The issue of miscarriages of justice has been at the heart of much recent discussion - legal, political and social - concerning the criminal justice process in England and Wales. Such has been the depth of the crisis of confidence that it has prompted attempts to re-establish legitimacy, including by such tried and tested methods as changes of personnel, and the appointment of a wide-ranging Royal Commission on Criminal Justice (the Runciman Commission) which followed the more focused May Inquiry. This book concentrates on how the criminal justice system creates and responds to miscarriages of justice. But before embarking on a detailed survey, this chapter will outline what is meant by 'miscarriages of justice' and will catalogue the recurrent causative factors as well as some prominent cases in which they have impacted.

The Nature of Miscarriages of Justice

Definitions and Categorisation

A 'miscarriage' means literally a failure to reach an intended destination or goal. A miscarriage of justice is therefore, *mutatis mutandis*, a failure to attain the desired end result of 'justice'. The meanings of justice and the ways in which it may be denied need to be dissected further, since the desired ends will inherently affect what counts as a miscarriage.

Justice is about distributions – according persons their fair shares and treatment. As far as the impact of the criminal justice system is concerned, one could argue that fair treatment in the dispensation of criminal justice in a liberal, democratic society means that the State should treat individuals with equal respect for their

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1 Lord Lane, LCJ, who was associated with the rejection of the *Birmingham Six* appeals (see: *R v Callaghan and others* (1988) 88 Cr App R 40) was succeeded by Lord Taylor in 1992.
2 The Commission was established in 1991 and reported in 1993 (Cm 2263).
rights and for the rights of others. Conversely, theories of justice which elevate in priority general, collective interest (such as utility) or which define rights in terms of class, rather than individual, interests (Marxism-Leninism) must be discarded, though this does not entail the rejection of rights to basic welfare provision for individuals. It does not follow that individual, liberal rights must always be treated as absolute, for it is rationally coherent to accept limitations for the sake of preserving the rights of others or competing rights. More controversially, it has been argued that an exercise of a right might be disallowed if its social costs (such as the downfall of a liberal society by inciting disaffection in wartime) are greater than the cost paid to grant the original right. Hopefully, a sceptical attitude will be taken to claims of catastrophic damage through the observance of rights in a stable, well-established polity such as the United Kingdom. However, one can readily find evidence that episodes of national xenophobia and hysteria affect the courts as much as other branches of the State, and one often looks in vain for an echo of the sentiments expressed two centuries earlier by Lord Mansfield in R v Wilkes that:

We must not regard political consequences; however formidable soever they may be; if rebellion was the certain consequence, we are bound to say 'fiat justitia, ruat caelum'.

As for rights potentially affected by the operation of the criminal justice system, several are at risk, including humane treatment, liberty, privacy and family life. The potential costs to the individual will be substantial if subjected to the criminal justice system. Nevertheless, criminal and anti-social activities also have a real adverse effect on the enjoyment of rights by others. Hence, it is justifiable and necessary for the criminal justice process to take steps against the

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10 R v Secretary of State for the Home Department, ex parte Cheblik [1991] 2 All ER 319.
11 (1770) 98 ER 327 at p. 347 ('Though the heavens fall, let justice be done'). This is an 'irresponsible' maxim to those with priorities of finality and stability: Nobles, R. and Schiff, D., 'The never ending story' (1997) 60 *Modern Law Review* 293 at p. 300.
12 These rights are delineated infra by reference to the European Convention on Human Rights.

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16 See Chapter 4.

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a person who has committed the elements of a crime. Some observers attempt to distinguish between those who are really ‘innocent’ and the wrongfully convicted — those who are acquitted ‘on a technicality’ — say, because of a misleading direction in law by a judge to a jury.\textsuperscript{19} However, the emphasis here is on the breach of rights, and rights to due process have central importance in assuring righteious treatment. 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 by processes which did not respect basic rights,\textsuperscript{20} though the misdirection of a jury may have more or less impact on rights in the fullness of any case. A much narrower variant of this view is put forward by the May Report, which, though not requiring ‘innocence’, does demand that ‘something criminal justice process which may have affected the result of the trial, even though one cannot be sure that it has done so’.\textsuperscript{21} Nevertheless, breaches of rights not falling under the May Report formula may still fall within an indirect meaning of miscarriages of justice discussed later.

Another conceivable category of persons suffering a miscarriage of justice because of a denial of their rights concerns those who fall foul of laws which are inherently unjust rather than unjustly applied. In a responsive, liberal democracy, such failures of the system should be few and far between. However, claims along these lines have been made in recent years by: persons convicted of failure to pay the poll tax or taxes to finance nuclear weapons;\textsuperscript{22} women provoked (in fact but not so defined in law until the Court of Appeal changed its mind in 1995 on the referral back of Sarah Thornton’s case) into retaliation by the violence of male relatives;\textsuperscript{23} those involved in prosecutions for homosexual activities by persons aged 16–21;\textsuperscript{24} or soldiers in Northern Ireland (or indeed ‘joyriders’) whose fate is determined by the application of the law of murder in situations of excessive force.\textsuperscript{25}

This book will mainly reflect upon dysfunctions in the application of laws, but some space is afforded to laws which some people view as inherently unfair, thereby misusing the powers in the Police and Criminal Evidence Act 1984. s. 118 do not require proof of a connection between the interference and the acquittal (and see also Runciman Report, ch. 10 para. 72).

In this way, mistakes of law do not have meaning just for lawyers, since any citizen could surely understand that persons should be convicted on the basis of the law as it is and not as some foolish judge says it is. Compare Sir John May, Report of the inquiry into the circumstances surrounding the convictions arising out of the bomb attacks in Guildford and Woolwich in 1974, Final Report (1993–94 HC 449) ch. 13 (concerning admissions by Gerard Conlon of IRA involvement); Nobles, R. and Schiff, D., ‘Miscarriages of justice: a systems approach’ (1996) 59 Modern Law Review 299 at p. 302.

\textsuperscript{19} There may be arguments for a retrial where the acquittal is through error of law or the misconduct of the defendant or defence counsel: DiBiagio, TM., ‘Judicial equity: an argument for post-acquittal retrial when the judicial process is fundamentally defective’ (1996) 46 Catholic University Law Review 77. By contrast, retrials following acquittals tainted by criminal interferences by the defendant under the Criminal Procedure and Investigations Act 1996 ss. 54–7 do not require proof of a connection between the interference and the acquittal (and see also Runciman Report, ch. 10 para. 72).

\textsuperscript{20} In this way, mistakes of law do not have meaning just for lawyers, since any citizen could surely understand that persons should be convicted on the basis of the law as it is and not as some foolish judge says it is. Compare Sir John May, Report of the inquiry into the circumstances surrounding the convictions arising out of the bomb attacks in Guildford and Woolwich in 1974, Final Report (1993–94 HC 449) ch. 13 (concerning admissions by Gerard Conlon of IRA involvement); Nobles, R. and Schiff, D., ‘Miscarriages of justice: a systems approach’ (1996) 59 Modern Law Review 299 at p. 302.


\textsuperscript{24} See Sutherland v UK, Appl. no. 25186/94.


\textsuperscript{26} Consider some of the powers in the Police and Criminal Evidence Act 1984, s. 25.


\textsuperscript{30} Failures in this regard may arise from ethnic composition (see: R v Ford [1989] 3 WLR 762, and Commission for Racial Equality, Submission to the Royal Commission (1991)), the abolition of the defence’s rights to peremptory challenge (Criminal Justice Act 1988, s. 118) and the rules about jury vetting (Practice Direction [1988] 3 All ER 1086).

\textsuperscript{31} Consider some of the powers in the Police and Criminal Evidence Act 1984, s. 25.

\textsuperscript{32} In regard to excessive charges, consider the consortium sado-masochists in R v Brown [1994] 1 AC 212; R v Wilson [1996] 3 WLR 125; but see also Laskey, Jogger and Brown v UK, Appl. no. 21627/93, 21826/93, 21974/93, 1997–1, The Times 20 February 1997; as regards sentences, consider the penalties for breach of Anti-Social Behaviour Orders in the Crime and Disorder Act 1998.

denials of rights and thereby miscarriages. That system was often rational and predictable according to its own lights, but to label it ‘just’ because it observed regular and solemn procedures would be blinkered.\textsuperscript{27} Laws such as these often deepen the injustice by the conferment of wide and low-visibility discretion, which undermines public accountability or redress.\textsuperscript{28}

The third category of miscarriage of justice occurs where there is no factual justification for the treatment or punishment. A conviction — perhaps because of mistaken identity — of a person who is in fact innocent would obviously fall into this category of breach of rights (ultimately of humanity and liberty) and indeed might be defined as a ‘core case’.\textsuperscript{29} Persons enjoy a ‘profound right not to be convicted of crimes of which they are innocent’.\textsuperscript{30} Perhaps the only qualification which may be entered at this point is that one must allow the system some time to correct itself, whether through acquittal or the payment of damages, and so the notion of ‘miscarriage’ involves a completion of a process (in failure) and not simply a mistake. Furthermore, there must be some kind of State responsibility for the conviction, but this should be defined in wide terms. For instance, the jury might be viewed as a State agency even though it normally produces verdicts which are largely independent. Nonetheless, the jury is part of the State’s criminal process, and the State retains a responsibility to ensure various safeguards against inaccurate decision-making, including the avoidance of bias,\textsuperscript{31} the provision of adequate facilities for lay decision-making and a willingness to reconsider perverse convictions. Similarly, a conviction brought about by a defendant who falsely confesses or by a mendacious informer or unreliable eyewitness can also be counted as a potential miscarriage of justice, since the State has chosen to rely upon facts which have not been subjected to adequate processes of scrutiny or review.

Illustrations of miscarriages of justice resulting from disproportionate treatment in terms of rights might include the granting of arrest or extensive search powers in respect of trivial anti-social conduct\textsuperscript{20} or excessively harsh charges or sentences.\textsuperscript{33} Similarly, the imposition of conditions during punishment which serve little purpose other than degradation and therefore do not ultimately bolster respect for rights should be treated as a miscarriage of justice. It should be noted that sentencing and penal regimes are not covered in the remainder of this book, which concentrates mainly upon the first, process-related type of miscarriage. This focus is adopted since it is at the heart of the controversial cases, reviews and reforms over the past decade, even though it is arguable that these other forms of miscarriage are more endemic.
The fifth type of miscarriage of justice, a failure to protect and vindicate the rights of potential or actual victims, can arise in various ways. For example, a lack of police officers to guard against violent attackers could be a breach of rights, though recent neo-Liberalism has sought to resurrect a heavier burden of responsibility for security. A refusal to prosecute particular types of suspects, whether through intimidation, bias or political manipulation or corruption, may also be viewed as a miscarriage. Such a situation arose in 1988, when the Attorney-General blocked proceedings against RUC officers accused by the Stalker/Sampson inquiry of perverting the course of justice and obstruction of the police investigation. There was also a failure to prosecute persons involved in the racist murder of Stephen Lawrence in 1993. These decisions may have been fair to the accused, but they did result in a failure to protect the rights of others because of State mismanagement of the process. A failure to vindicate rights may equally occur when a jury perversely refuses to convict an individual, through intimidation or bias. Disregard for the rights of Rodney King, a black suspect beaten severely by four white policemen, sparked riots in Los Angeles in May 1992 when they were acquitted, and criticisms in some quarters were also expressed in response to the acquittals of Ponting in 1985 and Randle and Pottle in 1991, though it could be argued that in these cases one ‘miscarriage’ prevented another – that of disproportionate treatment. Another controversial acquittal of the ‘obviously guilty’ was that of O.J Simpson in Los Angeles in 1995, probably heavily motivated by a wish on the part of the jury to discipline the police or at least to demonstrate that the police lacked credibility and thereby to uphold the integrity of the process. As well as substantive outcomes, victims may also be treated unjustly by the process, a point which is often raised in relation to rape survivors especially those who have to face the cross-examination of their alleged assailants or are required to produce corroborative evidence.

A sixth type of miscarriage of justice is the existence and application of laws which are inherently unfair to victims. To continue the theme raised in the last category, the treatment of the sexual history of rape survivors has been a problem, though the difficulty of balancing fairness to the accused is acute at this point. A less controversial example may be the (now repealed) legal rule with the law of murder that the victim must have died within a year and a day. These six categories, which revolve around themes of breach of rights of suspects/defendants, the disproportionate treatment of suspects/defendants or the non-vindication of the rights of victims, might be termed direct miscarriages. In addition, it may be possible to derive from their infliction a seventh, indirect miscarriage, which affects the community as a whole. A conviction arising from deceit or illegalities is corrosive of the State’s claims to legitimacy on the basis of its criminal justice system’s values such as respect for individual rights. In this way, as well as the undesirable fate of the individual, the ‘moral integrity of the criminal process’ suffers harm. Moreover, there may be practical detriment 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’. It is arguable that this indirect form of miscarriage can exist independently as well as contingently in two respects. One is that a breach of ‘the principle of judicial legitimacy’ should be of concern even if there is an accurate and fair determination of guilt or innocence. Secondly, it still produces a great moral harm even if, so far as the individual is concerned, there is a mistake but no real harm is inflicted (say, when a person imprisoned for life is wrongfully convicted soon afterwards of a minor motoring offence). It is therefore argued that the State itself should avoid actions or processes which might damage the integrity of the system. Consistent with this concern, lawyers, whether acting for prosecution or defence, are reminded that they are not the ciphers of their clients but owe duties of integrity to the system.

In summary, there are four points to infer from the definitions of ‘miscarriages’ adopted in this chapter. First, the meaning is not confined to miscarriages in court or in the penal system. Miscarriages can arise on the street when the police unjustly exercise their coercive powers, as may be increasingly the case if the rationale of criminal justice is switched from conviction to surveillance. Second, miscarriages can be institutionalised within laws as well as ensue from failures in the application of laws. Thirdly, a miscarriage of justice must involve a shortcoming for which there is a degree of State responsibility. In these days of private security

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**Notes:**

54 See: X v UK and Ireland, Appi. no. 9825/82, (1986) 8 EHRR 49.
58 See Report by the Police Complaints Authority on the investigation of a complaint against the Metropolitan Police Service by Mr J. and Mrs D Lawrence (Cm 3822, HMSO, London, 1997).
60 Such is alleged to be an ever-present danger in Northern Ireland: Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland (Cmd 5185) (1972).
67 The Home Secretary, Michael Howard, was critical of the corroboration rule in 1993: 'The other day a woman judge said she almost choked every time she gave the warning. It is offensive. It cannot be justified. It must go.' (The Daily Telegraph, 7 October 1993 p. 12.) See also Lesh, S., Ruling Passions (Open University Press, Buckingham, 1997).
69 Law Reform (Year and a Day Rule) Act 1996.
72 See for example Crown Prosecution Service, Statement of Purpose and Values (1997): 'We are committed to providing a high quality prosecution service, working in the interests of justice... We will act with integrity and objectivity....
services and prisons and other forms of ‘hollowing out’ of government, it is not essential that an official agency was involved in the proximate cause of the miscarriage so long as the function leading to the miscarriage was of a public nature and sanctioned by the State.54 But deceit, neglect or violence by private persons or bodies may inflict gross hardship and unfairness yet are not necessarily attributable to any deficiency in the criminal justice system. We do not normally assign the phrase ‘miscarriage of justice’ to a breach of contract or a trespass – unless a public agency was to blame or the State failed to offer any system for resolution or redress. The fourth point is to reiterate what was asserted at the outset: justice and failures of justice should primarily be defined with respect to rights. This last claim will now be explored further, but, if substantiated, will imply a strong duty on the part of the State to be vigilant about miscarriages and to be willing to rectify them, even if at some cost to aggregate happiness and traditions of utilitarian calculus.

Critique of an Individualistic Rights-based Approach to Miscarriages of Justice

Reliance upon theories of individual rights in an analysis of the criminal justice system is in some senses unremarkable. The discourse of rights is increasingly essential that an official agency was involved in the proximate cause of the miscarriage of justice: law and ethics in order to convince the impartial decision-maker at a trial. The rivalry of arguments in the curial marketplace is designed to expose the true facts and laws relevant to the case and is thought to avoid any form of complacency or bias by official inquisitors, including even judicial figures such as investigating magistrates. The central role of the defendant within the process necessarily entails a recognition of that person’s individual autonomy and interests. At the same time, the two sides are hardly equal in terms of powers and resources, so the imbalance is corrected by procedural and evidential rules, including the burden of proof, disclosure by the prosecution and legal assistance from public officials.60

The due process model fits well with the first and third of the definitions of miscarriage of justice outlined earlier. Treatment in breach of, or disproportionately to, rights, whether because of factual errors or because of a failure to secure rightful treatment (such as legal representation) is a core concern of the due process model which seeks to stamp out oppression on the part of the State and to provide an ‘obstacle course’ for any conviction.61 By contrast, inaccurate decision-making by the tribunal of fact is less readily treated as a miscarriage under the definitions and under the due process model, though the State may have responsibility through its prior actions for prompting the verdict and certainly has a responsibility after assuming it is a safe and legitimate conviction and subject to normative constraints as to treatment.

The ethical priority given to the interests of the individual also correlates with the taxonomy for criminal justice derived from Packer’s ‘normative antinomy’ between the due process model and the crime control model.62 The primacy of individual autonomy and rights is central to the due process model, which recognises that the possibility of human fallibility and error can thereby yield grave injustice, as when the system convicts the innocent or even convicts without respecting procedural rights. So, the emphasis must be on the quality of justice and on the deterrence of abuses of official power rather than the grant of wide, deterrent powers to catch criminals. Consistent with this due process model are a number of features, including, in England and Wales (as well as many other common law jurisdictions, including Northern Ireland, the Republic of Ireland and the USA), an adversarial approach to the determination of issues within the criminal justice system.62 In other words, the process is organised around the concept of two opposing sides, each freely and openly presenting in words their own contested case (hi)stories in order to convince the impartial decision-maker at a trial. The rivalry of arguments in the curial marketplace is designed to expose the true facts and laws relevant to the case and is thought to avoid any form of complacency or bias by official inquisitors, including even judicial figures such as investigating magistrates. The central role of the defendant within the process necessarily entails a recognition of that person’s individual autonomy and interests. At the same time, the two sides are hardly equal in terms of powers and resources, so the imbalance is corrected by procedural and evidential rules, including the burden of proof, disclosure by the prosecution and legal assistance from public officials.

61 But contrast the positions in Scotland and France: Chapters 16, 17.
65 These supportive features have been categorised as ‘result-eficacious’ (those that contribute to accurate convictions or acquittals) and ‘dignitary’ (those that ensure ethical treatment even if impeding the determination of facts): Areella, P. ‘Rethinking the functions of criminal procedure’ (1983) 72 Georgetown Law Journal 185.
it is reached for reviewing it in the light of respect for rights, whether of a defendant or a victim. The other definitions relate less to process and more to substantive ends or relate more to victims than to suspects; these concerns are outside the core of the due process model and can more readily be explained by the human rights focus which is ultimately adopted in this chapter. In addition, an emphasis upon the protection of rights rather than due process per se may avoid a degeneration into legal formalism whereby established processes rather than ultimate values become venerated.

The competing crime control model stresses the effective and efficient control and punishment of crime so as to minimise violations of the rights of victims and to maximise the deterrent impact of the criminal justice system. It follows that a great deal of trust has to be placed in the accurate screening of guilty from innocent by the police and other pre-trial gatekeepers of the system; this point is highlighted by Ericson who argues that surveillance and record-keeping are now the primary functions of criminal justice and may even be independent of crime control which still envisages a court decision on guilt. The treatment of the accused is not necessarily paramount unlike under the due process model.

Of course, neither due process nor crime control model exhausts the possible stances of a criminal justice system nor indeed fully explains its workings or purposes. Other archetypes (or 'polarities') include the rehabilitative model (often of importance for young offenders) and the bureaucratic model (reminiscent perhaps of the New Public Management of the 1980s as applied especially to the police). The interests of victims do not fit easily with either model. Centrality for the interests of victims under a restorative justice model might well conflict with basic due process features such as the presumption of innocence and open confrontation. Equally crime control focuses on the more collective (though not necessarily communitarian) interests of deterrence and security; individual determinations may not accurately reflect the injury suffered. Nor can it be claimed convincingly that one model is, or should be, wholly dominant within a given system, and one can immediately see from the examples given that the models depend on value judgments about rights as against other considerations which may come into play according to the level of the court, consequences of the decision and type of offender. There is next the concern that models, especially the due process version, are little more than propaganda designed to engender legitimacy for inherently oppressive societies and their coercive agencies. In a system which in fact processes most suspects without troubling the courts, and, even less often, juries, the crime control model in fact predominates and may even be the underlying purpose of the system as a whole. Further, it would be a delusion, especially in a book about miscarriages of justice, to pretend that, even where relevant, the due process model is perfectly observed. At the same time, it is maintained that the due process ideology is in fact taken seriously throughout much of the system and is arguably the dominant ethic of the more serious end of the criminal justice process - the Crown Court and appeals and post-appeals systems which have produced the caseload to be described next. In addition, these stages of criminal justice involve the most dramatic impacts in terms of rights, and so that agenda is again to the fore. Due process as a relevant value was not extinguished by the miscarriages of justice of the last two decades, but it is true that more mixed stances both in terms of the values of the criminal justice system and therefore of the meanings of miscarriages were re-established by the close of the Runciman Commission in 1993 and were certainly reflected in the legislative programme which followed it, as will be described later.

To conclude, the due process model does not underpin much of the daily operation of the criminal justice system, especially those parts of the system which involve routinised and unsupervised encounters between police and citizen. Yet, it should certainly be to the fore when those encounters become more formalised and more is at stake in terms of rights, such as by detention in a police station or when the suspect becomes formally charged, especially if liberty is at stake.

Though one can tally the due process/crime control debate with the rights-based conception of miscarriages of justice put forward in this chapter, there may be...
other conceptions of miscarriages of justice which are more difficult to subsume. One such alternative approach is taken by Nobles and Schiff. They argue that the controversies in cases like the Birmingham Six were essentially 'evidential': "that there was either insufficient evidence to accept their guilt or (in the minds of some) that there was good reason to believe them innocent.". So, miscarriages of justice are about 'evidence and proof' rather than the recognition or denial of rights, as suggested in this chapter. If this alternative conception can be called a definition at all, then it must be one of the shallowest definitions imaginable. It is shallow in that it wholly ignores two important aspects of miscarriages of justice firmly within the definitions set out earlier - namely, miscarriages which arise through the operation of laws which are inherently unjust, and miscarriages through the failure to vindicate the rights of victims. Their definition is equally inadequate even in regard to the first and fourth categories of miscarriages, namely those where individuals are treated without any or proportionate regard to their rights. Putting the boot on the other foot, we should now ask, 'what evidence' and 'what proof'? For example, would one want to embrace as 'evidence' confessions obtained as a result of torture? What about forensic evidence from an incompetent scientist or by means of unreliable techniques? Should we define silence as 'evidence', and if so how much does it count for? There seems to be a fundamental flaw here; it is implied that matters of 'evidence and proof' are self-evident and self-contained and are more fundamental than matters of 'rights'. However, it is central to the definition in this chapter that evidence and proof should reflect rights rather than the reverse. As recognised by others, only on the basis of deeper values within the criminal justice system can cogent answers be given to the questions 'what evidence' and 'what proof'. Otherwise, the door is opened to Home Secretaries who wish to dress up repressive legislation as merely technical adjustments.

A later, more sophisticated attempt by Nobles and Schiff to explain miscarriages of justice draws heavily upon theories of autopoiesis and so elucidates the definition in this chapter that evidence and proof should reflect rights rather than the recognition or denial of rights, as fairly. But these will not suffice; as the Birmingham Six case well illustrates, no matter how final the Lord Chief Justice's pronouncements were in dismissing the appeals, the case kept coming back whenever there was new evidence that they had not been accorded their rights. Such uncertainty and scepticism is only 'threatening' to the system if one's ultimate values emphasise finality but not respect for rights. More interestingly, it is suggested that the problem for the legal system is that the conception of justice is based increasingly on scientific truth rather than fairness or rights. However, the problem with this assertion is that not just some abstruse systems incompatibility but the failure to appreciate the limits in the value of scientific 'truth' as a form of factual and especially legal proof, a point taken up in Chapter 6. In this way, the assumed 'unresolved conflict between due process and truth' should be resolved in favour of individual rights, having regard both to the commitment of the system to their value (which is certainly more than a 'technicality') and also having regard to the constructed nature of both 'truth' as well as 'guilt' which can only be settled within a hierarchy of values (though that is not to say that those values are unique to one system).

In contrast to auto poiesis, more radical critiques of Liberalism, based in critical legal studies or postmodernism, accept that legal actions are far from closed either in influence or impact. But the 'ethics of alterity' in the context of miscarriages of justice suggests a rigid binary divide between lawful/unlawful which does not tally with how unfair convictions are in fact viewed, whether by lawyers or others. More fundamentally, the ultimate values shaping the criminal justice process, individual rights, cannot easily be confined within a second-order autopoietic system such as law, since rights draw their normative meaning from other 'systems' which interact and coalesce. Therefore, the authors seek refuge in much narrower values, such as finality (of verdicts) and workability (of rules of evidence and process), as the basis for the maintenance of the authority of criminal justice. But these will not suffice; as the Birmingham Six case well illustrates, no matter how final the Lord Chief Justice's pronouncements were in dismissing the appeals, the case kept coming back whenever there was new evidence that they had not been accorded their rights. Such uncertainty and scepticism is only 'threatening' to the system if one's ultimate values emphasise finality but not respect for rights. More interestingly, it is suggested that the problem for the legal system is that the conception of justice is based increasingly on scientific truth rather than fairness or rights. However, the problem with this assertion is that not just some abstruse systems incompatibility but the failure to appreciate the limits in the value of scientific 'truth' as a form of factual and especially legal proof, a point taken up in Chapter 6. In this way, the assumed 'unresolved conflict between due process and truth' should be resolved in favour of individual rights, having regard both to the commitment of the system to their value (which is certainly more than a 'technicality') and also having regard to the constructed nature of both 'truth' as well as 'guilt' which can only be settled within a hierarchy of values (though that is not to say that those values are unique to one system).

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Miscarriages seem to impose constraints against silencing and disrespect which are not so far distant from notions of due process. Of course, Liberalism ultimately demands attention for a universal standard, which, translated into law, can become a form of political repression of opposed viewpoints.102 Douzinas and Warrington cite the case of X v Morgan-Grampian103 as an illustration of the denunciatory power of law in the face of competing values. However, whilst the judgment inadequately weighed the competing values,104 it is wholly acceptable that the judges should have preferred the legislation of Parliament to the code of the National Union of Journalists which in fact influenced the defendant journalist to withhold the source of his confidential information in defiance of a court order. On the same basis, one would hope there would be something to choose between the ethics of parliamentary democracy and, say, the Cosa Nostra or the Ku Klux Klan. The critique does, however, usefully remind us that the prior morality of law cannot be assumed, a point fully recognised in the fourth and sixth meanings of 'miscarriage of justice'.

Even if one accepts the predominance of an individual rights discourse, there are still rivalries between competing right-holders to be determined. Within criminal justice, these may increasingly relate to the rights of, on the one hand, suspects/convicts and, on the other hand, victims. In this discussion, the rights of the former have tended to be treated as more important. One might offer two reasons for this ordering: that the loss of rights tends to be more acute in the case of the suspect or convicted person in the sense that, for example, liberty is immediately threatened; secondly, the loss of rights is entirely a matter of State responsibility whereas the victim has suffered primarily through the actions of third parties.

A competing conception of rights raised earlier is the communitarian perspective, which involves 'freedom holistically conceived: not the liberal conception of freedom as the condition of the atomistic individual, but a republican conception of freedom as freedom of the city, freedom in a social world.'105 This conception does share several deontological features with due process such as the constraint (of 'parsimony') that the onus of proof is against intervention and also the need to check State power. But amongst the less palatable features propounded by at least some of its proponents106 are the exclusionary emphasis upon 'citizenship' (or, on a more localised basis, 'community')107 and the willingness to promote state intervention (often in the form of surveillance) to protect the ill-defined 'province of others', which may encourage intervention on the basis of vague notions of 'anti-social conduct' such as appear in the Crime and Disorder Act 1998.

103 [1990] 2 WLR 1000.
106 But other versions more reassuringly depict communitarianism as not only consistent with the enjoyment of individual rights but as a necessary condition: Etzioni, A., The Spirit of Community (Fontana, London, 1995) pp. x, 15.

The Crisis in Criminal Justice – a Chronology of Causes Célèbres

It is not intended in this commentary to go back any further than cases which fed the instability leading to the Runciman Commission. The deadline may be taken to be around 1981, when the last major inquiry, the Royal Commission on Criminal Procedure (the 'Philips Report') was published.108 That Commission had in turn been mainly prompted by a miscarriage of justice in the Conflat case (see below), and the Philips Report did promote sweeping changes in terms of police powers (the Police and Criminal Evidence Act 1984 – PACE) and a new Crown Prosecution Service (the Prosecution of Offences Act 1985).109 Accordingly, this book will tend to focus upon later re-appeal or referral back cases110 which were the most compelling in shaping proposals to the Runciman Commission, as well as subsequent cases which have actually been returned to the appeal courts.111 Another reason for this selection is that many earlier miscarriages are already the subject of voluminous documentation. Famous cases in this category include those of Rowland (1947),112 Evans (1950),113 Bentley (1952),114 Hanratty (1962),115

108 Cmd 8092.
109 But note that the Philips Commission accepted without argument that an adversarial form of justice should be maintained and that its focus should be on pre-court issues: paras. 1.6–1.8.
111 There are of course hundreds of other notable cases not covered here. The following have been perhaps the most publicised: Terry Allen (Jessel, D., Trial and Error (Headline, London, 1994) ch. 5); Pauline Butterworth (Jessel, D., ibid. ch. 10); Mary Drauhan (Jessel, D., Trial and Error (Headline, London, 1994) ch. 2); Peter Fell (Jessel, D., ibid. ch. 4); Alf Fox (see Rose, D., In the Name of the Law (Jonathan Cape, London, 1996) p. 35); Eddie Guilfoyle (see R v Guilfoyle (1996) 3 All ER 883); Colin James (see The Express, 8 February 1997 pp. 22, 23); Paul Malone (McConville, M., and Bridges, L., 'Another miscarriage of justice' The Times, 26 July 1994 p. 37; Hill, P., 'Tackling the politics out of justice' (1994) 14 New Law Journal 1270); Gary Mills and Tony Poole (see Jessel, D., ibid. ch. 7); Rowland (David and Charles, London, 1994) ch. 7, 8 R v Hills; R v Leonard, 1999) 3 All ER 780); Matthew Richardson (Jessel, D., Trial and Error (Headline, London, 1994) ch. 9); Anthony Steel (see Hill, P., 'Finding finality' (1996) 146 New Law Journal 1552); Colin Wallace (see Fox, P., Who Framed Colin Wallace? MacMillan, London, 1989). Other campaigns are listed by Scandals in Justice (http://www.scandals.demon.co.uk/); The Guardian, 19 April 1994 p. 4; Patterson, R., English Criminal Appeals 1844–1994 (Clarendon Press, Oxford, 1996) pp. 353–359.
Stafford and Luwigio (1967). Murphy, McMahon and Cooper (the Luton Post Office murder in 1970). Lattimore, Salih and Leighton (the Confitai case in 1972). Dougherty (1973), and Maynard and Dudley (the Legal and General Gang in 1977). Although no description will be given of the foregoing, one should not assume that all (or even any) of the problems illustrated by them have been solved by previous inquiries or legislation. Indeed, most of the present concerns were equally current during the previous two decades. Accordingly, some of the aforementioned cases will appear in the following chapters.

As for the more recent cases which will figure more prominently in this book, the list may begin with the Guildford Four and Maguire Seven. The Guildford Four (Paul Hill, Carole Richardson, Gerard Conlon and Patrick Armstrong) were convicted of pub bombings on behalf of the IRA in Guildford and Woolwich. An appeal against conviction failed in 1977 despite the fact that other IRA defendants awaiting trial had by then claimed responsibility. However, other new evidence was eventually amassed (including of alibis and medical conditions) which convinced the Home Secretary to order further investigations and a referral back to the Court of Appeal. Once it was discovered that detectives in the Surrey Police suppressed possible exculpatory evidence, the Director of Public Prosecutions asked to the Court of Appeal. Once it was discovered that detectives in the Surrey Police suppressed possible exculpatory evidence, the Director of Public Prosecutions immediately prompted reconsideration of the Guildford Four case. Suspicion first fell on the Maguire household when Gerard Conlon (one of the Guildford Four) made statements to the police that his aunt, Anne Maguire, had taught him to manufacture bombs. The police raided her house, and convictions were obtained mainly on the basis of forensic tests which were said to show traces of nitroglycerine. The Court of Appeal, on a reference back in 1990, grudgingly overturned the convictions because of the possibility that third parties had left the traces in the house and so caused innocent contamination (the non-disclosure of evidence was also a material irregularity in the case). However, the May Inquiry’s Interim and Second Reports on the Maguire case more realistically cast doubt on whether the tests used could in any event be taken to be conclusive proof of the knowing handling of explosives.

The next blow to confidence in the criminal justice system was the Birmingham Six case in 1991. The six (Patrick Hill, Gerry Hunter, Richard McIlkenny, Billy Power, Johnny Walker and Hughie Callaghan) had been convicted along with three others of bombings in two Birmingham pubs in 1974. The attacks had caused the most deaths of any IRA incident in Britain and were the signal for the passing of the Prevention of Terrorism Acts. The prosecution evidence rested upon three legs: confessions which the defendants claimed had been beaten out of them; forensic tests which the defendants claimed were inherently unreliable and had been performed negligently by Dr Skuse; and highly circumstantial evidence, such as links to known Republicans, their movements and demeanour. After being refused leave to appeal in 1976, they ploughed a furrow in the civil courts by way of a claim for damages for assault against the police and prison warders. However, their path was eventually blocked by the House of Lords as an abuse of process, since any civil victory would undermine the finality of their criminal conviction. Their focus then switched back to the criminal courts, and there was a referral back to the Court of Appeal in 1988. The Court was then not persuaded, but further revelations about the police fabrication of statements (especially of McIlkenny) and new uncertainties about the quality of the forensic tests eventually secured
their release in 1991. That outcome was swiftly followed by the establishment of the Runciman Commission.

A further Irish-related case of relevance is that of Judith Ward, who was convicted in 1974 for delivering the bombs which resulted in 12 deaths on an Army coach travelling along the M62 in Yorkshire.130 The conviction was once again undermined by the unreliability of the forensic evidence (Skuse’s name appears once more) and of the confessions Ward made (though this time more because of her mental instability than because of police mistreatment of her). In the background were allegations of non-disclosure. Ward’s case was referred to the Court of Appeal unilaterally by the Home Office, and she was released in 1992 after the prosecution declined to contest the matter. The Court’s judgment was particularly censorious of the non-disclosure of evidence by named forensic scientists and prosecution counsel.

The final case arising from Irish paramilitary activities concerns the UDR Four—Neil Latimer, Alfred Allen, Noel Bell and James Hegan. The four defendants were members of the UDR who were convicted of the murder in Armagh city of Adrian Carroll, whom they believed to be active in the IRA.132 Their allegations of injustice arose from three main concerns. First, Latimer pointed to conflicting identification evidence and oppressive treatment during his police interrogation. Further, it was shown that the police had tampered with the confessions by rewriting some notes, deleting references to requests to see solicitors and attaching false authentications. After referral back to the Court of Appeal in 1992, Allen, Bell and Hegan were all freed on the basis that the police had indeed tampered with the evidence, but Latimer’s conviction was not overturned in the light of the identification evidence against him, his confirmation of his admission at the original trial in 1985 and the finding that he had lied to the court.133

It will be evident that the largest catalogue of contemporary miscarriages of justice has concerned Irish ‘terrorist’ cases. Amongst the reasons behind this tendency to lapse from acceptable standards are, first, that terrorist action creates, to be induced in the forces of authority, such as the police, just as much as in the military. Secondly, official reaction to terrorism often involves a conscious departure from the normal due process ideology of the criminal justice system and a tendency towards the holding of grand ‘State trials’.134 Considerations such as the primacy of the individual and the desire to stack the odds in favour of the innocent in part thereby give way to conflicting goal-based rather than rights-based factors.135 The relevant goals include the strategy of the criminalisation of terrorists – the policy of the condemnation of the motives and values held by the defendants and their kind together with the reinforcement of State legitimacy. There is also the ‘presentational’ aspect136 – the desire to be seen to be taking effective action against terrorists. Even if the official action is in reality worthless, it can still relieve public frustrations and fears. Hence, Lord Denning’s comment in response to the Guildford Four case was that even if the wrong people were convicted, ‘the whole community would be satisfied’.137 These wider societal considerations may also explain why miscarriages seem so hard to remedy. The problem is not simply stubbornness, but that an acquittal becomes particularly costly to the State in terms of damage to its legitimacy and prestige. These same factors may explain why miscarriages may in a sense be even more significant since they have occurred in more commonplace circumstances and sometimes under the ‘normal’ regime of PACE.

Perhaps the longest-running case, and one which incidentally predates PACE, is that involving the murder of Carl Bridgewater, a newspaper delivery boy who was killed when he interrupted a burglary at Yew Tree Farm, near Stourbridge.138 Michael Hickey, Vincent Hickey, James Robinson and Patrick Molloy were imprisoned in 1979. The convictions rested largely on the confessions of Molloy, who died in prison in 1981. Molloy, who was denied access to a solicitor, later retracted his confession and claimed he had been tricked by police (members of the West Midlands Serious Crime Squad) who showed him a confession by Vincent Hickey, and his refutation was given credence by later electrostatic tests on the police papers, which revealed the imprint of a fake confession. The case was referred back to the Court of Appeal in 1996 (leave to appeal had been refused in 1981, and an appeal had been refused in 1989 following a referral back in 1987) after the Home Secretary had been mauled by the Divisional Court for his secretive and grudging treatment of the available evidence.140 The men were released in 1997, though with some qualms on the part of Lord Justice Rock in respect of the guilt of Vincent Hickey.141

The business of the West Midlands Police Serious Crime Squad has also provided most of the cases during the more contemporary era of PACE, since its activities have given rise to 91 complaints about beatings, the fabrication of

131 [1986] 9 NIBJ 1 (total); [1988] 11 NIBJ 1 (appeal). For other cases, see Chapter 14.
140 R v Secretary of State for the Home Department, ex parte Hickey (no. 2) [1995] 1 WLR 735.
evidence and denial of access to lawyers.\footnote{See: R v Khan, The Independent, 2 March 1990; R v Edwards [1991] 1 WLR 207; R v Bingham (1991) NLI 189; R v Wellington, The Times, 26 March 1991 p. 7; R v Lynch, The Times, 22 October 1991 p. 3; Ex parte Coventry Newspapers Ltd. (1992) 3 WLR 916, Kirby, T., 'The force of corruption', The Independent Magazine, 14 October 1989 p. 14; Kaye, T., Unsafe and Un satisfactory (Civil Liberties Trust, 1991); Maloney, J., 'The squad that lost its way' (1991) 99 Police Review 2234.} Some of those affected have had their convictions quashed.\footnote{See: R v Fryer, Francis and Jeffers, The Times, 28 April 1993 p. 2.} An investigation into the conduct of the police resulted in the disbandment of the Squad in 1989 but no convictions of officers.\footnote{See: R v Mills, The Times, 21 June 1991 p. 3; The Times, 20 May 1992 pp. 1, 3; (1992) Law Society’s Gazette 27 May p. 10.} However, the award of civil damages for assault to Derek Treadaway in 1994 proved very significant. First, his conviction was quashed in 1996, following a reference back to the Court of Appeal, and then the refusal to prosecute five officers, who were alleged to have handcuffed the attendant and to have placed a plastic bag over his head so as to subject him to suffocation, was overturned on review in 1997 as not adequately taking account of the civil court’s findings against the police.\footnote{See: R v Director of Public Prosecutions, ex parte Treadaway (1997, LEXIS, QBD, The Times 1 August 1997 p. 1).}

Another well-publicised case dealt with under a PACE-type regime, and one with racial overtones akin to the Irish cases, is that of the \textit{Tottenham Three} (Engin Raghip, Winston Silcott and Mark Braithwaite), who were convicted of the murder of PC Blakelock during the Broadwater Farm riot in 1985.\footnote{See Lord Gifford, \textit{The Broadwater Farm Inquiry} (Karia Press, London, 1986); Rose, D., \textit{A Climate of Fear} (Bloombury Press, London, 1992); Rozenberg, J., 'Miscarriages of justice' in Stockdale, H., \textit{Miscarriages of Justice in Principle and Practice} (Fourth Estate, London, 1992).} On a referral back to the Court of Appeal in 1991,\footnote{See: (1979) 68 Cr App R 62, The Times, 18 February 1992 p. 5, 19 February 1992 p. 3; Rose, J., \textit{Innocents} (Fourth Estate, London, 1997).} it was shown that notes of the interview were altered by the police in the case of Silcott; that Raghip’s confession was negated by his mental state; and that Braithwaite had been unfairly denied a lawyer. Two police officers were charged with perversion of the course of justice; the officers were acquitted after a trial,\footnote{See: R v Melvis and Dingle, The Times, 27 July 1994 pp. 1, 3.} and Silcott was not allowed to bring a civil action for conspiracy and misfeasance.\footnote{The Times, 9 July 1995 CA.} There were also allegations that the Home Office officials gravely doubted the strength of the prosecution case long before the referral back.\footnote{See: The Guardian, 9 August 1994 pp. 1, 2, 19.}

Release after an even longer period of imprisonment, 13 years after his original appeal, was ordered in the case of Stefan Kiszko.\footnote{See: (1993) 98 Cr App Rep 361. See also Chapter 13 and R v Solicitor General, ex parte Taylor and Another, The Times, 14 August 1995.} His conviction for murder was accepted as unsustainable in the light of the medical evidence that he was unable to produce the sperm found on the murdered victim. The processing of this evidence by the prosecution counsel also gave rise to concern. Both a detective and a forensic scientist were charged with perverting the course of justice, but the case was halted as an abuse of process (because of delay) by the committing lawyers.\footnote{See: Devlin, M., \textit{Dial and Error}, ch. 5.}

The remaining cases to be mentioned are difficult to catalogue as often multiple causes of miscarriages of justice have occurred. However, a substantial strand of them relates to the circumstances of confessions. One such case concerns the

Darvell brothers, Wayne and Paul,\footnote{See: The Times, 15 July 1993 pp. 1, 3. An earlier appeal had been rejected in 1987, but a further investigation had been ordered after a \textit{Rough Justice} television programme on the case.} who had been convicted in Swansea Crown Court in June 1986 of murdering the manageress of a sex shop. Their convictions were overturned after an uncontested appeal in 1992. Evidence was then presented that police notes about the investigation and a confession had been redrafted at a later date, that police witnesses who had identified the brothers as being in the area of the murder at the crucial time were in fact nine miles away and that fingerprint evidence at the scene of the crime which pointed elsewhere was not disclosed to the defence, was not fully investigated and was even destroyed before the trial. A pre-\textit{PACE} confession was also at the centre of the case of Mark Cleary, who was convicted of murder in 1985 (along with a co-accused, Philip Atherton who had implicated him). It was alleged in the television programme, \textit{Trial and Error}, in 1993 that the timings and other details suggested by the defendant did not stand serious scrutiny and the conviction was quashed.\footnote{See: (1991) NU 189; (1992) 148 JAC 223.} Cleary, described as a person of limited intelligence, had been pressured by the police into making a statement which he then retracted. Next, the convictions in 1990 of the \textit{Cardiff Three} for the murder of a prostitute were overturned in December 1992 on referral to the Court of Appeal.\footnote{See: (1995) 1 Cr App R 559. See Davies, G.M., 'Mistaken identification' (1996) \textit{Howard Journal} 232.} The Court expressed itself as horrified by evidence of oppression from the police interview tapes. Unreliable confessions by a suspect, George Long, with a history of mental instability who had been refused access to a solicitor resulted in the quashing of the conviction for murder in 1995.

Non-disclosure of evidence affecting the reliability of a prosecution witness was at the heart of the appeal of Michelle and Lisa Taylor, convicted of the murder of Alison Shaughnessy but acquitted in 1994 in the light of the suppression of evidence (an inconsistent statement) and the unremitting, extensive, sensational, inaccurate and misleading media coverage and its impact on the trial.\footnote{Editorial, 'Dangerous evidence' (1994) 144 New Law Journal 661; The Times, 14 May 1994 p. 8.}

Evidence from eyewitnesses remains a cause of difficulty, as it has done since cases like Luke Douggherty and Laslo Virag.\footnote{The acquittal of Eddie Browning in 1994, after his conviction of the murder of a stranded female motorist in 1988, turned on the unreliability of an off-duty police witness, who had also been hypnotised in order to recall vital details, especially of a car registration number. Sam Hill was released in 1995 after his conviction in 1988 for 'Borden baseball bat murder' during a gang fight; the Court of Appeal, after rejecting an earlier appeal, was not satisfied that the direction in regard to identification was sufficiently fair and clear.\footnote{The fallibility of expert evidence was illustrated again in an extraordinary way in the case of Kevin Callan, who was freed in 1995 after being sentenced to life imprisonment for the murder of his girlfriend’s daughter in 1992.\footnote{See: The Times, 7 April 1995 p. 6; Sage, H., 'How infallible is the expert’s voice?’ (1996) \textit{The Lawyer} 12 March.} Evidence from
the Home Office pathologist (unaccredited in this particular field) suggested that the child had been shaken to death but Callan’s own studies of medicine whilst in prison demonstrated other possible causes of death such as injury from cerebral palsy. Lack of convincing forensic evidence – that Sheila Bowler murdered her senile and disabled aunt-in-law by pushing her into a river after trekking some distance over difficult terrain – prompted the quashing of a conviction and eventual acquittal at retrial.162

Aside from these notorious cases, some indication should be given of the number of miscarriages produced overall. In a Report in 1989, the organisation, JUSTICE, estimated that up to 15 defendants a year sentenced to four years or more on indictment have been wrongly convicted.163 Just over 1 per cent of those convicted on indictment fall into this sentencing band, so the total number of miscarriages in the Crown Court may be well over 1000 a year. No attempt has been made to estimate the rate in magistrates’ courts where over 90 per cent of cases are heard.164 More recently, the Society of Prison Officers has estimated that there might be up to 700 innocent persons in prisons after conviction.165 Likewise, the Home Office has revealed that it receives about 700 to 800 petitions a year.166 In 1992, Liberty compiled a dossier of 163 cases which it intended to pursue.167 Evidence presented to the Runciman Commission from a survey of Crown Court cases found that ‘problematic’ convictions occurred at a rate of 2 per cent (250 cases a year) in the view of judges and 17 per cent (about 2000) in the view of defence lawyers.168 By March 1998 (after just under one year of operation), the Criminal Cases Review Commission had received 1304 applications, though around 240 cases had been transmitted from the Home Office.

Part III of this book will examine the corresponding cases and rates of incidence in selected jurisdictions outside England and Wales. There are some variations, but the principal causes (summarised below) are largely constant.

Recurrent Forms of Miscarriage in Practice – a Summary

Miscarriages result from a multiplicity of causes, and individual prisoners have often been subjected to more than one form of abuse of authority. The problems arise from the very outset of contact with police, with allegations of harassment and assault, to the very end of entanglement with the State, when machinery to reopen problematical judgments has been shown to be unfair and inappropriate.


164 Miscarriages of Justice, p. 1 and see also App. 1.


166 Memoranda (1991) para. 4.47.


inherently unreliable, that the scientists conducting them were inefficient or both. The Maguire Seven, Birmingham Six, Ward, Callan and Kiszko cases all fit into this category.\textsuperscript{175}

4 Unreliable confessions as a result of police pressure, physiological or mental instability or a combination of all are the next common factor. Examples include the Guildford Four, Birmingham Six, Ward, Treadaway, Tottenham Three and Cardiff Three cases.\textsuperscript{176}

5 The non-disclosure of relevant evidence by the police or prosecution to the defence may be a further issue. The investigation of a case is by and large reliant on the police – they speak to all possible witnesses and arrange for all manner of forensic testing. The defence have neither the financial resources to undertake such work nor the opportunities in terms of access – indeed, approaches to prosecution witnesses might well be construed as attempts to pervert the course of justice. Yet, several cases – the Guildford Four, Maguire Seven, Darvell brothers and Ward in particular\textsuperscript{177} – demonstrate that the police, forensic scientists and prosecution cannot be relied upon fairly to pass on evidence which might be helpful to the accused, despite there being no other agency which might uncover it in the interests of justice.

6 The conduct of the trial may produce miscarriages. For example, judges are sometimes prone to favour the prosecution evidence rather than acting as impartial umpires, as is alleged in connection with the Birmingham Six. A failure to appreciate the defence’s submissions either in law or fact can result in unfairness in judges’ rulings or directions to the jury, as in the Maguire Seven case. Equally, defence lawyers are not always beyond reproach. Lack of legal aid funding has made defence work the Cinderella service of the criminal justice system, so it is not surprising that the quality of defence lawyers is not always as good as it should be. Yet, defendants select (or more likely are assigned) lawyers at their own risk. In \textit{R v Ensor},\textsuperscript{178} the Court of Appeal said that defence counsel must be ‘flagrantly incompetent’, not just unwise or mistaken, before the Court will overturn conviction.\textsuperscript{179}

7 The presentation of defendants in a prejudicial manner is the next problem. An insidious way of achieving this effect is the pejorative labelling of them as ‘terrorists’. Similarly, the obvious and heavy-handed security arrangements accompanying trips to court and the defendants’ quarantined appearance in the dock inevitably convey an impression of guilt and menace. These problems could be alleviated by advice to the media and by different physical arrangements in court, but little has yet been done. Prejudice can also arise through comments on the case.


\textsuperscript{176} Note also the case of George Lindo: Hansen, O., ‘Justice delayed – justice denied’ (1980) \textit{Legal Action Group Bulletin} 83.

\textsuperscript{177} [1989] 2 All ER 586. See also Chapter 7.

\textsuperscript{178} [1989] 2 All ER at p. 590. Defiance of instructions would be a further reason for intervention: \textit{R v Clinton} [1993] 2 All ER 998.

\textsuperscript{179} The law of contempt may temper excessive behaviour, but the courts should be more concerned about securing a fair trial rather than punishing contemptors. At least in the cases of the Winchester Three and Taylor sisters, comment did result in the overturning of convictions.\textsuperscript{180} Intervention in this way has become more common,\textsuperscript{181} but though fairness to the individual accused should predominate, the deleterious impact on victims and community confidence suggest that other protective strategies (aimed at the jury) should be developed.

8 There are the problems associated with appeals and the procedures thereafter. Common difficulties include the lack of access to lawyers and limited legal aid funding, so there has to be reliance on extra-legal campaigns which may or may not be taken up by the media dependent upon factors which have little to do with the strength of the case. The Court of Appeal has made life even more difficult because of its interpretations of the grounds for appeal. Once the courts are exhausted, complainants have, until recently, had to rely upon a ramshackle and secretive review by Home Office officials rather than an independent inquiry.

9 Finally, a miscarriage can occur through the failure of State agencies to vindicate or protect rights or through laws which are inherently contradictory to the concept of individual rights. Examples have already been adduced.

This list might be described as the direct causes of concern. However, there are several underlying issues not all of which can be taken up within the confines of this book and, more disappointingly, virtually none of which figure as part of the agenda of the inquiries envisaged by the Runciman Commission. Such matters include the particular difficulties arising in Northern Ireland and Scotland; police institutional issues, such as accountability and the investigation of complaints; the funding of legal aid; and the penal system.

The Runciman Commission

The details of the \textit{Report} are for later chapters. Here it will be considered how far the \textit{Report} assisted with the conceptualisation of miscarriages of justice or focused on an appropriate agenda of issues.

Conceptualisation

The \textit{Runciman Report} does little more than restate the guiding principles set out in its terms of reference which, it will be recalled, emphasised ‘the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent’, as well as ‘the efficient use of resources’.\textsuperscript{182} The only gloss on these statements is the