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1

What is a Miscarriage of Justice?

Introduction

Public and political discourses on miscarriages of justice are highly polarised. On the one hand, those committed to due process express concerns about the possible wrongful conviction of the factually innocent. On the other hand, those committed to crime control express concerns about the need to ensure that all guilty offenders receive their 'just deserts'. Initiatively, it would seem correct that the criminal justice system should be *both* about the conviction of the factually guilty and acquittal of the factually innocent and that both due process *and* crime control should be accommodated in the delivery of justice. However, as illustrated in the following quotation taken from a successful appeal judgement, the criminal justice system does not neatly correspond with the expectations of either due process or crime control advocates as expressed in public/political discourses and can neither guarantee that the factually innocent will be acquitted in criminal trials, nor that the factually guilty will be convicted.

In our view the case against all three appellants was formidable... However we are bound to follow the approach set out earlier in this judgment, namely assuming the irregularities which we have identified had not occurred would a reasonable jury have been bound to return verdicts of guilty? In all conscience we cannot say that it would...Accordingly we cannot say that any of these convictions is safe. They must be quashed and the appeals allowed...For the better understanding of those who have listened to this judgment and of those who may report it hereafter this is not a finding of innocence, far from it (R v Davis, Johnson and Rowe, *The Times* July 25, 2000; (2001) 1 Cr App R 115).

Rather, then, the criminal justice process operates on an altogether different plane to the ideological struggle between due process versus crime control combatants. In the absence of a crystal ball or concrete certainties about the perpetrators of alleged crimes, it relies on an elaborate system of rules and procedures which attempt to ensure that suspects of crime and defendants in criminal courts receive a 'fair hearing'. From such a perspective, the criminal justice system's definition of a miscarriage of justice is not so much related to whether a person convicted of a criminal offence is innocent of the crime but, rather, whether the person received a 'fair trial'. This may seem unsatisfactory and out of step with public understandings about what the criminal justice system should deliver and what political promises say it will deliver. Nonetheless, as will be shown, if the criminal justice process functioned in any other way it would be at odds with the underlying governmental rationality that renders it legitimate.

This chapter begins with a closer analysis of the difference between popular aspirations (public and political discourses) on what the criminal justice system *should* deliver and what it *actually* delivers to illustrate the overriding concern for the criminal justice system is ensuring that all accused of criminal offences receive fair and just treatment, in accordance with the rules and procedures of due process. Then, an historical analysis is undertaken of the emergence of a new form of governmental rationality (which Foucault termed governmentality) as society shifted from sovereign exercises of power to existing forms grounded in the rule of law. In particular, this emphasises the extent to which the legitimacy of existing exercises of power in the realm of criminal justice is determined by reference to principles of due process, transparency and fairness and how this differs from previous exercises of power in response to acts deemed criminal. Finally, the need to challenge all abuses of due process, both in the interests of enhancing governmentality in the on-going shift from sovereignty and for the potential damage to governmental legitimacy that they represent, is outlined, again making use of a Foucauldian inspired perspective.

Popular discourses and what the criminal justice system actually delivers

The proposition that the criminal justice process should convict the guilty and acquit the innocent highlights a crucial incompatibility between discourses which embody public/political aspirations of what the criminal justice system should deliver and what it actually delivers.

Miscarriages of justice as they relate to the criminal justice system do not and cannot relate to the wrongful acquittal of the guilty in any practical or strict legal sense, as this undermines fundamental principles that underpin the legitimacy of the entire criminal justice process: the presumption that defendants are innocent in criminal trials until a case has been proven beyond a reasonable doubt by the prosecution against them (discussed further below). As Helena Kennedy (2004: 11) put it:

In the adversarial criminal justice system we do not start off from a position of neutrality. We start off with a preferred truth – that the accused is innocent – and we ask the jury to err on the side of that preferred truth, even if they think she (sic) probably did do it. I explain to juries that if they find themselves in the jury room saying I think she probably committed the offence or she may well have done it, they have to stop themselves short, because probabilities are not good enough. The criminal justice system is based on the fundamental value that it is far worse to convict an innocent person than to let a guilty one walk free.

The main difficulty, then, with the idea that guilty offenders who are acquitted by the courts represent miscarriages of justice is that it works from the untenable premise that defendants in criminal trials who are acquitted are, in fact, guilty. This is not to defend the acquittal of the factually guilty in criminal trials. It is, simply, to clarify the logic of the criminal justice system as it is currently constituted and practised, as compared with popular discourse. From this perspective, this analysis is not focused on expressions of popular notions about guilty acquittals and miscarriages of justice. Rather, it concentrates on the other side of the popular miscarriage of justice conundrum as it relates to popular concerns about the possible miscarriages of justice to the innocent.

However, as conventional perceptions on miscarriages of justice relate to the possible wrongful conviction of the innocent, here, too, are significant misconceptions about what the criminal justice system is able to provide. As will be shown below, miscarriages of justice do not relate to the wrongful conviction of the innocent in any reliable sense either. This is not to infer that innocent people are not convicted by the criminal justice system, nor is it to suggest that the public should not be concerned about the conviction of the innocent. On the contrary, as already indicated and developed further below, the *belief*

and widespread concern that innocent people were convicted of crimes that they did not commit has been the vital motor force behind the introduction of progressive modifications of the criminal justice system and is a crucial aspect of the governmentality project.⁶ Rather, my specific aim here is to highlight the distinction between what the public want from the criminal justice system, what politicians promise the criminal justice system will deliver and what the criminal justice system can actually deliver. It is an attempt to clarify what, precisely, constitutes a miscarriage of justice according to the legal system in the interests of a more meaningful understanding about how they are managed by the criminal justice system and how they might be more effectively challenged.

What, precisely, is a miscarriage of justice?

A key characteristic of miscarriages of justice is that whatever allegations there may be, a miscarriage of justice cannot be said to have occurred unless and until an applicant has been successful in an appeal against a criminal conviction, and until such time she/he remains an *alleged* miscarriage of justice. This is, generally, the case for public, political and criminal justice system discourses alike. For instance, the Birmingham Six had two unsuccessful appeals before they were officially acknowledged and recorded in the official statistics as victims of wrongful conviction/imprisonment following their success in their third appeal, the Bridgewater Four (Regan, 1997b; Foot, 1986), Maguire Seven (Maguire, 1994) and the Guildford Four also all had multiple appeals before they were accepted, officially, as victims of miscarriages of justice. I have noted previously that, in this sense, definitions of miscarriages of justice can be said to be entirely 'legalistic': they are defined by law, they are wholly determined by the rules and procedures of the criminal justice system, and if those rules and procedures change, then the way in which miscarriages of justice are defined will also change. Miscarriages of justice as they are understood and acted upon by the criminal justice system, however, differ from popular perceptions in an important way. They are distinct from the specific problem of the wrongful conviction of the innocent, as a successful appeal against a criminal conviction is *not* evidence of the wrongful conviction of the innocent. On the contrary, a successful appeal against criminal conviction denotes an official and systemic acknowledgement of what might be termed a breach of the 'carriage of justice', the rules and procedures that together make-up the criminal justice process, and it bears no relation to whether a successful appellant is factually guilty or factually innocent: these are not questions that our criminal justice system pursues or attempts to resolve, at least in the ordinary

sense that these terms are popularly understood (Naughton, 2005c: 165–167).

The criminal justice system in England and Wales is not about the pursuit of the objective truth of a suspect's or defendant's guilt or innocence. Adversarial justice is an evidential contest, regulated by principles of due process, compliance with the rules and procedures of the legal system. In particular, the two key tenets of the criminal law in England and Wales are stated as the presumption of innocence and the standard of proof. The presumption of innocence is claimed to mean that an individual is deemed to be innocent, until proven guilty. The standard of proof states that to find a defendant guilty in criminal cases in England and Wales the evidence should establish guilt beyond reasonable doubt (Chapman & Niven, 2000: 4–5). However, criminal trials are not a consideration of factual innocence or factual guilt in any straightforward sense. They are highly technical affairs which attempt to determine if defendants are 'guilty' or 'not guilty' of criminal offences on the basis of the reliability of the evidence before the court. The following quotation, for instance, taken from the House of Lords ruling in the case of *Director of Public Prosecutions v. Shannon* [1974] 59 Cr.App.R.250 sums up the legal position fairly succinctly:

The law in action is not concerned with absolute truth, but with proof before a fallible human tribunal to a requisite standard of probability in accordance with formal rules of evidence.

In an even more critical mode, McBarnet (1981: 12–13) noted, the criminal process is not about absolutes, but about pragmatics:

What is involved is not a philosophical or scientific concept of proof but a much less demanding *legal* concept. The justification lies not in any idealism that 'the truth the whole truth and nothing but the truth' results, but in pragmatics. The courts are there not to indulge in the impossible absolutes of philosophy or science but to reach decisions – quickly. So the courts have drawn a line at what will do as proof. Prosecutors do not have to prove everything a jury might want to know, they only have to produce a *sufficiency* of evidence. The law defines how much evidence constitutes 'sufficient' to prove a case and it is the judge's role to decide and to persuade the jury that the required legal standard has been met (original emphasis).

Correspondingly, criminal appeals do not seek to determine the guilt or innocence of appellants or correct the wrongs of criminal trials in the sense that popular discourses may suppose: under s. 108 of the Magistrates Courts Act (1980) appeals against conviction are allowed to the Crown Court for criminal convictions given in the Magistrates' Courts, so long as the potential appellant did not plead guilty. Under s. 79 of the Supreme Court Act (1981) such appeals are by way of a full rehearing to determine if the appellant/defendant was 'guilty' or 'not guilty' in line with criminal trials. In more serious cases, appeals to the Court of Appeal (Criminal Division) (CACD) do *not* attempt to determine innocence or guilt either, but, rather, s. 2 of the Criminal Appeal Act (1995) instructs that it (a) shall allow an appeal against conviction if it thinks that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case. There are also specific rules under s. 4 that regulate the CACD to 'receive any evidence which was not adduced in the proceedings from which the appeal lies', but only within certain criteria. Section 4, for instance, specifies that the CACD 'shall, in considering whether to receive any evidence, have regard in particular to (a) whether the evidence appears to the Court to be capable of belief; (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal; (c) whether the evidence would have been admissible at the trial on an issue which is the subject of the appeal; and, (d) whether there is a reasonable explanation for the failure to adduce the evidence at the trial'. In these highly technical processes, subject to common law and Parliamentary change, miscarriages of justice, as evidenced by successful appeals against criminal conviction, are routine, even mundane, occurrences, which, as will be shown in the next chapter, number over 4,500 cases per annum (see also Naughton, 2003). Importantly, however, these successful appeals are not evidence of factual innocence and may include both the guilty and the innocent who satisfy the required criteria of the appeal courts (see also Naughton, 2005c, 2006).

Public and political discourses

As indicated, and contrary to the foregoing outline of the process of criminal trials and appeals, public discourses on the criminal justice system are quite straightforward: the criminal justice system should attempt to convict the guilty and acquit the innocent. Indeed, from such a perspective, public discourses about miscarriages of justice, deriving from the media (for example, Gillan, 2001; Goodman, 1999; Foot, 2002; Woffinden, 1998, 1998a; Dodd, 2000; Rose, 2002),

routinely (mis)conceive successful appeals against criminal conviction as *prima facie* evidence that supports their belief that an innocent person has been the victim of a wrongful conviction. Moreover, public discourse works from the equally mistaken premise that the appeals system exists (or should exist) precisely because the criminal justice system is a fallible, human system that can and does make mistakes and that innocent people can, therefore, be wrongly convicted in criminal trials. The function of the appeals system from this perspective, then, is to correct the 'errors' of criminal trials by overturning the convictions of the innocent. On the contrary, however, the criminal appeals system exists and functions to ensure that appellants received a fair trial, as defined by the rules of the system, and that their convictions are, therefore, 'safe' on these terms. Under such a regime, proof of innocence does not guarantee that a criminal conviction will be quashed, unless, of course, it undermines the safety of the conviction too (discussed further below in reference to the case of John Roden who was recently reported to have been refused a referral to the CACD by the CCRC).

Public discourse is reinforced by political discourse that also states that the intention of criminal trials is the conviction of the guilty and the acquittal of the innocent. This was recently expressed, for example, by the Prime Minister (Tony Blair) in rolling out the removal of certain long-standing procedures regarded as safeguards against the wrongful conviction of the innocent under the Criminal Justice Act (2003) (CJA). The stated intention of the CJA (2003) is to 'rebalance' the criminal justice system so that more guilty offenders are convicted (Home Office, 2002: 15). To this end, the criminal justice system is undergoing its most radical overhaul for centuries (for a critical discussion see Kennedy, 2004). For instance, the CJA (2003) put an end to the 'double jeopardy' rule, which for almost 800 years has prevented people being tried for the same crime twice (for a discussion see James et al, 2000b; Broadbridge, 2002). The CJA (2003) also introduced 'hearsay' evidence into criminal trials, allowing as admissible oral evidence in criminal proceedings which is adduced as evidence of any fact or opinion asserted even though it is not given by the alleged witness live in court (for a discussion see, for example, Arkininstall, 2003). Despite evidence from other jurisdictions and claims that such moves erode civil liberties, undermine key procedural safeguards and, thus, result in miscarriages of justice, understood as meaning the wrongful conviction of the innocent (see, for example, Lilley, 2002; Tempest, 2002; Letwin, 2002), the Prime Minister utilised a popular discourse on miscarriages of

justice pertaining to guilty acquittals to push the changes through stating that: 'It is perhaps the biggest miscarriage of justice in today's system when the guilty walk away unpunished' (Blair, 2002). At the same time, however, the Prime Minister stressed that those concerned with the possible wrongful conviction of the innocent need not worry as at the heart of the changes 'there is an absolute determination to ensure that the innocent are acquitted in criminal trials' (Tony Blair cited Home Office, 2002: 11).

There are a number of immediate problems with the most senior politician's analysis of the criminal justice system and the possibility that guilty offenders acquitted by the courts would constitute a miscarriage of justice at all, let alone the greatest miscarriage of justice today. Leaving aside the fact that the Prime Minister is, himself, legally qualified, his assertions represent a complete misunderstanding of the nature of the criminal justice system. It is completely at odds with the reality of criminal justice in England and Wales. The prosecution already achieves the conviction of over 95 per cent of defendants at magistrates' courts (Griffiths, 2002) where in excess of 98 per cent of criminal trials are currently conducted (Bright & Nicklin, 2002). Moreover, over 87 per cent of defendants in the Crown Court where the remaining 2 per cent of cases are heard are also found guilty (Naughton, 2002). More significantly, perhaps, and as already discussed, any idea that criminal trials attempt to ensure the acquittal of the innocent or the conviction of the guilty is not reflective of the reality of the operations of criminal trials and/or appeals. It is, therefore, simply a 'determination' that 'absolutely' cannot be met under the present arrangements (see also Naughton, 2005b).

Miscarriages of justice from the perspective of the criminal justice system

A distinction between miscarriages of justice and the wrongful conviction of the innocent emerges, then, whereupon a miscarriage of justice is entirely *internal* to the workings of the criminal justice system, wholly dependent upon how 'justice' is defined: miscarriages of justice, as evidenced by successful appeals against criminal conviction, derive from technical decisions made from the existing rules and procedures of the appeal courts. They can appropriately be termed 'miscarriages of due process'. Alternatively, concerns about the wrongful conviction of the innocent are wholly *external* to the criminal justice system, which is *incompatible* with public/political discourses (Naughton, 2006). This is emphasised in the following quotation from Clive Walker (1993: 4

my italics) about the inherent legal nature of miscarriages of justice, which, at the same time, further emphasises the distinction between miscarriages of justice and public/political concerns about the wrongful conviction of the innocent:

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...Accordingly, *even a person who has in fact and with intent committed a crime could be said to have suffered a miscarriage [of justice] if convicted on evidence which is legally inadmissible or which is not proven beyond reasonable doubt.*

From a legal perspective, then, miscarriages of justice are neither about ensuring that the factually guilty are convicted, nor that the factually innocent are acquitted. This is not merely a theoretical or abstract academic argument. It is supported by the leading legal authorities on successful appeals against criminal conviction, which demonstrate, further, that the appeal courts do not consider the question of an appellant’s innocence or guilt. Instead, for convictions to be quashed they have to be adjudged to question the integrity of the trial in which they were given and, thus, be rendered ‘unsafe’ by appeal court judges. This is evident, for example, in the following extract from the appeal judgement that quashed the Bridgewater case:

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 (Hickey & Ors, R v [1997] EWCA Crim 2028).

The problem with such judgements from the perspective of public/political discourses on what the criminal justice *should* deliver is that they can fuel whispering campaigns that lump together victims of miscarriage of justice who are guilty with those who are innocent. They

conceive both as 'getting off on technicalities', as, indeed, they do, as criminal appeals are highly technical affairs governed by strict rules and procedures. This, in turn, can act to allow the issue of accountability for miscarriages of justice and/or the wrongful conviction of the innocent to be sidestepped. It, in effect, acts to subjugate the problem of the wrongful convictions of the innocent from the public/political gaze until such time that the real perpetrators of the crimes for which they were convicted are apprehended and convicted. It suggests that until such an unlikely scenario occurs, their innocence should remain in doubt.

A case that starts to unearth the wrongful conviction of the innocent and separates it from the general problem of technical miscarriages of justice, however, is the Cardiff Three. But, the Cardiff Three, convicted for the murder of Lynette White in 1988, did not overturn their convictions in 1992 because they were innocent. On the contrary, in line with all successful appeals they had to get the CACD to agree that a lack of integrity in the way that their convictions were obtained rendered them unsafe. This was achieved when Lord Taylor quashed the convictions asserting that whether Steven Miller's admission to the murder of Lynette White were true or not was 'irrelevant', as the oppressive nature of his questioning (he was asked the same question 300 times) required the interview to be rejected as evidence. It was a breach of due process, more specifically the rules of evidence under the Police and Criminal Evidence Act (1984) (PACE) (*R v Paris, Abdullahi & Miller* (1993) 97 Cr App R99). In keeping with the general uncertainty that results from successful appeals, doubts prevailed for the next decade about whether or not the Cardiff Three were involved in the murder until the case made British legal history and the real killer of Lynette White, Jeffrey Gafoor, who had been traced by the National DNA Database, was convicted for her murder in July 2003 (BBC News, 2003).

The case of the Cardiff Three, then, not only provides a milestone in British policing, it, also, confirms the wrongful conviction of the innocent, distinguishing it from the general problem of technical miscarriages of justice. At the same time, the case of the Cardiff Three highlights the difficulties that the innocent face in overturning criminal convictions and, then, in their attempts to prove their innocence: given the limits of the appeals system, not all innocent victims of wrongful conviction will be able to overturn their convictions and attain a miscarriage of justice; nor will all victims of miscarriages of justice be fortunate enough to have the real perpetrators of the crimes

for which they were convicted brought to justice and their innocence proven (see Naughton, 2006).

Despite the factual innocence of the Cardiff Three, however, the current structures of criminal trials and criminal appeals remain, meaning that a possible strategy exists whereby guilty offenders could maintain innocence to keep alive the possibility of overturning their convictions on appeal by showing an abuse of process. Abuse of process has been defined as ‘something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respect a regular proceeding’ (*Hui Chi-Ming v R* [1992] 1 A.C. 34). Although there is an inbuilt incentive to plead guilty to criminal offences to receive a sentence discount (s. 144 Criminal Justice Act, 2003), the disincentive of pleading guilty to criminal offences is that it guarantees conviction. Moreover, it virtually closes off the possibility of overturning the conviction on appeal.⁷ So, some guilty offenders will plead not guilty at trial, some of these will be convicted and sent to prison, and some of these will then maintain innocence in the hope of achieving their release through a successful appeal.⁸

A notable abuse of process case that was successful on appeal and which further clarifies the official position of the criminal justice system in England and Wales is the case of Nicholas Mullen. In his judgment on the merits of Mullen’s appeal, Lord Justice Schiemann spelt out the position of the criminal justice system and miscarriages of justice as follows:

The phrase ‘miscarriage of justice’ does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or the defendant were disregarded or denied (*R (Mullen) v Secretary of State for the Home Department* [2002] EWCA Civ 1882).

Leaving aside the fact that Lord Justice Schiemann, himself, apparently misconceives the criminal appeal process by feeding from and into public and political discourses with the suggestion that the wrongful acquittal of the guilty and wrongful conviction of the innocent *would* constitute a miscarriage of justice, although entirely satisfied that the appellant was factually guilty, the CACD quashed Mullen’s conviction because it had involved ‘a blatant and extremely serious failure to

adhere to the rule of law.' Mullen's conviction had been deemed unsafe after it was found ten years into his 30 year sentence that all involved in his deportation from Zimbabwe – the police, MI6, the Security Service and officials from the Foreign Office and the Home Office as well as the relevant authorities in Zimbabwe – had colluded to secure his extradition in breach of domestic law in Zimbabwe and internationally recognised human rights. The quashing of the conviction is seen as the CACD's way of denoting its condemnation of the behaviour of the prosecuting authorities in ever bringing the case of Mullen to trial (see Roberts, 2003: 441).

In quashing Mullen's conviction, Lord Justice Rose was clear about the legal system's (lack of) position on innocence or guilt and the possible advantage to offenders likely to be guilty who plead not guilty and maintain their innocence whilst preparing their appeals: '...for a conviction to be safe, it must be lawful; and if it results from a trial which should never have taken place, it can hardly be regarded as safe' (R v Mullen [1999] EWCA Crim 278).⁹

This analysis is further evidenced by the official legal definition of miscarriages of justice, found in s. 133(1) of the Criminal Justice Act 1988, enacted to give effect to the UK's obligations under Article 14(6) of the International Covenant on Civil and Political Rights (ICCPR), which states:

...when a person has been convicted of a criminal offence and when subsequently his (sic) conviction has been reversed or he (sic) has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice...unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.

To qualify for compensation, then, successful appellants need not prove their innocence and may even be guilty. Rather, they must be able to demonstrate that their convictions were rendered 'unsafe' by a newly discovered fact, providing the non-disclosure of the new fact was not wholly or partly attributable to the claimant. In this sense, s. 133 of the CJA (1988) does not define what is meant by a miscarriage of justice but, rather, states that compensation is only payable when a convicted person has been pardoned or a conviction quashed on an appeal out of time, or on a reference

to the CACD by the CCRC. As Stephanie Roberts (2003: 441–442) noted:

The rationale for this is that it has to be a decision which is no longer open to challenge under the normal judicial process so if a conviction has been quashed within the usual time limits the appellant will not be eligible for compensation. This gives effect to the Article's intentions that compensation should be paid where a new fact has emerged and where the normal working of the judicial system has not revealed the wrongful conviction.

An obvious critique of the existing official definition of a miscarriage of justice from the perspective put forward by this analysis is that it works to disqualify the thousands of victims who will be shown in the next chapter to annually achieve a successful appeal against a criminal conviction. This abdicates governmental responsibility for the harm caused by 'errors' of the criminal justice system. As will be shown in the next section, it, simultaneously, indicates a wide scale governmental failure to ensure the wellbeing of the population it is mandated responsibility for.¹⁰

Governmentality and the birth of due process

Historically, criminal justice was not subject to the elaborate system of rules and procedures that govern acts deemed criminal today. Ideas such as the 'presumption of innocence' and the 'burden of proof' on the prosecution to prove their case 'beyond all reasonable doubt' simply did not exist. On the contrary, under previous regimes of truth and power, 'justice' was an eminently subjective and arbitrary affair. This was a time when the pronouncements of the sovereign went unchallenged, whether they were correct or otherwise. There were no formal opportunities for appeal and, hence, no official acknowledgement that a miscarriage of justice had occurred.

Apart from being unsatisfactory against current criminal justice ideas and practices, the arbitrary exercise of power presented a considerable constraint to social change. Norbert Elias's (1978) analysis of what he termed 'the civilizing process' traced the delicate changes in manners within European societies as they progressed from feudal systems to modern nation states governed by the rule of law, showing how seemingly mild changes in etiquette reflected deep transformations of the power relations in society. In particular, Elias's sociology identified a dynamic relationship between the structures of society and the psy-

chology of the population that together comprise society: changes in the structures of society effect changes in how people think about what is and is not possible and, accordingly, how they act in social reality. As this relates specifically to this discussion of the birth of due process and fair trials as a governing principle in criminal justice matters, for modern capitalist societies to flourish they required populations that were not hindered by a perpetual anxiety about the arbitrary exercise of power. On the contrary, modern capitalist societies (are supposed to) provide structural conditions that allow people to go about their daily lives and commercial activities freely and openly without undue fear or impediment of arbitrary discrimination or persecution. Hence, the introduction of due processes in exercises of power in what might be termed rule of law societies to render governmental interventions into public life legitimate. This is not intended as an advocacy of capitalist societies *per se*. It is a descriptive sociological analysis of the transition of power relations in society. It is an attempt to highlight the very different problematic that links government and governed in a complex relationship of power in existing rule of law societies in which government has a key role to play in the management of the structures of society to enable us to live open and fear-free lives.

Foucault's (1979a, 1991) analysis of the emergence of the modern nation state dovetails with Elias's (1978) analysis in showing the links between new forms of governance and the consequent freeing-up of the citizenry to think and act in different ways. Indeed, from a Foucauldian inspired reading, it is not possible to study the technologies of power without an analysis of the political rationality underpinning them (Lemke, 2000). However, for Foucault (1979a), the modern 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, 1979a, 1991; Rabinow, 1984: 14; Gordon, 1991: 3) it includes and involves all. Foucault's history of government highlighted that 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 (sic) power. Their scope 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, 1984: 15). Political reflection was, 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: 15).

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 (or should be) used to enhance the wellbeing of the population:

...the population is the object that government must take into account in all its observations and 'savoir', in order to be able to govern in a rational and conscious manner. The formation of a 'savoir' of government is absolutely bound up with the knowledge of all the processes related to the population (Foucault, 1979a: 18).

In particular, Foucault's (1979a: 14–16, 1991) analysis showed 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 (1979a: 18, 1991). For Foucault, (1979a: 17, 1991) '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: 16).

From such a perspective, governmental rationalities in modern societies are intrinsically linked to developments in statistical forms of knowledge and to the powers of governmental expertise which attempt to improve the overall welfare of society and its members – the improvement of its conditions, the increase of its wealth, health, and so on (Foucault, 1991: 100). 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 & Miller, 1992: 174). Personal autonomy from this perspective '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 & Miller, 1992: 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 & Miller, 1992: 174). Of primary importance, from this model of societal power relations 'is not so much the State-domination of society, but the "governmentalization" of the State' (Rose & Miller, 1992: 175). This highlights a certain paradox of governmentality: 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 *oblige*s the government with regard to the organisation and wellbeing of society (Rose & Miller, 1992: 179).

Much akin to models of power in the sphere of corporate governance, then, government can be seen as an *ideal type* that can be conceived as the 'board', whilst population/governed can be seen as analogous with the 'shareholders' or 'stakeholders' in whose beneficial interests the board exists to exercise its decision making responsibilities with fairness, transparency and accountability. This is not to suggest that all governmental decisions and/or activities of the 'board' are benign. Nor is it to imply that all members of the population/governed are equal 'shareholders'. However, (as will be explained further below) unlike under sovereign exercises of power which were not open to challenge by the populous, the governmentality project is premised on the need for members from sections of the population/governed to struggle against apparent instances that they (we) believe detract from their (our) wellbeing; under governmentality, it is incumbent on the governed to inform government of changes needed to address social problems to enhance their interests. As this relates specifically to the issue of miscarriages of justice, then, alleged victims of miscarriages of justice are obliged to challenge the aspect of the existing criminal justice system that is said to be the cause of the miscarriage of justice. And, in line with the governmentality process, only if such claims achieve support in the form of a successful appeal against criminal conviction can government even consider making an intervention to change the offending aspect of the criminal justice system (outlined in detail in Chapter 4). In this sense, the main point to be made here is that the shift from sovereignty ushered rationalities of due process into the general realm of the governmentality of society and the specific realm of the governmentality of the criminal justice system, deviations from which call into question the legitimacy of governmental exercises of power. In short, governments cannot make changes to the criminal

justice system in response to miscarriages of justice without the authorisation that a member of the population/governed/public has suffered a miscarriage of justice as evidenced by a successful appeal against criminal conviction (outlined in detail in Chapter 5).

An oft cited defining moment in the appearance of due process as the guiding principle in the governmentality of the criminal justice system is the Magna Carta. A lot has been written about the motivations of King John when he signed the Magna Carta, the consensus view seeing it as an attempt to protect his own position (for a discussion see, for example, Holt, 1992: 188–236). Nevertheless, of most significance for this discussion is what the Magna Carta has come to mean and stand for since it was signed:

...despite the fact that the words 'due process' do not appear in any of the documents that have come to be known as the Magna Carta...King John's attaching his seal to those documents in 1215 was nonetheless an explicit commitment to the principle that no one, not even the king, was above the law, that the governed shall not be subjected to capricious rule (Forst, 2004: 11).

From the perspective put forward here, the Magna Carta, then, can be conceived as indicative of a shift in the power relations in society and a new relationship between government and governed. It represents a very early acknowledgement of a shift to a rule of law system and due process in criminal justice matters. As Holt (1992: 2) noted, it 'lays down that no free man (sic) is to be imprisoned, dispossessed, outlawed, exiled or damaged without lawful judgement of his (sic) peers or by the law of the land'. It established the foundations for our ideas about what justice ought to be about – judgement by our peers, the presumption of innocence until proven guilty and the burden of proof on the prosecution to prove guilt beyond a reasonable doubt.

Government in rule of law societies, then, need not be conceived as an intrinsically 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: 44) noted, '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: 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. 'Pastoral' government attains the 'intelligence' to enhance the well-being of those individuals and domains for which it has responsibility through new forms of rationality that also emerged alongside the replacement of 'sovereignty' by 'governmentality' that are intrinsically connected to the production and deployment of statistical forms of knowledge, calculation, categorisation and expertise (see, for example, Foucault, 1991: 96; Hunt & Wickham, 1994: 27). Statistics on successful appeals against criminal conviction, for instance, (should) inform government about the scale of the miscarriage of justice problem, indicating the likely number of people that are harmed by 'justice in error'.

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'. The notion of bio-power as a political rationality is essential to Foucault's thoughts on governmentality and was crucial to his analysis of power within modern societies. For Foucault, a society's 'threshold of modernity' has been crossed when power, a particular kind of power – 'bio-power' – is primarily a matter of the 'administration of life' and 'life-processes' (Foucault, 1979b: 143). He asserted:

...'bio-power' brought life and its mechanisms into the realm of explicit calculations and made knowledge-power an agent of the transformation of human life...Modern man (sic) is an animal whose politics places his existence as a living being in question (Foucault cited in Rabinow, 1984: 17).

It is bio-power that makes the management or governmentality of post-sovereign rule of law societies possible: in order to manage or govern a population/the governed, administrative knowledge of 'life' and of 'life-processes' is a necessary prerequisite. 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: 17). Moreover, for Foucault, bio-power/population management is achieved, not through the exercise or threat of physical or economic power, but rather, through 'disciplinary techniques'. *Discipline* referred to the

instruments and *techniques* utilised in the operations of 'disciplinary power' that can be taken over and used by *any* social institution: prisons, certainly, but also schools, hospitals, the military, factories, and so on. Discipline requires surveillance knowledge, by which those to be 'known' and acted upon are made 'visible' and knowable (Foucault, 1977). 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: 114) that are utilised to visualise and statistically represent populations and societal domains. The purpose of such knowledge, often seen in entirely negative terms, is, also, to inform government as to the norms proper to the particular domain, rather than to provide the direct rationale for government itself (Osborne, 1996: 101). To repeat, this is not to infer that all exercises of governmental power are equally benign for all members of society. Nor is it to suggest that governmental exercises of power are not open to abuse. Rather, it is to present a new relationship between government and governed, situating legitimate exercises of governmental power in a relational role with the population/governed whose welfare it is mandated to enhance. Moreover, as we shall see, discipline is a two-way-street in a society in which power is relational between government and governed. However, the governed must participate in the governmentality process by bringing to light and contesting occurrences such as miscarriages of justice to activate government to address aspects of the existing arrangements that they can prove are detracting from the general wellbeing of all.

Governing government

At root, then, governmentality can be conceived as a *process* by which rule of law societies are managed, operating with the professed interests or rationale of enhancing the wellbeing of the population. This introduces questions pertaining to existing exercises of power that were not possible under previous systems, bringing into focus the 'other' side of power relations, the part played by the population, the governed, which determines, ultimately, whether governmental exercises of power are legitimate or otherwise. This suggests, further, that not only are the governed not passive under governmentality, they are, actually, in the driving seat of power relations, in response to whose needs government must, under certain conditions, respond with suitable improvements to the way things are.

As already indicated, unlike sovereign exercises of power, legitimate governmental exercises of power are not arbitrary. Governmental modes of power cannot simply impose changes to societal systems. On the contrary, they must themselves follow a certain form of governmental 'due process'-governmentality – within which any proposed changes must not only be acceptable to the governed, they have to come from the governed itself. In societies where exercises of power are relational between government and governed, it is incumbent upon the governed to play their active part in informing government of aspects of social life detrimental to public wellbeing. Through such engagement, which may be termed 'governing government', government knows (has forms of discourse) about societal problems in need of intervention. Only through such engagement is government legitimately *allowed* to intervene. Sticking with the example of the establishment of the CCRC in response to perceived miscarriages of justice, governmental changes to the way in which post-appeal allegations of miscarriages of justice were referred back to the CACD could not be introduced without the efforts of victim support groups and campaigning organisations that kept faith with the Guildford Four and the Birmingham Six despite them exhausting the existing legal remedies. These real cases provided the tangible *evidence* that members of the population were actually being harmed by the existing post-appeal arrangements and that governmental intervention was legitimately required. This puts a certain onus on the governed to participate in the production of counter-discourses on aspects of social life that are detrimental to our wellbeing, backed up by concrete evidence, in attempts to prompt governmental intervention and corrective change. It suggests that governmentality follows its own due processes and evidential standards (in the shape of real cases) for achieving changes to the criminal justice system in response to apparent miscarriages of justice.

This analysis is supported by Foucault's (1980: 80–81) theoretical observation of what he termed an 'insurrection' of 'subjugated knowledges' or forms of 'anti-discourse' in recent times 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 and resulted in governmental intervention. 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: 82). On the other hand, however, Foucault (1980: 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: 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: 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: 83). As Foucault (1980b: 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 harmful effects of the forms of power that predominate in societies like ours.

Evidence abounds in contemporary society of apparent 'failures' by government to curtail what are often termed the 'crimes of the powerful' at the expense of punitive measures in response to the crimes of the 'powerless' (for a recent critique in the context of state and corporate crime see, for instance, Tombs & Whyte, 2003). To be sure, we are surrounded with evidence of forms of bias, discrimination and inequality in the delivery of 'justice', for instance, which may lead some to the (mistaken) conclusion that exercises of power remain fundamentally sovereign in form. However, the crucial sociological point from Marx is that social systems do not emerge fully formed out of the ashes of the social system that they come to replace. On the contrary, from the perspective developed here, it is perhaps more fruitful to conceive the governmentality project as still under construction; as an on-going process that works to shake off sovereign mores and hangovers in response to forms of critique that unearth currently subjugated discourses with the forcefulness to disturb and dislodge the existing ways of managing forms of apparent social injustice. As this relates specifically to the governmentality of the criminal justice system, guiding principles such as

the 'presumption of innocence' and 'burden of proof' on the prosecution (as representative of Government) to prove their case 'beyond a reasonable doubt' can, therefore, be viewed as ideals to be strived for. They provide the foundational concepts from which critiques of the way things are can be made. To be sure, without foundational ideals of fairness and due process, counter-discourses about injustice would not be possible, there would be nothing to ground their critiques in. It is only because the criminal justice system is supposed to be (and purports to be) fair and just that proven instances of unfairness, injustice and/or non-compliance with the rules and procedures of due process, such as successful appeals as evidence of miscarriages of justice, have counter-discursive strength against the way things are, the truths we live by.

In this sense, the governmentality project can, itself, be viewed as a (due) process of reform from sovereign forms of rule, which cannot itself be reformed until it has been entirely rid of all remnants of sovereignty. On this journey, however, it is vital that the representatives of the governed in the jigsaw of the miscarriage of justice problem – high profile individual victims, campaigning groups and organisations, critical academics, human rights activists, and so on – seek out cases in support of apparent shortcomings in the existing criminal justice system arrangements to give force (power) to their voices for change. From this perspective, governmentality is as much as about how effective the surveillance techniques and tactics of the governed are at prompting governmental intervention to problematic areas of social life in need of correction, as they are about forms of government surveillance that attempt to visualise the needs of the governed.

Conclusion

This chapter has sought to provide the theoretical foundation from which the analyses in the remainder of the book will be grounded. Despite a popular desire that the criminal justice system should convict the guilty and acquit the innocent, the system relies on prevailing standards of due process to determine the guilt or not guilt of criminal defendants. At root this involves an attempt to ensure that suspects and defendants of crime receive trials deemed to be fair on the system's terms. Quashed convictions are achieved by showing that trials were unfair and, thus, unsafe and illegitimate. This stems from the complex relationship between government and governed in post-sovereign rule of law societies striving towards governmental rationalities, which

determine how legitimate exercises of power must be implemented. At the same time, the onus on the governed as part of governing government is to seek out instances which show 'failures' to comply with the underlying structural requirement that legitimate expressions of power follow the principles of fairness and the enhancement of public wellbeing. Indeed, Foucault's (1980b) genealogical approach has an important relevance to this analysis of governmental interventions into the criminal justice system in response to the specific problem of perceived miscarriages of justice. 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 that accompany routine and/or mundane miscarriages of justice. 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 scale and harmful consequences of the problem.

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.

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