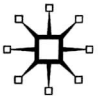
Rethinking Miscarriages of Justice

Beyond the Tip of the Iceberg

Michael Naughton

Foreword by Jonathan Simon



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For Amanda, David and Olivia

Foreword

Jonathan Simon[1]

Wrongful Convictions, Miscarriages of Justice, and the Path to a Better Politics of Criminal Justice

As I write this, the execution of a death row inmate, Troy Davis, by the State of Georgia in the United States continues to draw media attention and expressions of outrage from around the world. The outcry over Davis' execution, the latest of more than one thousand since the resumption of capital punishment in 1977, is a testament not to opposition to capital punishment (most executions draw little comment), but lingering doubt over Davis' guilt. Convicted of shooting an Atlanta police officer to death more than twenty years ago, Davis maintained his innocence from the start. Davis' claim has been bolstered in recent years by the fact that a number of eye-witnesses recanted their testimony and blamed heavy police coercion for their original testimony. His cause was taken up by a large number of prominent public figures, not only traditional death penalty opponents, but also a former Director of the Federal Bureau of Investigation and a conservative former Member of Congress from Georgia. In 2010 the US Supreme Court ordered a lower court to conduct a hearing into Davis' innocence claims. Despite the fact that the court failed to find sufficient reason to overturn the verdict, doubt continued up to the moment of Davis' execution, with the George Board of Pardons (which has the power to commute a sentence) apparently splitting 3–2, and final temporary stay by the Supreme Court.

Twenty years ago, in the early 1990s, as death sentences and support for the death penalty surged, a small cluster of US lawyers and journalists began to promote a public awareness that potentially many US prisoners, including on death row, were wrongfully convicted; victims of heavy-handed police tactics, junk science experts in forensic identification of crime-scene evidence, incompetent defense lawyers and unprincipled prosecutors (all compounded by 'death qualified' juries who brought something less than a presumption of innocence to their work). As new DNA technology made it possible to re-examine biological evidence from even decades-

[1]Adrian A. Kragen Professor of Law, UC Berkeley.

old cases, lawyers succeeded in reopening cases and winning the release of prisoners. These victories created powerful media events. Few things (except violent crimes themselves) compete in drama and televisibility with the story of a person wrongly locked in prison for decades under threat of execution. The images of middle-aged men, both softened by age and hardened by prison into a dignified but non-threatening solidity, walking into the embrace of siblings and adult children who had kept their faith alive for years, touched an American public supposedly unified behind a common sense as victims of a high-crime society and support for harsh and unremitting punishment.

Like most criminologists and socio-legal scholars at the time, I personally failed to see much importance in these developments. Alarmed by the growth of mass incarceration since the start of my graduate studies in the early 1980s, I was primarily concerned with understanding why Americans were so committed to excessively punishing the guilty (compared to historic norms). If some of those convictions were tainted by procedural failures, even if in some cases that meant that a factually innocent person was being punished, that was at worst a poignant but small result of the same intemperate turn in penality. Today it is clear that this could not have been more wrong. The work of overturning long finalized convictions in court, and collating a growing list of 'high risk' police and prosecutorial factors that can lead to wrongful convictions, has produced what Michel Foucault would have called a 'power/knowledge' formation in which legal actions, were producing 'truth effects,' which were in turn producing new opportunities for action. The action has even moved, albeit slowly, into legislatures, long the engines of excessive punishment, which began to debate recommendations to outlaw poor forensic practices and to establish clearer legal pathways to challenge suspicious evidence.

Today there is widespread agreement among observers that the issue of wrongful convictions is responsible for a significant drop in public support for the death penalty in the United States, along with substantial declines in the number of death sentences sought by prosecutors and handed down by jurors. The spotlight shown on problematic police investigations and the lack of prosecutorial oversight has also opened a new vulnerability to the broader apparatus of excessive punishment. For decades, under the slogan of 'war on crime,' enhancing the power of police and shielding them from judicial oversight, has been seen as synonymous with protecting the public from violent crime. Wrongful convictions raise the possibility or even probability that the actual perpetrator remains at large and possibly still active criminally, an inference that places 'tough on crime' policies disastrously out of joint with creating public safety.

While there is no empirical evidence yet that this injury to the logic of the war on crime is weakening public support for long prison sentences and the weakening of legal due process procedures, comparable to that detected in support for capital punishment, it may be occurring. Prison populations are dropping in many states and some have even begun sentencing reforms and while these developments are attributable to a number of factors, including long-term declines in crime rates and hard fiscal times, these effects would likely be far more limited had the knowledge/power spiral of wrongful convictions not begun to undermine the politics of punitive populism.

Most of the work by criminologists and socio-legal scholars on this topic has focused on documenting the frequency of wrongful convictions and classifying and analyzing the practices which produce it. In the UK, a stronger critical criminology tradition has also produced a discussion of the structures of power and inequality that cause justice processes to fail (or to succeed at some other, perniciously motivated project of race or class control). In effect, this scholarship extends that basic knowledge/power spiral of litigation and journalism around wrongful convictions with a focus on policy solutions or political critiques.

Michael Naughton's *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg*, first published in 2007, made knowledge/power effects of wrongful convictions itself the subject on the inquiry in a central way. Rather than investigate the factual predicates of wrongful convictions or trace the pattern of discriminations inscribed in the operation of criminal justice and manifest in these miscarriages of justice, Naughton examined the consequences of how wrongful convictions were being problematized in both popular and criminological discourse and explored how those effects might be expanded considerably by problematizing them in different ways and in different fields.

As the title suggests, the first and most important move is reframing (and renaming) the problem from the presence of factually innocent people in prison (one possible meaning of wrongful conviction) to a problem of all people who are in prison (or subject to other criminal penalties) because of a procedural failure of justice, whether they are factually guilty or innocent. This is a move well justified in at least two senses. First, the legal system is simply not constituted to produce either factual guilt or innocence. To prioritize those external events, like DNA, or confessions, which can bring strong evidence of such a status into the legal process, is to render invisible a vastly larger multitude of individuals whose cases do not involve such evidence. Second, because the substantive harms of wrongful conviction, both to the individual involved and to the integrity

and legitimacy of the legal system are largely the same. Troy Davis' case is a good example of this. There was no definitive evidence proving his innocence, and he was executed after a court in an extraordinary procedure ordered by the Supreme Court failed to find him innocent. Yet many features of the police investigation of his case, including coercive tactics used against witnesses reveal the kind of practices associated with the war on crime that both denies rights and undermines the reliability and thus the crime control mission of the law.

As Naughton documents, examining miscarriages of justice in this broader sense immediately and radically rescales and distributes the field. Much of the discussion of wrongful conviction has focused solely on those released from prison by virtue of extraordinary court actions (through a habeas petition in the US or a referral by the Criminal Cases Review Commission), and often by the introduction of new evidence in the form of DNA, witness recantations, or a confession by another person, a class that consists of a relatively tiny portion of criminal cases. The miscarriages of justice framework brings in all cases where a conviction has been reversed by a court, including the through the routine appellate process; a class of cases that number in the thousands in the UK and the tens of thousands in the US on an annual basis.

The potential power/knowledge effects of problematizing miscarriages of justice can be expanded further by broadening the legal context of miscarriage of justice to human rights (especially in the UK where the Human Rights Act and the European Convention on Human Rights open important channels for legal and political claims to be raised, but increasingly in the US as well) and by exploring the range of harms created by such miscarriages that lie beyond the continuing incarceration of those wrongfully convicted. Indeed this is the kind of expansion of which will be necessary if the knowledge/power effects produced by the emergence of wrongful convictions is going to help to produce a broad transformation of the way criminal justice is used to govern contemporary societies.

In this regard *Miscarriages of Justice* anticipates Ian Loader and Richard Sparks' recent call[2] for criminologists to abandon the effort to wish away the public and political influence on criminal justice in favor of an effort to contribute toward a 'better politics' of crime. With its focus on how the framing of wrongful conviction acts to shape the ways government itself is problematized, the Miscarriages of Justice is an effort to turn criminology and socio-legal studies from how criminal justice governs the

[2]Ian Loader and Richard Sparks, *Public Criminology?* (Routledge 2010).

population (an important topic on which much ink has been spilled), towards the possibility of counter flows of knowledge and the surveillance of government by the governed, a topic on which very little has been said and which makes this an important read well beyond criminology and socio-legal studies.

the criminal justice system, evidenced by successful appeals, to prevent and/or reduce wrongful convictions and the harm that they cause, not only to direct victims, but secondary victims and, even, society as a whole. However, as this book makes clear, this does not mean that we should somehow abandon concerns with miscarriages of justice that derive from technical breaches of due process in favour of a narrower concern with the wrongful conviction and/or imprisonment of the innocent. On the contrary, the theoretical perspective constructed in what follows emphasises the extent to which the legitimacy of the criminal justice system depends on a rigid compliance with due process which underpins the relationship between governed and government in the processes of governmentality. Moreover, on a more empirical level, the work of The Innocence Project, a non-profit legal clinic affiliated with the Benjamin N. Cardozo School of Law at Yeshiva University, New York, reaffirms the need for vigilance on the conventional causes of miscarriages of justice. Since it was established in 1992, almost 200 cases have led to exonerations through DNA testing, some of which were of men and women on death row. Perhaps surprisingly, however, The Innocence Project has found that eyewitness misidentification is the single greatest cause of the wrongful conviction of the innocent in the US, playing a role in 75 per cent of convictions overturned through DNA testing; that in more than 25 per cent of the DNA exoneration cases, factually innocent defendants made incriminating statements, delivered outright confessions or pleaded guilty to crimes that they did not commit; and, that in more than 15 per cent of cases of wrongful conviction overturned by DNA testing, an informant or 'jailhouse snitch' testified against the innocent defendant. As such, we must demand adherence to due process, precisely to protect against the wrongful conviction and imprisonment of the innocent.

Defining key terms is an important first step for any sociological enquiry, providing coherence to the analysis and the premises from which it may proceed. As will be seen, this is an urgent task for the study of miscarriages of justice and the wrongful conviction/imprisonment of the innocent, which is in dire need of definitional clarity and methodological consistency. More specifically, the starting point for this book is a radical redefinition of miscarriages of justice, separating how they are understood and practised by the criminal justice system from public discourses that see miscarriages of justice in terms of the wrongful conviction of the innocent. From this platform, a systematic engagement with, and analysis of, the various 'voices' and 'audiences' that mediate the miscarriages of justice problem is undertaken.

Informed and inspired by a novel interpretation of Foucault's theses on power, knowledge and governmentality and the zemiological approach ('zemia' a Greek word meaning 'harm' or 'damage'), I have sought to highlight the limits of the entire criminal justice process and to challenge the dominant discourses in all spheres – media, campaigning, practitioner, academic and governmental – that see miscarriages of justice as rare and exceptional cases of wrongful imprisonment. This exposes miscarriages of justice as mundane features of the criminal justice system, opening up a scale of miscarriages of justice that has not hitherto been subjected to critical appraisal. It reveals the limitations of all previous attempts to reform the criminal justice system to prevent miscarriages of justice. It presents a new perspective on the extensive range and different forms of harm that befall victims of miscarriages of justice and wrongful convictions.

On a more practical level, the available sources for this book were extremely limited. Whilst there is a surfeit of newspaper articles on miscarriages of justice and a growing bank of biographical accounts from victims in high profile cases, there is a dearth of academic literature on any of my main research questions. To account for this, a constructive data analysis approach is adopted to provide information and illustrations for the various analyses that are offered, derived from official statistics, academic literature, newspapers, appeal court judgements and relevant websites. As such, this book is not a review of existing literature on miscarriages of justice. On the contrary, the overall attempt here is to contribute to new ways of thinking about and acting upon miscarriages of justice. It is an attempt to contribute to the production of more effective forms of counter discourse that might, truly, prevent miscarriages of justice from occurring and the extensive range of harmful consequences that they cause. It is to seek to disturb the dominant discourse on miscarriages of justice, replacing it with a new 'regime of truth' that more appropriately portrays the scale of the problem and the damage that they cause.

Finally, there are a number of people that I would like to acknowledge for the part that they have each played in helping to shape my thoughts on these matters. Firstly, thanks to Gregor McLennan and Tom Osborne, the supervisors of the doctoral thesis upon which the book is based, for ongoing support, without which this work would, certainly, have been the poorer; to Ruth Levitas and Paddy Hillyard who also had a hand in the doctoral thesis and/or work since; to Julie Price, Aneurin Morgan Lewis and Mike O' Brien, Innocence Network UK colleagues; to the members of the University of Bristol Innocence Project, especially Gabe

Tan, who also provided invaluable assistance in compiling the index; and, to friends and other colleagues from the wider miscarriage of justice community including Bernard Naughton, Hazel Kierle, Andrew Green, John McManus, Paddy Joe Hill, Paul Blackburn, Kevin Kerrigan, Allan Jamieson, Dennis Eady, Robert Schehr and Bob Woffinden. The usual caveat applies, of course, any error or mistakes are my own.

Michael Naughton

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Introduction

The Royal Commission on Criminal Justice (1993) (RCCJ) spells out an authoritative vision of criminal justice that fits well with popular sentiment:

> All law-abiding citizens have a common interest in a system of criminal justice in which the risks of the innocent being convicted...are as low as human fallibility allows...mistaken verdicts can and do sometimes occur and our task, when such occasions arise, is to recommend changes to our system of criminal justice which will make them less likely in the future...The widely publicised miscarriages of justice which have occurred in recent years have created a need to restore public confidence in the criminal justice system (Royal Commission on Criminal Justice, 1993: 2–6).[1]

The task of the legal system from this view is that it should acquit the innocent in criminal trials and, if it is apparent that it is failing in that task, should be quickly brought into line with its intended purpose. From this perspective, it is, perhaps, unsurprising, then, that the public *belief* that the criminal justice system is responsible for convicting an innocent victim has been at the heart of some of the most far-reaching changes of the criminal justice system in the shape of professed safeguards to prevent miscarriages of justice and to restore public confidence that it is operating as it is thought it should.

A recent example of a legislative change to the criminal justice system to prevent possible miscarriages of justice to the innocent flowed from the RCCJ, which was, primarily, established in response to the public crisis of confidence following the successful appeals of the Guildford Four (see Conlon, 1990; May, 1994), the Maguire Seven (see

Kee, 1986) and the Birmingham Six[2] (see Mullin, 1986), all of whom were convicted for crimes related to Irish Republican Army (IRA) bombings in the 1970s.[3] These cases exemplified, among other things,[4] an apparent reluctance by successive Home Secretaries to return potentially meritorious cases in which the public believed the cases of innocent victims of miscarriages of justice back to the Court of Appeal (Criminal Division) (CACD) for political, as opposed to legal, reasons. In resolving the public crisis of confidence in the cases of the Guildford Four, Birmingham Six, and so on, one of the most significant amendments spawned by the RCCJ was the Criminal Appeal Act (1995), which took away the power of referral from the Home Secretary and established the Criminal Cases Review Commission (CCRC), an independent public body with the task of investigating alleged or suspected miscarriages of justice that have already been through the appeals system and have not succeeded (for details, see Criminal Cases Review Commission, 2006).

It is interesting to note, however, that although the CCRC was established in response to a public crisis of confidence based on cases in which innocent victims were *believed* to be unable to overturn their wrongful convictions through the existing post-appeal mechanisms, it is subordinated by statute to the appeal courts, only referring applications if it is felt that there is a 'real possibility' that the case will be overturned (Criminal Appeal Act, 1995: s. 13(1)a). As will become evident, in this sense, the CCRC is not so much concerned with the possible wrongful conviction of the innocent as it is with breaches of due process and, therefore, 'technical' miscarriages of justice. So, too, are a range of other significant changes of the criminal justice system in response to perceived miscarriages of justice to victims believed to be factually innocent that will be detailed below. To be sure, the criminal justice system's notion of a miscarriage of justice does not correspond with popular thoughts as they relate to concerns about the possible wrongful conviction of the innocent. Instead, the official test of a miscarriage of justice relates to prevailing procedures of due process, not whether appellants are innocent.

From this perspective, it is also interesting to note that both popular (deriving from the public and political spheres) and legal discourses alike have excluded from their critical gaze the overwhelming majority of 'low profile' miscarriages of justice that are overturned each and every day in the CACD and the Crown Court from already established causes and/or harmful consequences to these victims of miscarriages of justice in favour of concerns with victims in post-appeal cases which