

Chapter 1

The Conceptualisation of Miscarriages of Justice

This chapter seeks to conceptualise ‘miscarriage of justice’ and build a theoretical framework around the concept. The purpose here is to define and problematize miscarriage of justice so that the purpose and philosophical basis of campaigns against miscarriage of justice are better understood. The chapter will examine contrasting arguments covering miscarriage of justice including legal, academic and ‘innocence’ discourses. During the course of this study a variety of terms will be used to designate ‘miscarriages of justice’: ‘wrongfully convicted’, ‘wrongly imprisoned’, ‘appellant’, ‘defendant’ ‘miscarriage of justice’ or simply ‘miscarriage’. The term miscarriage of justice, however, is a legalistic term and is principally defined by law. This means that until a victim of wrongful conviction has their conviction overturned by the CACD they remain an alleged victim of miscarriage of justice. For the purposes of this study the legal definition will apply regardless of which term is used. The concepts and ideas surrounding miscarriage of justice discussed in this chapter will inform the process of interpreting data in Part 2.

Literature and discussion on the subject of miscarriage of justice have focussed primarily on providing examples of justice in error and to a lesser extent on literature that highlights the causes of justice in error. In terms of examples, the idea of a ‘miscarriage’ is often understood in relation to a specific case and to the experiences of defendants who have been wrongly convicted (Price and Caplan, 1976; Foot, 1986; Kee, 1986; Mullen, 1986; Woffinden, 1987; Conlan, 1990; Ward, 1993; Batt, 2005; Cannings and Davies, 2006; O’Brien and Lewis, 2008; Mansfield, 2009). This literature has dominated much of the public and political discourse on

miscarriage of justice. A further development was literature that moved beyond the (hi)stories of specific cases to an analysis of the causes of justice in error (Bottoms, and McClean, 1976; Mansfield and Wardle, 1993; Sanders and Young, 1997; McConville and Wilson, 2002; Bohm, 2005; Denov and Campbell, 2005; Macfarlane, 2005; Naughton, 2007) (See Appendix 1).

The definition of miscarriage of justice suggested by Walker (2008: 186) reflects a rights-based approach to conceptualising the concept in which:

A miscarriage occurs whenever suspects or defendants or convicts are treated by the state in breach of their rights, whether because of, first, deficient processes; second, the laws that are applied to them, or third, because there is no factual justification for the applied treatment or punishment; fourth, whenever suspects or defendants or convicts are treated adversely by the state to a disproportionate extent in comparison with the need to protect the rights of others; fifth, whenever the rights of others are not effectively or proportionately protected or vindicated by state action against wrongdoers; or, sixth, by state law itself.

Savage, Poyser and Grieve (2007: 11) examined miscarriage of justice from the perspective of 'failures to act' (Savage, 2007a) and suggested that the concept can equally apply to situations where there has been '...no action, inaction or questionable actions in the sense that an act has taken place (an offence against a victim) but no action or insufficient action or intervention has followed'. A number of recent cases have highlighted the need to accommodate this broader categorisation of miscarriage of justice from the murder of Stephen Lawrence and subsequent response from the authorities, to the case of Mubarak, a young Asian held in custody but who was murdered in his cell having been incarcerated with another offender known to be racist and violent (Savage, Poyser and Grieve, 2007: 12; Charman and Savage, 2009: 4; Hall, Grieve and Savage, 2009).

Although most studies have sought to build on earlier research by focussing on causes and remedies of miscarriage, some of these studies have attempted to conceptualise the concept. Walker (2004: 61) argues that there have been opportunities to analyse miscarriages of justice 'heuristically' but that the approach

taken by the Royal Commission on Criminal Justice (2003) and the Home Office has been to consider the issue in a 'piecemeal' fashion. Zdenkowski (1993) focussed on the remedies of miscarriage of justice and specifically wrongful imprisonment but accepted at the outset that although a relatively straightforward notion, even 'definitions of wrongful imprisonment' can be problematical. Zdenkowski (1993: 105) suggests that a degree of rigour is required when attempting to define the concept which he suggests could include:

The period of remand in custody of a person who is subsequently acquitted; the period of remand in custody of a person who is subsequently convicted and given a non-custodial sentence; the period in detention of a person who is convicted and subsequently acquitted by the appellate court or in a fresh trial ordered by such a court; the period in detention of a person who is convicted, given a prison sentence and is subsequently given a non-custodial penalty by an appellate court; the period in detention of a person who is convicted, whose conviction is upheld by trial court and who is subsequently released following an inquiry. There are doubtless other permutations and combinations.

Despite seeking a precise definition Zdenkowski (1993) attempt is too far reaching and fails to adequately locate miscarriage of justice within a coherent theoretical framework. The problematical nature of defining wrongful imprisonment extends to finding an agreed definition of miscarriage of justice (Huff, 2002; Huff, Rattner and Sagrin, 1996). Anderson (1992) focuses on wrongful conviction and suggests that understanding their causes will assist in the process of reform. He accepts, however, the need to define miscarriage and suggests that:

The most useful definition of a miscarriage of justice, it seems to me, would be: a serious wrong within the criminal justice system involving any or all of the following: (a) wrongful accusation or arrest by police, (b) wrongful treatment by the courts, most often including wrongful conviction, and (c) wrongful penalty or serious abuse in prison (Anderson, 1992: 74).

Anderson (1992: 74) argues that '...there is good reason for widening the definition of a miscarriage to include all serious wrongs' although in his study he does not suggest a practicable working definition but highlights eight possible causes of

miscarriage from which he suggests that only by identifying the causes of miscarriages of justice will the full extent of the problem be understood.

Poveda (2001: 687) likewise attempts to focus on 'wrongful conviction' and suggests that they are created by 'justice-system' errors and range from those who are falsely accused to those who are convicted and imprisoned and in extreme cases, to those who are unjustly executed. The approach taken by Poveda (2001: 690) when defining the subject is to distinguish 'wrong person errors' from procedural errors although he accepts that this in itself can be a problematic distinction. The study draws on earlier studies (Bedau and Radelet, 1987; Radelet, Bedau, and Putnam, 1992) and distinguishes those defendants who are exonerated because they are factually innocent from those who are released on the basis that their due process rights were violated. Poveda (2001: 691) accepts that definitions of wrongful conviction which focus on 'innocence' are problematic, not least because:

It is difficult to determine when someone is factually innocent. The fact that an offender's conviction is overturned on appeal and that the offender is acquitted in a subsequent trial does not in itself establish innocence. It simply means that the state was not able to establish guilt beyond a reasonable doubt.

It is to the subject of 'innocence' we now turn and whether innocence should be a determining factor in how miscarriage of justice is understood and conceptualised.

Miscarriages of Justice and 'Innocence'

The use of the term 'innocence' when defining wrongful conviction can lead to a more restrictive definition when conceptualising miscarriage of justice (Radin, 1964; Yant, 1991; Scott and Stuntz, 1992; Scheck, Neufield and Dwyer, 2000) and obscure the procedural safeguards that protect the rights of defendants when caught in the criminal justice system. Huff, Rattner and Sagrin (1996) when examining wrongful conviction and public policy only included cases in which the defendants had been 'clearly exonerated' although the difficulty of gathering and presenting evidence

which proves beyond all doubt that a defendant is innocent is highlighted by Bedau and Radelet (1987:47) who suggest that ‘...there is no quantity or quality of evidence that could be produced that would definitively prove innocence.’ Wisotsky (1996) examining the causes of miscarriage of justice sought to define ‘innocence’. The study suggests three types of innocence beginning with defendants who have been wrongly convicted because the real culprit has avoided justice. Wisotsky (1996: 550) then highlights two other categories of innocence which he terms ‘factual innocence’ and ‘legal innocence.’ In terms of factual innocence he argues that this can be applied ‘...when there is substantial evidence against a defendant, but reasonable doubt is created by evidence, new or old, not presented to the jury, which would have the effect of undermining due process procedures’. He argues that ‘legal innocence’ could be interpreted in cases where the defendant does not deny committing the offence but advocates, for example, a defence of diminished responsibility or insanity.

The views expressed by competing criminal justice models are sometimes polarised between those who advocate a due process model (Packer, 1968) and the belief that the factually innocent should always be protected, against those who are committed to a crime control model whose priorities are that the guilty should not escape justice (King, 1981). Of course the criminal justice system would hope or at least aspire to do both but the notion of ‘innocence’ as a means of clarifying the meaning of miscarriage of justice, although seductive, might in the long term undermine the current system and unwittingly create more victims of miscarriage. Naughton (2007) suggests that the criminal justice system operates on a totally different footing from the ‘ideological’ arguments of due process and crime control and that any definition of 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’
(Naughton, 2007: 15).

The issue of finding an agreed working definition is complicated by the language and motivation of actors from different disciplines who advocate meanings that are

not necessarily compatible with the criminal justice process as it currently exists. The Labour Government's aim of 'rebalancing the criminal justice system' (Home Office, 2006: 17) sought, amongst other things, to '...restrict the ability of the plainly guilty to have their convictions quashed because of a procedural irregularity'. This sounds plausible but the purpose of the criminal trial has never been to consider the objective truth of whether a defendant is 'guilty' or 'innocent' but to present evidence and to decide on the basis of this evidence whether the defendant is guilty or not guilty (Sanders and Young, 1994). Throughout the trial process the defendant is accorded the 'presumption of innocence' whereby they are assumed 'innocent until proven guilty' and the 'standard of proof' required to convict is guilt 'beyond reasonable doubt' (Dennis, 2002; Ashworth, 2002). During appeal proceedings the appellant and defence do not have to 'prove innocence' as this is not the purpose of the appeal and as such the term is rarely used in court (Nobles and Schiff, 2002a; Roberts, 2003). The appeal court considers itself the 'court of review' and its role is only to determine whether a conviction is 'safe' or 'unsafe' (Hungerford-Welch, 2009).

Stephen Downing was convicted and imprisoned for the murder of Wendy Sewell in 1974 (Herbert and Burrell, 2000). During his imprisonment Downing protested his innocence but was classified as being in denial of murder by the prison service and therefore not eligible for parole. The case was referred to the Criminal Cases Review Commission in 1997 and in 2001 Downing was released by the CACD having spent 27 years in prison (Hale, 2002). The court accepted the central grounds of appeal argued by the defence and in particular that his confession should not have been allowed to go before the jury and secondly, that he was not formally cautioned during questioning nor had he been provided with a solicitor (Hale, 2002). During the appeal Lord Justice Pill argued that the question the Court of Appeal had to consider was '...whether the conviction is safe and not whether the accused is guilty'. After examination of the evidence the court ruled:

The court cannot be sure the confessions are reliable. It follows that the conviction is unsafe. The conviction is quashed (R v Downing, [2002] EWCA Crim 263).

There are similarly other cases where the court specifically addresses the issue of innocence as it relates to the role of the Court of Appeal. When the appeal judges gave their judgement at the close of the Bridgewater case they stated that:

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 and Ors, R v [1997] EWCA Crim 2028).

This judgement, in principle, upholds procedures of due process and particularly that the trial process should be governed by principles which protect defendants and ensures the innocent are acquitted and the guilty convicted (Davies, Croall and Tyrer, 2005). Greer (1994) suggests that even where a defendant is actually responsible for committing part or all of the offence, they should still be viewed as a miscarriage of justice if their rights have been abused. Greer (1994) questions the idea of defendants being viewed as 'really innocent' as opposed to those who have been freed on a legal technicality. Walker and Starmer (2004: 33) argue that the issue of abuse of process and breaches in due process are central to the administration of justice. In such circumstances '...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.' This does not mean that appeal judges do not express views on the guilt or innocence of appellants. The case of the M25 Three led to the wrongful conviction of Rowe, Davies and Johnson in 1990 who were convicted of murder and robbery. The case was so named because the original crimes were committed around the M25, London's orbital motorway in 1988 (Shaw, 2000). The three men were finally released from prison on 17 July 2000 due to serious irregularities committed during the police investigation and trial concerning a failure to disclose evidence (Hopkins, 2000). In an extract from the judgement given at the end of the appeal the court

stated they were minded to quash the convictions because of 'irregularities' that had been identified during the course of the appeal but that:

For the better understanding of those who have listened to this judgement and of those who may report it hereafter this is not a finding of innocence, far from it (R v Davies, Johnson and Rowe, [2001] 1 Cr App R 115).

The role of the CACD, however, has never been to determine 'innocence' so the judgement appears to contradict those principles outlining the purpose of the Court of Appeal which is solely to determine the safety of a conviction. In this sense whether an appellant is guilty or innocent is not a factor that the CACD addresses during its deliberations (Zuckerman, 1989; Smith, 1995; Nobles and Schiff, 2002a).

A further complication when defining a miscarriage of justice from the perspective of innocence is introduced when a miscarriage of justice is later judged 'really innocent' by criminal justice agencies and other public and political actors following the apprehension and conviction of the true culprit of the offence. In the case involving the murder of Rachael Nickell in 1992 on Wimbledon Common, Colin Stagg was charged with her murder but following a trial at the Old Bailey, Stagg was acquitted after Mr Justice Ognall excluded prosecution evidence on the basis that the police had shown 'excessive zeal.' When Stagg walked from the Old Bailey he was later vilified (Cohen, 2006) following suggestions by the press that he was 'really guilty'. Despite the fact he was accorded the 'presumption of innocence' during his trial Stagg found that after his acquittal some in the media and persons in his own community believed that he had somehow 'got off' on a technicality and that he was probably guilty (Stagg and Hynds, 2007). It was not until Robert Napper was apprehended through his DNA being found on Nickell and subsequently pleaded guilty (on the grounds of diminished responsibility), that the emphasis of the public and political discourse changed. Suddenly Stagg was '...completely innocent' rather than simply being 'acquitted' (Stagg and Hynds, 2007). The Metropolitan Police following Napper's conviction offered Stagg an apology in which they said '...they would make it a matter of public record that he was an innocent man' (Laville, Siddique, Percival and Sturke, 2008: 23).

The debate regarding 'innocence' or 'guilt' continues to inform public and political discourse but similarly to confuse debate as to what constitutes a miscarriage of justice (Roberts, 2003). In the case of Michael Shields who was convicted of the attempted murder of Martin Georgiev in 2005 another expression defining a miscarriage of justice emerged. In referring to the case, the Justice Minister, Jack Straw stated that Shield was '...morally and technically innocent' (Bunyan, 2009). Another case which has generated considerable debate in relation to innocence discourse is that of Timothy Evans convicted of the murder of his daughter on January 3 1950. After a failed appeal on 20 February Evans was hanged 9 March 1950. Evans was to receive a royal pardon in 1966 (Kennedy, 1961, 2002). After the pardon and following the creation of the CCRC, Mary Westlake, Evan's half-sister, began a campaign for her brother to be referred back to the CACD. The Commission refused to refer the case so the family appealed the decision arguing that the pardon was an 'inadequate remedy' (Blake, 2004). The request to refer the case was dismissed on November 19 2004 with the judges arguing that the cost and resources needed to quash the conviction could not be justified. In response the Commission argued:

The free pardon, with its attendant publicity and recognition of Mr Evans' case as a miscarriage of justice, was sufficient to establish his innocence and restore his reputation (Blake, 2004).

The issue for Timothy Evans' family was that a royal pardon was not a declaration of innocence but simply a pardon of crimes committed (BBC News, 2010). The family continue to campaign for a declaration of innocence. Current debates around notions of factual innocence and wrongful conviction has been stimulated by Innocence Network UK (INUK) the umbrella organisation for innocence projects operating in UK universities. The INUK projects conduct investigations into cases where the appellant claims factual innocence as opposed to those who are appealing on the basis of technical irregularities. The purpose of the investigations is '...to explore claims of innocence, that may, potentially, be genuine' (Naughton, 2010: 31).

Quirk (2007: 768) contends, however, that to circumscribe the debate to one where the protection of the innocent is paramount ‘...can only assist the government in its drive to restrict due process protections for ‘criminals’ and will harm both individuals and the administration of justice.’ Quirk’s argument is that in most cases it is impossible to know if a defendant is factually innocent and that raising the threshold by which appellants have their convictions quashed would result in poor justice and the abrogation of fundamental due process safeguards. Richard Foster the current chairman of the CCRC in relation to ‘innocence’ and in response to criticism levelled at the CCRC argued that the role of the Commission was to decide if a conviction was ‘safe’ and not to decide if the appellant is innocent. Foster defended the Commission’s record of referrals stating that:

It’s utterly spurious to claim we’re not interested in innocence...the claim that we wouldn’t refer a case if we had evidence of innocence is offensive. It is true that we’re not in the business of seeking to establish who did and didn’t commit the crime. We’re in the business of establishing whether or not a conviction is safe – and our critics should be glad that we are (Hill, 2011: 13).

Roberts (2003) suggests that focussing on innocence could undermine the administration of due process and unwittingly lead to more miscarriages of justice. The legal system does not focus on guilt or innocence and is governed by precedent. This means that although the court seeks to correct individual ‘errors’ it also has an important role in advising on the conduct of all future cases (Tregilgas-Davey, 1991). Ashworth and Redmayne (2005: 16) suggest that specific cases, however, can be useful as harbingers for change and cites the Confait case that led to PACE (1984); the Birmingham Six and other miscarriages that led to the Runciman Commission (1993) and the Criminal Appeal Act (1995). But focussing on individual cases in isolation can also create inconsistencies within the law such as the removal of double jeopardy which Ashworth (2005) suggests was facilitated by the failed prosecution of the suspects in the Stephen Lawrence case but which has been criticised by the Joint Committee on Human Rights as being incompatible with the UK’s international human rights obligations (Ashworth, 2005:365). Also influential in seeking the removal of double jeopardy was the campaign led by Ann

Ming and her husband who campaigned for 17 years following the murder of their daughter Julie Hogg in 1989 by Billy Dunlop. This campaign was assisted by the MacPherson Report (1999) regarding the murder of Stephen Lawrence (Jardine, 2008) (See Chapter 8).

Although individual cases pursued on the basis of innocence can be influential in terms of initiating and sustaining campaigns against miscarriage of justice there are wider consequences both for the individual caught in the system and for others attempting to encourage reform in the criminal justice system (Quirk, 2007). Individual cases of 'innocence' sometimes appear to clarify the debate but when this becomes the sole concern of campaigners, politicians and the media then two levels of miscarriage are created, those who are proven to be innocent and those who cannot meet this threshold (Nobles and Schiff, 1995).

In terms of how miscarriages of justice are defined in relation to innocence criterion, Quirk (2007:776) suggests that:

The appellate test has to be expressed in the neutral term of 'safety'. The media and campaigners have different motivations and usually focus upon cases of innocence in order to attract public interest and to achieve reform. Despite the moral and political impact of innocence cases, for those who seek to safeguard the rights of defendants and to uphold the integrity of the criminal justice system, it is imperative to resist allowing the criminal justice debate to degenerate into competing claims of guilt versus innocence.

This suggests that campaigning organisations in their desire to achieve justice through engagement against decisions made by agencies of the criminal justice system might actually undermine the very thing they seek to uphold, namely the integrity of due process. From the preceding literature, definitions of miscarriage of justice can be seen to be legalistic in nature and wholly defined by the law. For many years the judiciary have dismissed or upheld appeals and through their judgements outlined their reasons for deciding on the safety of a conviction but it was the case of Nicholas Mullen that inclined the CACD and the House of Lords to discuss what it considered to be a "miscarriage of justice". The test case did not

examine miscarriage of justice in relation to the quashing of a conviction but in relation to statutory compensation. The case was controversial because Mullen's conviction was quashed due to breaches in due process despite the appellant accepting that he was guilty of the crime. The appellant then sought to apply for compensation which was refused by the Home Secretary. Mullen then sought to challenge this decision (See Appendix 2).

The Supreme Court: Miscarriages of Justice and Compensation

The issue of Mullen was further considered by the Supreme Court in R (on application of Adams) (Appellant) v Secretary of State for Justice (Respondent); In the matter of an Application by Eamonn MacDermott for Judicial Review (Northern Ireland); In the Matter of an Application by Raymond Pius McCartney for Judicial Review (Northern Ireland) [2011] UKSC 18. The appeals were heard on 15, 16 and 27 February 2011. The court's judgement was given on 11 May 2011. The issue for the Supreme Court in these cases was what constituted a 'miscarriage of justice' for the purposes of compensation. During the hearing the Justices who included: Lord Phillips (President), Lord Hope (Deputy President), Lord Roger, Lord Walker, Lady Hale, Lord Brown, Lord Judge, Lord Kerr and Lord Clarke argued that it would consider four categories of miscarriage of justice where the Court of Appeal might quash a conviction on the basis of fresh evidence. These included (paragraph 9):

- Category 1: Where it showed a defendant was innocent of the crime;
- Category 2: Where it was such that, had it been available at the time of the trial, no reasonable jury could properly have convicted the defendant;
- Category 3: Where it rendered the conviction unsafe in that, had it been available at the trial, a reasonable jury might or might not have convicted the defendant;
- Category 4: Where something had gone seriously wrong in the investigation of the offence or the conduct of the trial resulting in the conviction of someone who should not have been convicted.

For the purposes of interpreting a miscarriage of justice in relation to Section 133 (1) of the Criminal Justice Act and the payment of compensation the court

discussed what constituted 'a new or newly discovered fact' and whether a denial of compensation infringed the 'presumption of innocence' afforded to successful appellants (paragraph 108). Despite differences in emphasis between the justices the majority of the court found that the correct interpretation of miscarriage of justice in section 133 (1) was (paragraph 273):

- (1) The conviction of an innocent defendant, or
- (2) The conviction of a defendant who, by a new fact, so undermines the evidence against him as to show that, on the undermined evidence, he could not possibly have been convicted – essentially Lord Phillips' (category 2) formulation (at para 55).

The Supreme Court judgement whilst not stipulating that only a clear demonstration of innocence would suffice when interpreting what constituted a miscarriage of justice, the panel, however, emphasised that an appellant would '...have to show that...he should not have been convicted or that conviction could not be based on those facts' (Bowcott and Laville, 2011). Following the judgement the term 'miscarriage of justice' appears to remain synonymous with notions of factual innocence or that the appellant could not have committed the offence. The court would not consider interpreting section 133 and article 14(6) of the International Covenant on Civil and Political Rights as embracing category 3 or 4 as a subsidiary object of awarding compensation to an innocent person was that compensation should not be awarded to a person who did or who might have committed the crime (UKSC, 2011). In terms of defining a miscarriage of justice the court held that categories 1 and 2 provided the correct interpretation of section 133 (1) and the award of compensation following a successful appeal. Adams (the appellant) contesting the Secretary of State argued that denying compensation would violate a fundamental legal principle namely the presumption of innocence. This issue had already been examined in the case of Mullen by Lord Bingham in paragraph 10 and by Lord Steyn in paragraphs 41-44. The Supreme Court ruled in relation to Adams that the interpretation of 14(6) did not prevent comments on the underlying facts of a case during subsequent proceedings and that:

The procedure laid down in section 33 provides for a decision to be taken by the executive on the question of entitlement to compensation which is entirely separate from the proceedings in the criminal court (paragraph 111).

The judgement by the Supreme Court will continue to have ramifications on the interpretation of miscarriage of justice and the award of compensation. Barry George, acquitted of the murder of Jill Dando following a retrial, was initially refused compensation (See Introduction). Since the judgement, of which George was added to the application as an Intervener, George, through his solicitor, has indicated he will renew his application. A Ministry of Justice spokesperson, however, responding to this news stated that:

We will continue to fight the Barry George case. We still think that under the new measure he would still not be entitled to compensation (Bowcott and Laville, 2011a).

Whilst the Supreme Court ruling has provided more clarity as to how section 133 (1) and Article 14(6) should be interpreted, the dividing line between categories of 'miscarriage of justice' and similarly which category a particular case of miscarriage of justice should be designated, is likely to perpetuate misunderstanding within the Ministry of Justice and criminal defence teams.

Sociological Perspectives of Miscarriages of Justice

There have been a number of attempts to define a miscarriage of justice from a sociological perspective including Greer (1994) and Walker (2004; 2008) who have used a rights-based approach, while Nobles and Schiff (1995; 2002) have preferred a systems-theory approach, namely autopoiesis. This theory suggests that different systems are unable to communicate effectively with one another and that the miscommunication which exists between the legal system and the media often means that there is no one agreed discourse as to what constitutes a miscarriage of justice. Naughton (2004, 2007) has attempted to deconstruct the concept through challenging some of the assumptions held by different groups within society about

miscarriage of justice and particularly the notion of extending miscarriage of justice discourse to include those cases of wrongful conviction which begin in the Magistrates' Court but are rectified in the Crown Court. Savage, Poyser and Grieve (2007) examining campaigns against miscarriage of justice have argued that definitions should extend to those cases where 'no action' or 'inaction' has taken place.

The next section will examine approaches to miscarriage of justice from the perspective of human rights.

A Rights-Based Approach to Understanding Miscarriages of Justice

Despite limited agreement on the philosophical roots that underpin the criminal justice system, a number of criminal justice models have been discussed that help locate priorities within the criminal justice system. The due process and crime control models argue that due process safeguards require the State to prove the guilt of a defendant beyond reasonable doubt and that the presumption of innocence should be accorded to the suspect and/or defendant through the criminal process (Packer, 1968; Hungerford-Welch, 2009). These ideals similarly involve the creation of rules and procedures that are designed to protect the individual from the power of the State, and particularly those agencies whose role it is to investigate and seek a conviction (Sanders and Young, 1994; Davies, Croall and Tyrer, 1998). The due process model, however, emphasises the protection of suspects' rights and is distinguished from the crime control model which emphasises the role of the State in apprehending, convicting and punishing offenders. In a crime control model 'rights' are accorded less prominence and safeguards that make it harder to identify and convict offenders are sometimes challenged by Government as a means of promoting crime control policies. The conflict between the two models is illustrated by the use or exclusion of evidence that is secured improperly (Hungerford-Welch, 2009). Adherents of the crime control model would permit the use of evidence obtained improperly providing that it had probative value. A belief in the merits of due process, however, would

exclude evidence obtained improperly, even if it was highly relevant, because of the fundamental requirement to protect the integrity of the criminal justice system. Hungerford-Welch (2009: 7) suggests the reality of criminal proceedings in the UK usually resides within the two extremes with:

Evidence...obtained illegally may be admissible, but only if its probative value exceeds its prejudicial effect on the fairness of the trial of the accused.

King (1981) identified a 'medical' model which focuses on prognosis, treatment and cure. The focus of this model is on the identification and 'scientific' response to the offender and not primarily on procedural safeguards and the rights of the defendant. King (1981) similarly identified three sociological perspectives which he referred to as the 'bureaucratic model' (focusing on precision and efficiency); a 'power model' (focusing on the maintenance of political, social and economic domination) and a 'status passage model' (emphasising stigmatisation and social cohesion). Analysis of all the models suggests that the due process model is most concerned with suspects' rights, although Greer (1994: 60) prefers the adoption of a 'human rights' perspective as it suggests the '...importance of minimum ethical standards'.

A central argument advocated by Greer (1994: 73) is that although no system can be 'miscarriage proof' no system can likewise operate without reference to a core set of values and beliefs and that for the purposes of 'justice' a human rights approach offers the safest route towards generating sound investigative and judicial decisions. Greer (1994: 74) suggests important reasons why the human rights approach is to be favoured. It focuses the criminal justice system on the administration of core values and secondly provides 'a firmer ethical basis than due process'. It emphasises that the '...conviction of the factually innocent is only one amongst several types of miscarriage of criminal justice' and that others include:

Four types of unjustified avoidance of conviction (those due to defects in substantive criminal law and procedure, indefensible decisions not to charge or prosecute and unjustified acquittal) and six types of unjustified conviction (those deriving from defects in substantive criminal law and procedure, plea bargaining,

anti-terrorist criminal justice processes, impropriety by tribunals of fact and other agencies, and mistake).

The following sections will consider Greer's (1994) analysis and use his conceptual framework. The ideas of Greer have been influential in developing later theories of what constitutes a miscarriage of justice.

Unjustified Conviction

When discussing 'unjustified conviction' Greer (1994:68) makes a distinction between those convictions that arise from what he terms as 'structural sources' and those that arise from the behaviour of criminal justice agencies. In terms of highlighting structural sources of miscarriage of justice, Greer (1994) suggests it is necessary to acknowledge that some convictions could be seen as unjust if the 'offender' has been found guilty of an offence that should not have been criminalized in the first place. Another structural source concerns the subject of plea-bargaining which has been a source of disquiet for many years. Greer (1994: 67) argues that the majority of defendants in the Magistrates' Court and Crown Court '...are persuaded to plead guilty'. One of the criticisms of plea-bargaining is that defendants in the Crown Court knowing that a guilty plea might reduce the severity of a sentence might be inclined to plead guilty despite being innocent of the offence. This might be for several reasons including the defendant having previous convictions and so feeling less confident of the jury to acquit or simply having little confidence in their legal team to present a strong defence. For some defendants, the decision not to gamble with the possibility of a longer sentence means that sometimes, despite being innocent, defendants will put in a guilty plea to guarantee a lesser punishment. Greer (1994) suggests that such an outcome should be regarded as unjust and come under the aegis of miscarriage of justice. Little evidence exists, however, concerning the extent of plea-bargaining. Greer (1994) similarly argues that legislation that undermines principles of due process and legal safeguards is more likely to create miscarriages of justice. Anti-terrorist legislation is often '...characterised by reduced standards of proof and weakened

rights of suspects and defendants' (Greer, 1994: 68). The weakness of such legislation is that by undermining due process constraints defendants are more likely to be convicted of crimes they have not committed.

Another aspect of unjustified conviction leading to miscarriage of justice is a conviction instigated through 'impropriety' by agencies of the criminal justice system. Greer (1994) argues that in such cases the upholding of due process is central to the integrity of the criminal justice system and that the Court should protect that ideal even if the defendant is guilty of the offence as charged. It is accepted by the legal establishment that wherever criminal justice agencies engage in impropriety an acquittal or quashed conviction is the proper decision.

Mistaken Conviction

Mistaken convictions can occur when the jury hear the evidence but misunderstand the case. In such cases the jury might find the defendant guilty either because it feels the defence case 'lacks credibility' or that the central elements of the case are misrepresented leading to a legally innocent defendant being found guilty. In terms of court procedures this situation can be exacerbated by the jury not understanding the legal burden of proof; inaccurate directions from the judge when deciding on points of law or misguided tactics (Mansfield, 2009). Greer (1994: 73) suggests there are other sources of mistaken conviction: evidence the defence needed to 'prove' their case might go missing or get lost in the bundles sent by the prosecution; witnesses might be subject to interference leading them either to avoid giving evidence or to perjure themselves; false confessions when the defendant has not been pressurised to do so; trials where an innocent defendant is undermined by the guilt of his co-defendant in a joint trial; mistaken identity; false evidence that is presented to the Court through misunderstanding the case rather than through malice.

Greer's analysis of miscarriages of justice identifies possible 'sources' of miscarriage as a means of conceptualising and defining the concept. As such how campaigners

then define justice in error has implications on how they approach wrongful conviction. An area that has received little attention within campaigning discourses is 'unjustified acquittal'. It is to this subject we now turn.

Unjustified Acquittal

Greer (1994:65) suggests two types of unjustified acquittal, namely those that stem from the jury being intimidated leading them to acquit when they actually believe the defendant to be guilty; and secondly, when a jury ignore the weight of evidence and acquit through prejudice or allegiance to a person or group rather than on matters of evidential integrity. In terms of understanding why juries come to a particular conclusion, Greer (1994: 65) argues that in cases where an acquittal is thought to be 'questionable' it is '...not appropriate to characterise as an unjustified acquittal cases in which the 'real offender' is found not guilty because of persisting doubts about the prosecution evidence'. In such cases, the defendant is counted as 'innocent' whilst the case is being heard so any decision to acquit simply upholds the status of the defendant. Despite the centrality of the presumption of innocence this has not stopped commentators and politicians from insinuating that some offenders are acquitted or freed 'on a technicality' and that such cases do not constitute a miscarriage of justice.

For Walker and Starmer (1993: 4) justice is about according citizens their 'fair distribution' of rights. In terms of individuals affected by the criminal justice system the protection of defendants' human rights could be seen as integral to the workings of a democratic, liberal society (Emerson and Ashworth, 2001; Feldman, 2002). The power and influence of the State often means that through the process of investigation, charge and conviction, basic rights will come under threat including '...humane treatment, liberty, privacy and family life' (Walker, 2004: 32). Although human rights in any democratic society are formally revered and supported in statute, the power of the State will sometimes mean that the agencies of the criminal justice system are susceptible to contravening individual's rights during the operation of their duties. Walker (2008: 186) suggests that individual rights are

central to the philosophy of the due process model although he argues that in routine and 'unsupervised encounters' with criminal justice agencies the principles of due process are not prioritized. It is argued, however, that when encounters become more formalized, usually from the point of arrest, then the importance of human rights and due process safeguards is intensified.

An important component of any rights-based approach to miscarriages of justice is that definitions need to accommodate the competing rivalries of different groups which include on the one hand the rights of suspects and defendants, and on the other, the rights of victims (Bottoms and McClean, 1976; Jackson, 2003). This debate has become increasingly polarised over the last decade with political discourses arguing for more crime control measures to counter, what some perceive, as excessive allegiance to due process. A recent Home Secretary (Home Office, 2006: 3) questioned whether '...the rights of the accused and those of the victim and the community are correctly balanced'. In terms of conceptualizing miscarriage of justice, the debate on rights and whose rights society should uphold is of relevance. If it is argued that the rights of suspects and defendants can be legitimately eroded to balance the criminal justice system in favour of the victim, then society might have to prepare itself for more victims of miscarriage (Walker, 2004).

Since the widening of rights discourse and the application of the European Convention on Human Rights, itself augmented by the Human Rights Act (1998), the 'rights-based' approach adopted by Walker (1993; 2004) appears to have increased legal applicability. The rights that seem to have most applicability in potential miscarriage of justice cases are Article 2 (the right to life); Article 3 (the right to humane treatment); Article 5 (right to liberty and security); Article 6 (right to a fair trial and importing a concern for fairness and equality of arms); Article 8 (right to privacy and freedom from intrusion). Walker (2004:38) suggests that a rights-based approach has advantages since the criminal justice system takes action against those who offend the rights of others, whilst a function of the State is to protect the rights of citizens. Clearly in these situations the State, through its criminal justice agencies, aims to prosecute and punish those who violate the rights of others, but

Walker (2004) contends that it would be 'counter-productive' if the State in its enthusiasm to apprehend an offender prosecuted defendants who were factually innocent. Not only would this create suffering for the convicted person and their family, but it would undermine the legitimacy of the State.

The existing system of justice upholds individual rights and through a system of due process attempts to protect the rights of suspects and defendants. The system operates an adversarial mode of justice whereby two parties are placed in opposition to one another in an evidential contest designed to achieve a just verdict (Ashworth and Redmayne, 2005). However, the two sides in this contest of adversarial justice do not have access to the same resources neither do they have equitable powers. The agencies of the State are able to wield enormous power and to appropriate the resources and 'evidence' they require to successfully prosecute a case (Bottoms and McClean, 1976). The defence, on the other hand, without any balances in place, would be at a significant disadvantage. Walker (2004: 40) suggests that '...the imbalance is corrected by procedural and evidential rules, including the burden of proof, disclosure by the prosecution and legal assistance from public funds'. Despite these balances miscarriage of justice continues to be a feature of the criminal justice system and often because the legislated balances have either been ignored or abused. From this it follows that even where a defendant might be wholly or partly guilty of an offence, it is appropriate to view any subsequent conviction as a miscarriage of justice, if the rule of law and procedural safeguards have been ignored (Walker: 1993).

Nobles and Schiff (1994: 383) question Walker's right-based approach preferring evidence based theories of miscarriage of justice. Their argument is that particular cases, for example, the Birmingham Six, are 'evidential' in 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'. This approach argues that miscarriages of justice are principally about 'evidence and proof' rather than notions of due process and human rights. Walker (1995: 662) considers such arguments 'shallow' and suggests that matters of evidence and proof are not 'self-evident' and should not be seen as being more fundamental than 'rights'. His central argument is that

‘evidence and proof should reflect rights rather than the reverse’ (Walker, 1995: 662).

What is clear is that definitions of miscarriage of justice, whichever model of criminal justice one adopts, has much to do with the philosophical and theoretical foundations that underpin any criminal justice system. Some commentators have sought to deconstruct the concept of miscarriage of justice and ‘to disturb the dominant discourse’ (Naughton, 2007: x). The next section will examine perspectives that seek to redefine and extend the meaning of miscarriage of justice.

Deconstructing Miscarriages of Justice

Perhaps the most significant contribution of Naughton (2005: 166; 2007: 39-42) has been in widening the discourse of miscarriage of justice to include ‘routine’ and ‘mundane’ successful appeals against conviction. This is a theme he returns to regularly when considering public and political discourse and the campaigning activities of pressure groups. His view is that miscarriage of justice discourse has focussed on ‘exceptional’ cases rather than considering all cases of successful appeal, including appeals at the Crown Court for convictions in the Magistrates Court. The importance of this is that the counter discourse generated by exceptional appeals has perpetuated a belief that miscarriages of justice are unusual events and that they are ‘rare’. Naughton (2007) suggests that his analysis does not argue that current definitions of miscarriage of justice are misguided but that the term needs to be extended so that the full extent of miscarriage of justice can be acknowledged.

In terms of wrongful conviction and imprisonment Naughton (2005a; 2005b) suggests that the definition of a miscarriage could be widened to include life sentenced prisoners who are maintaining their innocence, but who are refused parole or sentence progression because they refuse to accept responsibility for the index offence. In such cases life sentenced prisoners who refuse to cooperate with the prison service and parole board are sometimes refused progressive moves to

lower category prison establishments because they continue to protest their innocence. The case of Stephen Downing who served 27 years for the murder of Wendy Sewell is a well publicised example. Despite being eligible for parole much earlier in his sentence, he was incarcerated for significantly longer because he refused to accept responsibility for the murder (Hale, 2002). Downing was eventually released by the CACD in January 2002.

Nobles and Schiff (2002) take a more sociological approach to conceptualising miscarriage of justice. Their main contribution concerns the use of autopoietic systems literature developed by Teuber (1988; 1992) and 'Tragic Choices' perspectives first developed by Calabresi and Bobbit (1978). Nobles and Schiff (1995; 2002: 16) suggest that the idea of finding an agreed definition of miscarriage of justice is problematical. They argue that one definition could include whatever '...individuals believe is less than justice' but such a definition would be far removed from how the judiciary, politicians and the media use the expression. In terms of 'Tragic Choices' theory (Calabresi and Bobbit, 1978) the work of the CACD is to protect the rhetoric of values and to construct arguments for the acknowledgement of miscarriage of justice that do not undermine the existing practices of the Court (Nobles and Schiff, 1995). This has sometimes been seen as an inherent weakness of the system, because in its desire to protect existing arrangements, the Court might question its understanding and definition of miscarriage of justice in order to uphold the decision of the first tribunal (Jenkins and Woffinden, 2008). Resource limitations within the criminal justice system similarly mean that a point comes when 'truth' and 'rights' might be sacrificed so that the system can acknowledge 'finality' within the processes of justice (Donglais, 2008: 249; Nobles and Schiff, 1995: 310). Walker and Starmer (2004: 41-42) question this analysis and suggest that notions of finality do not hold up as whenever new evidence emerges, as in the Birmingham Six case, which suggests that because '...they had not been accorded their rights', the case was regularly sent back for consideration. This argument, however, does not take sufficient account of the admissibility of new evidence by the CACD and the difficulties faced by some defence teams when attempting to persuade the Court to permit such evidence (R. v Jenkins [2004] EWCA Crim 2047).

Differences in how miscarriage of justice is defined and communicated provides a useful back-cloth to understanding the contribution of autopoietic systems theory, namely that different systems communicate differently and, because of this, misunderstanding is built into any venture that seeks to provide an agreed conception of miscarriage of justice. Some of the interactions between competing stake-holders when conceptualising justice in error are best explained because ‘...the actors are not speaking the same language’ (Nobles and Schiff, 2002: 8).

Miscarriages of Justice and the Media

The language of the legal system is often at odds with how the media conceptualise the subject and how they communicate it (See Chapter 3). This has obvious applicability in terms of how miscarriage of justice is interpreted and conceptualised by different groups. The importance of the relationship between the media and the legal system when defining miscarriage of justice is the subject of the next section.

The Media and the Legal System: Definitions of Miscarriage of Justice

Nobles and Schiff (2002a) comment that the judiciary when hearing an appeal are less than enthusiastic about questioning a case on the basis of fact. Greer (1994: 74) supports this view but goes further and argues that the CACD sometimes seems unwilling to accept that a mistake might have been made at trial and further that the Court seeks to ‘...protect the system and its officials from embarrassment, rather than correct injustices’. The ‘miscommunication’ between the media and the legal system is most obviously witnessed by how particular cases are reported. Where a case is highlighted by the media as a possible miscarriage of justice, there follows what can be described as attempts by the judiciary to hold their position against media reporting that questions their ability to ensure justice is dispensed fairly (Nobles and Schiff, 2002: 92). They suggest that the media ‘...misread legal operations associated with appeals’. The Court of Appeal is not concerned with

'innocence', yet the media often portray a defendant in terms of factual innocence and approach the appeal process '...with the expectation that it can produce versions of the truth that accord with its own' (Nobles and Schiff, 2002: 92).

It is often at the moment of conviction that contradictions most noticeably emerge between the interpretation of truth by the legal system and that of the media. For the legal system a conviction represents more than just the discovery of truth. It is primarily about the finding of guilt in a court of law where the defendant has received a fair trial and where the rules and procedures of engagement have been followed (Ashworth, 2005; Naughton, 2007a). For the media, considerations of due process are not so important following the jury's decision to find the defendant guilty. In legal discourse the trial is an evidential contest, governed by due process, in which two opposing sides compete to persuade a jury of the rightness of their position (McConville and Wilson, 2002; Dennis, 2002). The media take a more simplistic view when reporting a verdict and do so in terms that are markedly different from the legal system's interpretation and understanding of what has just taken place (Stephens and Hill, 2004). From this perspective, despite the media, or some within it being concerned with the truth, '...there is a stable misreading of conviction by the media' (Nobles and Schiff, 2002: 101).

One issue for the criminal justice system and the media when defining miscarriage of justice is how the language of fundamental values is bridged with considerations of cost and institutional exigency. When a conviction is quashed by the CACD, the legal system and the media are faced with the task of communicating the judgement. Nobles and Schiff (2002: 234) argue that harmonising the divide between the 'rhetoric' of values advanced by the criminal justice system and its actual practices is not possible. Their view is that the values upheld by the legal system and media to protect against miscarriage of justice '...are unattainable, incoherent, and traded off against non-values such as institutional interests and costs'.

An area of interest to campaigners, as will be seen later in this chapter, is the issue of news selectivity and why certain cases are reported whilst others are avoided or

ignored as not being sufficiently news worthy. The subject of news selectivity, ownership and media orientation is examined by Herman and Chomsky (1988) who argue that media firms are large businesses run by wealthy people and managers who have interdependent relationships with the banks, government and other major corporations. Consequently this multi-faceted relationship acts as a 'filter' that influences news stories. In short Herman and Chomsky's 'propaganda model' suggests that certain stories are either avoided or underrepresented because they come into conflict with the ideals of the powerful. Developing the theme of social control, Ericson (1991) suggests that the five principal components of news communication are visualizing, symbolizing, authorizing, staging and convincing. Media news is therefore viewed as a means of social control in relation to crime, law and justice. Although pluralist arguments suggest that more citizens are now able to express their views and participate in meaningful dialogue, this is questioned by some who argue that excessive competition for viewers has encouraged sound-bite journalism in which the subject matter is reported superficially and without sufficient explanation (Jewkes, 2004). Whilst it might appear that diversity is being achieved through a multiplication of channels this does not necessarily equate with diversity of content and the participation of citizens in serious political debate over matters of policy and reform (Kitzinger, 2004). One consequence of this in matters relating to the criminal justice system is that the public remain uninformed and susceptible to arguments that label, stereotype and criminalize minority groups (Wilson, 1964; Schattenberg, 1981; Ditton and Duffy, 1983; Jewkes, 2004). Media agencies appear to prioritise specific news stories on the basis of media values and 'journalistic imperatives' that guide decision-making in relation to the construction of news (Chibnall, 1977). It is to the subject of how crime news is constructed and what is considered 'newsworthy' that we now turn.

Crime News, Values and Selectivity

The importance of crime news selectivity for campaigners against miscarriage of justice is that whilst some campaigns are able to garner media interest during their campaign, other campaigns struggle to persuade the media to investigate or report their campaign against an alleged wrongful conviction. The importance of this is that many campaigns against miscarriage of justice appear to be successful because they have been able to access 'critical success factors' of which the media and accompanying publicity is an important contributory factor (Savage, Poyser and Grieve, 2007).

Media news has always drawn on crime as a topic of particular interest for 'social, cultural, political, moral and economic purposes' yet how the news is read will often depend on the theoretical approach adopted by the viewer or reader (Greer, 2010: 201). From the perspective of 'Durkheimian' functionalists crime reporting serves to strengthen moral consensus and social cohesion through labelling behaviour that it considers criminal. As such the reading of crime becomes a 'collective ritual experience' providing a shared response to deviancy (Katz, 1987: 230). Marxists focus on the role of the State in orchestrating political consent for crime control paradigms, law and order and the criminalization of groups in the interests of the powerful elite (Chibnall, 1977; Hall, 1980). For feminists the reporting of crime often perpetuates patriarchy and contributes to reinforcing unequal power relations and culturally biased assumptions about women. The female as 'victim' rather than 'survivor' (See Chapter 2) is emphasised with women's psychological and biological make-up condemning them to differential treatment under the law (Smart, 1977; Heidensohn, 1985; Howe, 1994; Lloyd, 1995). Within these perspectives there is often overlap and even within perspectives there are disagreements between theorists. What they do share, however, is an acknowledgement that news reporting is 'highly selective and unrepresentative' and that it presents a picture of crime that is 'the direct inverse of that portrayed by official criminal statistics' (Greer, 2010a: 202). In relation to this study most of the participants are campaigning against wrongful conviction that involve serious offences including murder and manslaughter; sexual offences

including rape; and, other offences including fraud and armed robbery. The media appears to have a particular interest in the offence of murder and manslaughter. Many participants campaigning against convictions of murder have been able to interest the media whilst other participants campaigning against other serious offences have found it difficult to interest the mass media in their campaign (See Chapter 6). Rock (1998: 225) commenting on cases of murder and manslaughter suggests that:

They have pathos, immediacy, urgency, and horror that lend themselves to ready dramatisation, and they are continually being translated into news entertainment, and 'human interest' stories for public edification.

The subject of selectivity and the values attributed to media news has been examined in a number of influential studies (Chibnall, 1977; Hall *et al*, 1978; Katz, 1987; Herman and Chomsky, 1988; Ericson, Baranek and Chan, 1989; Schlesinger *et al*, 1991; Chermak, 1995; Jewkes, 2004; Greer, 2007). Two notable studies that have attempted to prioritise news values in relation to crime news are Chibnall (1977) and Jewkes (2004). Chibnall examined eight news imperatives that guide the work of journalists. These journalistic imperatives provide a framework that helps explain some of the components that are likely to justify a story being counted as newsworthy. Some of these are noted by campaigns against miscarriage of justice particularly as they seek to involve the media in raising the profile of their campaign. Jewkes (2004) has developed and added to Chibnall's list. In particular Jewkes highlights the importance of visual images in the selection of news stories. The contention is that some news is selected on the basis of its perceived visual impact (Greer, 2007). The next section will summarise their arguments.

The eight news values identified by Chibnall (1977: 205-212) are: immediacy, dramatisation, personalization, simplification, titillation, conventionalism, structured access and novelty. Although not presented as an exhaustive list it nevertheless provides a set of components that guide the practice and professional decision-making of journalists. Chibnall's analysis will now be considered in greater detail.

Immediacy: The priority is on the present and on stories that focus on change. Present day events are given precedence and are constrained by the editorial desire to get a story out and achieve deadlines. The prioritisation of present day events means that important sections of news are not covered because they do not fit easily into the usual news format (p. 205). In terms of miscarriage of justice those cases that meet other news values and which are reported in the mass media soon after the crime appear more likely to interest the media at a later date should the case go to appeal and involve a campaign against the conviction. *Dramatization:* Media news organisations are in competition with one another and acknowledge the fact that their organisations are required to make financial profits. By focusing on events journalists seek 'the dramatic' as a means of securing the attention of their audience and increasing their readership or viewers. This has sometimes meant that certain crimes are of particular interest to the media, particularly murder. The dramatic nature and reporting of such crimes means that campaigns focussing on wrongful conviction and murder sometimes find it easier to interest the media in their criminal case. One consequence of prioritising 'impact' is that it becomes easier to focus on 'action' rather than on the underlying motivations, beliefs and thoughts behind the story (p.206). By ignoring complex issues media reporting focuses the public's attention on the 'symptoms' of events rather than on the underlying 'causes' of what led to the story. *Personalization:* The cultural imperative is on the use of 'celebrity'. This has little to do with what the celebrity has achieved and more about what they represent. They become 'an image, an embodiment of popular fantasy' (p. 207) and as such important events, policies and dissent become an opportunity to focus on the cult of personality rather than on the examination of the social processes behind the story. *Simplification:* The imperative leads news journalists to simplify stories so that news can be quickly assimilated by people of varying intellectual capabilities. Simplification leads to stories being presented in superficial terms with arguments focusing on extreme positions rather than discussing the complexities of the argument or event. In terms of miscarriage of justice, complex evidence is often simplified by the media so that the facts of the case are substituted for headlines and explanation that seek to discuss the case but avoid the complexities of legal argument and evidence. For

many campaigners, as will be seen later, an important aim of many campaigns is to counter inaccurate and simplified reporting from the first trial and appeal.

Titillation: Popular journalism has long realised the power of sexual titillation to draw the reader or viewer to a story. As news is presented in voyeuristic terms so the media organisations that generate the stories distance themselves from the events they portray. An important consequence of this 'commercial imperative' is that events are trivialised and the deeper issues surrounding events are ignored (p. 209). *Conventionalism:* In order to help the audience make sense of complex issues, the journalist provides an interpretative aid to accompany the story whereby the event is framed in terms of a pool of recognizable and familiar images. As popular journalism often draws on a stockpile of well worn clichés this permits journalists to produce stories quickly and meet editorial deadlines. *Structured access:* Editors expect journalists to provide official accounts of a story and to seek the opinions of those 'in authority' who might similarly be counted as 'experts' in their field. It is argued that audiences place greater worth on the opinions of individuals who hold positions of authority because they have all the relevant facts at their disposal. This imperative suggests that media accounts are 'structured in dominance' with a preference for 'legitimate institutional positions' as opposed to counter discourse positions taken by those who might '...lack formal qualifications to comment' (p. 210). *Novelty:* The imperative of novelty operates when a story is 'kept alive' by approaching the event from a new perspective. Media competition often means that a current news event requires a fresh angle so that the story has greater impact and novelty value on the audience. For some campaigns against miscarriage of justice, a victim of miscarriage of justice will sometimes release new evidence or information as a means of generating renewed media interest (Jeremy Bamber, 2010a).

Chibnall's (1977) ethnographic study is situated within a Marxist framework and seeks to explore from a sociological perspective why some news stories, rather than others, become focal points in the prioritisation of news media. In terms of reporting on the criminal justice system the professional imperatives help explain why crime events become the focus of attention rather than on the socio-structural

conditions that have contributed to the event. This sometimes has the effect of trivialising reporting on criminal justice issues, including miscarriage of justice, and of focusing attention on symptoms and outcomes rather than on the underlying causes of what leads to justice in error. Despite the continued relevance of Chibnall's study (Mawby, 2010) the number of television channels, newspaper titles and magazines has increased dramatically (Jewkes, 2004). In terms of crime reporting there has been a change in emphasis and nomenclature with new crimes emerging that reflect technological advances particularly in the use of computer services. Jewkes (2004) study constitutes one of the few recent attempts to reassess news values and to develop an updated list which reflects societal changes and attitudes to the media, crime and politics. The 12 news structures and values identified by Jewkes (2004: 41-60) includes: threshold, predictability, simplification, individualism, risk, sex, celebrity or high-status persons, proximity, violence, spectacle and graphic imagery, children and conservative ideology and political diversion. Many of these have a direct bearing on campaigns against miscarriage of justice and particularly whether the mass media are prepared to report a specific case of alleged wrongful conviction. Greer (2010) suggests that six of these values whilst contributing to the debate do not significantly develop Chibnall's ideas which remain just as relevant thirty years later. Six news values, however, do provide appreciable advances to understanding and these will be summarised briefly in the next section.

Risk: Media representations often exaggerate the risks of victimization in order to reflect public anxiety and fear of crime. Most serious crime (murder, rape, serious assault), is committed by offenders either known to the victim or in particular socio-economic or geographical groups. The media, however, persist in reporting serious crime as if it is likely to happen to the reader or viewer at any moment. This could lead to more 'moral panics' but most people's sense of the likelihood of their being a victim of crime has more to do with their past experiences rather than crime media news. The media's interest in reporting serious crime means that campaigns against miscarriage of justice involving serious offences are more likely to interest the media and investigative journalists (Mason, 2010). *Sex:* The media distort

reporting on crime through excessive interest in crimes of a sexual nature. This sometimes inflates the fears felt by some women of the likelihood of them becoming a sexual victim. Ferraro (1996) argues that many women fear rape because of its potential impact on their lives and not primarily of its prevalence. The themes of violence and sex are closely interlinked with crimes involving murder which are sexually motivated being regarded as particularly newsworthy. The archetypal case of extreme news value becomes the lone male who, driven by sexual desire, murders an unknown woman to fulfil his deviant needs (Cameron and Fraser, 1987, cited by Jewkes, 2004: 48). The regular use of stories of violence against women suggests that such stories fulfil news values. They similarly permit highly sexualised accounts of stories to be presented so that whether the woman is a victim or offender the narratives often report accounts of their sexual history or orientation (Naylor, 2001, cited by Jewkes, 2004). In fact many female offenders are portrayed as sexual predators regardless of whether their crime involves a sexual element. The media's obsession with stranger violence has the effect of distorting the overall picture of crime as portrayed by criminal statistics which counter the idea that the public sphere is unsafe and that the private sphere is safe. For some victims of miscarriage of justice convicted of murdering a female it has sometimes been necessary to counter sexualised and inaccurate reporting concerning the appellant and original victim. The campaigns orchestrated to fight the convictions of Colin Stagg (convicted of the murder of Rachael Nickell) and Barry George (Jill Dando) both sought to counter inaccurate sexualised stories featured in tabloid newspapers as part of their campaign against miscarriage of justice (Stagg and Hynds, 2007; BBC News, 2009). *Proximity*: Refers to those crimes which fall within the geographical or cultural domain of the audience. Geographical or 'spatial' relevance concerns the location of the event whilst cultural domain focuses on issues of 'relevance'. Spatial and cultural factors often overlap but stories which accommodate both domains are more likely to be counted as newsworthy. There are often differences in how local and national news interpret proximity with particular crimes being reported by the local press whilst they are ignored by the national media. Campaigners, as will be seen later, seeking to interest the national media are sometimes surprised that whilst their case might be of interest to the

local press the national media show little inclination to publicise their campaign or write about the conviction. This changes, however, should other news values support the local story (See Chapter 6). The issue of cultural and geographical proximity affect whether a serious crime is reported national or locally. A murder will often be reported locally but for it to receive national interest it might need to meet other news requirements. Particular cases often become more newsworthy if the victim is 'young, female, white, middle-class and conventionally attractive' whilst cases involving victims who are male, working class, from ethnic minorities or whose life-style is not deemed as conventional often have less chance of generating media interest (Jewkes, 2004: 52). This is of particular concern when families seek the assistance of the media to help initiate an appeal for witnesses or to help the family with a campaign for justice. *Violence*: This news value is prevalent across all sections of the media and at a local and national level. Violence enables the media to report crimes with impact and to do so graphically. Jewkes (2004: 52-53) cites Hall *et al* (1978: 68) who suggest that:

Any crime can be lifted into news visibility if violence becomes associated with it, since violence is perhaps the supreme example of ...'negative consequences'. Violence represents a basic violation of the person; the greatest personal crime is 'murder', bettered only by the murder of a law-enforcement agent, a policeman. Violence is also the ultimate crime against property and against the State. It thus represents a fundamental rupture in the social order.

Spectacle and graphic imagery: Some crimes and acts of violence are visually reported so that the overall impact of the story is substantially increased. A consequence of focusing on the 'spectacular' and visually arresting crime is that crimes which do not meet this journalistic benchmark are often marginalized. Crimes in the private sphere like 'domestic violence, child abuse, elder abuse, accidents at work, pollution in the environment, much white collar crime, corporate corruption, state violence...' are sometimes ignored because it is harder to present such stories using graphic imagery (Jewkes, 2004: 55). Brutal murders are often reported by the mass media particularly where graphic imagery permits the media to print or televise images from the scene of crime. This can later stimulate a

campaign's ability to interest the media in their case. *Children*: Whether as victims or perpetrators, children can raise a story's profile and significantly increase the media's interest in the event. Jenkins (1992: 11) suggests that children will guarantee media interest but Jewkes (2004: 57) argues that private sphere crimes such as sexual abuse receive little attention as the media often prefer to report images of the 'ideal family'. Children who commit crimes are often of particular interest to the media. The murder of James Bulger in 1993 by two 10 year old children led to sensationalist reporting by sections of the media which mythologised the children and questioned the moral and social health of society. As such 'children' can be viewed as a 'social construction' in which notions of what constitutes childhood is subject to a process of continuous reinterpretation. Whilst children are seen as being demonstrably different from adults and representing notions of 'innocence' the Bulger case led to Venables and Thompson being demonised by the media and re-created into some kind of 'other' (Jewkes, 2004).

The news values or imperatives listed by Chibnall (1977) and Jewkes (2004) contribute to understanding the complex processes that shape news production and help explain why some stories are categorized as newsworthy whilst others are left unreported. This has particular relevance to campaigns against miscarriage of justice which attempt to interest the media in order to secure their commitment to the campaign. Many cases heard by the CACD have been successfully overturned in part by the intervention and interest of media organisations that have raised the profile of the case as a possible miscarriage of justice (Nobles and Schiff, 2002). Campaigns which do not attract media interest are therefore hindered or frustrated from achieving their aims.

Conclusion

The overall conclusion of this chapter is that discourses conceptualising miscarriage of justice are structured around competing frameworks. This provides a rich source of difference but the uncertainties in how miscarriages of justice are defined do

have implications on how the judiciary and other actors within the criminal justice system, including the media, define miscarriage of justice. These uncertainties have impinged on the administration of justice and how it is reported. In terms of the judiciary, senior Law Lords have debated possible definitions of miscarriage of justice, but recent judgements [2002, 2004 and SCUK, 2011] have done little to assist other legal practitioners define the concept as they seek to represent their clients when seeking compensation. The media often continue to define miscarriage of justice in terms that is incongruous with the operation of trials and appeals and this can similarly impact on how society understands and interprets justice in error.

For the purposes of this study miscarriages of justice will be defined in terms of wrongful conviction and innocence. Whilst miscarriages of justice can be conceptualised in broad terms as incorporating any conviction where there has been an abuse of process or breaches in due process, this study will focus on those campaigns where the alleged victims of miscarriage of justice and those campaigning for them, campaign on the basis of the appellant's alleged factual innocence. The notion of innocence, whilst not a feature of the criminal trial or appeal, does inform the activities and status of campaigns against wrongful conviction and provide many victims with the motivation and resilience to campaign despite legal obstacles. Innocence discourse and miscarriages of justice is therefore more than a declaration of 'legal innocence'. It is a statement of intent defining how a campaign should be fought and the moral and ideological roots that underpin the campaign. Wrongful conviction and 'factual innocence' in this context sustains the psychological and emotional equilibrium of alleged victims of miscarriage of justice and provides campaigners with the determination to continue.

An important area of discussion within miscarriages of justice discourse is the status of the 'wrongfully convicted' and the extent to which they too are 'victims' or 'survivors' of the criminal justice system. It is to the discipline of victimology we now turn and whether theoretical perspectives of victimology and victimization contribute to extending miscarriage of justice discourse.