RCCJ can be conceived to have failed to properly understand both the conditions for its establishment and to exploit the real opportunities that it provided.

In essence, then, this thesis represents a concerted attempt to move away from exceptionalist understandings of wrongful convictions towards a much more inclusive depiction of the miscarriage of justice terrain. Extending existing analyses in this way, the domain of human rights and the moral promise of the HRA were explored. For although the HRA does allow for the lawful transgression from the rights and freedoms it provides, it does so only within the context of certain limits and prohibitions against the abuse of rights. From such a standpoint, a closer analysis of the various Articles of the HRA and the current scale of successful appeals revealed that almost all were conceivably being contravened by a judiciary that produces too many wrongful convictions. This re-orientated human rights voice, however, also displayed insurmountable limitations in terms of depictions of the harmful
consequences of wrongful convictions, because human rights discourses are entirely grounded in notions of legally constructed individual subjects.

In an attempt to provide a voice that might better be able to depict the full range of harm, both to individuals other than the direct victims of wrongful convictions and the collectivity as a whole, the fledgling zemiological approach was considered. This took the human rights analysis further into the territory of moral critique. Even so, once again reservations were lodged. In its most extreme, but quite logical, guise the zemiological voice requires that critical discourse takes place completely outside of the legal agenda because ‘crime’ must be substituted in toto by ‘harm’. This was argued to be a mistake as it would inevitably diminish the contribution of zemiology to struggles for change and more focussed forms of political action against existing legal regimes. There is also an almost constitutive risk of subjectivism and incommensurability at the heart of zemiology, because of the experiential relativity of ‘harm’ across immeasurable social situations. Suitably qualified, the zemiological voice was put to work in the terrain of successful appeals whereupon it called up depictions and calculations of the consequences of miscarriage of justice that are not available from other perspectives.

The thesis, then, has sought to contribute towards the articulation of a new critical ‘voice’ in several ways and at different, but related, levels. The existing definitions, calculations, conceptions of causality and understandings of reform around miscarriages of justice have been persistently questioned and cumulatively, at least to an extent, replaced by more inclusive horizons. This involved a series of conceptual ‘interventions’ derived from a particular reading of Foucault’s insights, and it also
required considerable reworking of both empirical cases and evaluative standpoints. When first embarking on this thesis I was struck by the fact that the ‘terrain’ or ‘field’ of miscarriage of justice analysis appeared rather incoherent and even morally arbitrary. Whilst it is hardly likely that the much needed task of re-mapping the field could be accomplished by any one study or another, the different aspects of argument and enquiry contained in this thesis contribute to something of a new agenda in this area.
References


Campbell, d. (1999a) ‘Mother in arson case goes free’ The Guardian April 17.


Criminal Appeal Act 1907 London: HMSO.


Dudley, R. (2002) ‘We were victims too’ *The Observer* July 7.


Editorial (1889b) The Times August 8, p. 7.

Editorial (1889c) The Times August 9, p. 3.


Editorial (1889g) The Times August 15, p. 5.


Editorial (1889i) The Times August 19, p. 4.


Editorial (1904a) The Times August 26, p. 3.


Editorial (1904c) The Times August 30, p. 8.

Editorial (1904d) The Times September 22, p. 4.

Editorial (1904e) The Times October 18, p. 8.

Editorial (1904f) The Times October 19, p. 5.


Editorial (2002b) ‘Freedom Fight’ This is Bury July 5.


Ford, R. (2002a) ‘Fair trial is still a right, even in prison’ *The Times* July 16.


Green, A. (2002a) informal interview conducted in Manchester August 7.


Hall, S. (1977) Policing the Crisis: mugging, the state, and law and order London: Macmillan.


Hill, A. (2001a) “‘I won my freedom, but those years in jail smashed my life to bit’” *The Observer* March 18.


Hill, A. (2002b) “‘I thought it was love. Now I know that I was wrong’” *The Observer* June 2.


Mental Health Act (1983) London: HMSO.


Pallister, D. (1999b) ‘“Confession” to disgraced crime squad led to 20-year jail term’ The Guardian October 27.


Panorama (2001) ‘Finger of Suspicion’ broadcast on Sunday 8 July at 22:15 p.m. on BBC1.


Prosecution of Offenders Act 1985 London: HMSO.


Rough Justice (1997) Television programme BBC 1 April 7.


Royal Commission on Capital Punishment (1953) *Report* (Cmd. 8932), London: HMSO.

Royal Commission on Criminal Justice (1993) *Report* (Cm. 2263), London HMSO.


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Smith, R. (1993) 'Integrity or Convictions?' Law Society's Gazette 90(38), 2


The Clerk's Notes (1984) 'notes of the week' Justice of the Peace: The Journal for the Practitioner in the Magistrates' Court and the Crown Court Chichester, Sussex: Published by the Proprietors, Justice of the Peace Ltd.


The Five Percenters (2002b) '3 things we'd like to see happen' website: http://www.sbs5.dircon.co.uk/five.htm retrieved July 30.


The Law Commission 'Double Jeopardy and Prosecution Appeals: Report on two references under section 3(1)(e) of the Law Commissions Act 1965' LAW COM Number 267, Cm 5048.


Times Parliamentary Proceedings (1889) August 9, p. 5.


Trow, M. J. (19900 ‘Let him have it Chris’: the murder of Derek Bentley London: Constable.


Warren, J. (1999) 'I was guilty of nothing, so jail was a nightmare. But being kept from my children was sheer hell' Daily Express February 16.

Watkins, T. (2001) 'Miscarriage Statistics' e-mail correspondence in reply to my inquiry about the reliability of the Portia Campaign's statement that there are currently 3000 innocent people wrongfully imprisoned in England and Wales September 19.


Weale, S. (2000) 'This ex-head teacher abused these women when they were his pupils. So why didn't he go to prison?' The Guardian June 22.


Woffinden, B. (2001a) ‘There are probably 20 convictions that I now consider unsafe’ *The Guardian* November 7.


