MISCARRIAGES OF JUSTICE:

A DEFINITION

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ABSTRACT

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To date, debate and discussion about 'miscarriages of justice' has occurred without any firm understanding of what the term does, or should, signify. This thesis argues that in light of the significant conceptual distinctions which must be drawn between the numerous flaws and injustices which can arise at each stage of the criminal justice system, the best approach is to aim for a principled and consistent functional definition. The definition offered here is functional in that it provides a means by which attempts to identify and remedy miscarriages of justice can be analysed.

Key to the proposed definition is the act of convicting an individual of a criminal offence. This act is central to the criminal process, and therefore central to any meaningful account of miscarriage of justice. Furthermore, it is an act which is conceptually distinct from any other activity in the criminal justice system, and one which is of such significance that its improper imposition is of such concern that it warrants consideration in isolation.

In a criminal justice system which is premised on the fair and equal treatment of its citizens as moral actors, there are three distinct circumstances in which a conviction cannot stand. The first two concern themselves with situations where an individual is either innocent, or has been put at unfair jeopardy of conviction in circumstances where they may not be guilty. That is: when the individual is factually innocent of the crime of which they have been convicted or when there has been a material breach of a due process protection provided by positive law. The final situation where a conviction ought not to be upheld is not one in which the innocence of an individual is in doubt, but rather where the integrity of the criminal justice system as a whole is impugned.

Other definitions are both possible and plausible, as the distinctions drawn in order to arrive at this point are contestable. However, taken together, these three categories provide a consistent and principled account of the matters which an entity charged with reviewing criminal convictions ought to concern themselves with, and therefore a tool for analysing their success or failure

FOR REBECCA

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MISCARRIAGES OF JUSTICE: A DEFINITION

1 Introduction

The past quarter-century has seen an explosion in public concern about perceived failures in the criminal justice system. Central to this concern, and the ensuing official and academic debates, has been the notion that 'miscarriages of justice' are endemic. The term 'miscarriage of justice' accordingly carries both considerable rhetorical power, and a high level of public salience; yet it does not carry a precise meaning, nor are the circumstances in which it is invoked consistent.

While this lack of clarity or precision might be expected in public debate, it poses considerable difficulty when it comes to the academic investigation of the area. In order to study miscarriages of justice, whether one's aim is to identify their causes or frequency, or to address their remedy, it is necessary to first understand what precisely a miscarriage of justice is (and is not). Coming to such an understanding is troublesome as, while there has been some academic discussion of this matter, the proper scope of the term remains contested.

Some argue that a minimalist definition is necessary – one which focuses only on cases where something has gone exceptionally awry – but such restrictive definitions are usually offered for reasons of expediency rather than of principle, so risk being under-inclusive. Others have attempted to craft a behemoth definition of the term, but closer analysis reveals that over-extensive definitions risk conflating materially different concepts, significantly reducing their practical utility.

In light of these difficulties, this thesis argues that it is more fruitful to approach the task from a functional perspective. It seeks to identify a definition of miscarriage of

justice, within the context of a modern liberal criminal justice system, for the purpose of analysing attempts to remedy miscarriages once they have already arisen – a definition which could be used, for example, to investigate critically the work of an appellate court, or a criminal cases review commission. With the significant political, media, academic and public attention paid to the functioning of such bodies, the absence of definition at present is conspicuous.

Given the central importance that the act of convicting someone of a crime has in the criminal law, a miscarriage of justice can be broadly defined as *the conviction of an individual in circumstances where the conviction ought not to have occurred*. This is a definition which is at once extremely narrow, when one considers the numerous facets of the criminal process which are excluded from its scope, and extremely broad, when one considers all of the matters which it might encompass. As such, considerable attention must be paid to what is included and excluded to ensure that the correct distinctions are being made. This is the burden of this thesis.

The resulting definition is offered in order to suggest a way forward for those who wish to investigate the means by which miscarriages of justice can be remedied. It identifies three categories of situations in which a conviction ought not to have occurred and therefore cannot be sustained: situations were an individual is factually innocent of the crime of which they were convicted; situations in which a violation of a due process protection provided in positive law placed an individual at greater risk of a factually incorrect conviction; and finally, situations in which the conviction of an individual occurred in circumstances where foundational values of the criminal justice system were seriously violated, even though the factual accuracy of the conviction may not have been affected. The bases on which each of these categories is argued to be a miscarriage of justice are different, and the exclusions and inclusions based on, it is suggested, sound distinctions. This is not to say that they are incontestable or absolute, but rather that they

form the best available foundation on which further investigation of the subject can proceed.

2 The Importance of Definition

Gone are the days when it was assumed that Western criminal procedures were foolproof, or that errors were so infrequent that they could be safely ignored.[1] A number of very public exonerations in several jurisdictions have put lie to Judge Learned Hand's oft-cited claim that 'the ghost of the innocent man convicted' haunting criminal procedure was 'an unreal dream'.[2]

(a) Criminal Justice in 'Crisis'

In the United Kingdom, public and political interest in the subject was piqued by the efforts of investigative reporters during the 1980s, notably by those connected with a primetime show on the BBC's flagship channel dedicated to uncovering suspected miscarriages of justice.[3] Towards the end of the 1980s, this rising concern crystallised around three groups of individuals[4] convicted in the 1970s for terrorist activity related to 'the troubles' in Northern Ireland. Those convicted entered the public consciousness collectively as members of the 'Guildford Four', 'Birmingham Six' and 'Maguire Seven' following a flurry of media coverage,[5] a number of mass-marketed books,[6] and, later, a

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[1] See B MacFarlane, 'Convicting the Innocent: A Triple Failure of the Justice System' (2006) 31 Manitoba LJ 403 for an extended discussion of the emergence of concern about failures in the criminal trial process in a number of common law jurisdictions. The rise of general public concern about such matters may be earlier than even that suggested in that article – see BL Berger, 'Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals' (2005) 10 Can Crim L Rev 1.

[2] *United States v Garsson* 291 Fed 646 (SDNY 1923) 649; *MacFarlane* (n 1) 405.

[3] 'Rough Justice', a series which ran until 2007 and spawned two mass-marketed books: M Young and P Hill, *Rough Justice* (British Broadcasting Corp., London 1983) and P Hill, M Young and T Sargant, *More Rough Justice* (Penguin, Harmondsworth 1985).

[4] A further case involved a single individual who was convicted, and later acquitted, of murdering twelve people in a series of IRA bombings on the basis of misleading testimony - *R v Ward* [1993] 1 WLR 619 (CA).

[5] The media reporting of these matters is analysed in R Nobles and D Schiff, *Understanding Miscarriages of Justice : Law, the Media, and the Inevitability of Crisis* (Oxford University Press, Oxford 2000) ch 4.

film.[7] The eventual quashing of their convictions, and the emergence of a number of further questionable convictions, led both the media[8] and prominent academics[9] to diagnose the criminal justice system as being in a state of crisis.

This phenomenon was (and is) not unique to the United Kingdom. In New Zealand, the watershed was the pardoning of convicted murderer Arthur Allan Thomas following an inquiry prompted by allegations made by English investigative writer David Yallop.[10] A Royal Commission of Inquiry subsequently found that crucial evidence in the case had been planted by police.[11] Similarly, concern about miscarriages of justice in Canada developed after a number of convictions were found to be unsafe by a series of commissions of inquiry.[12] In Australia,[13] the cause célèbre was that of Lindy Chamberlain, whose conviction for the murder of her daughter was upheld on a number of occasions – including by the High Court of Australia,[14] before being quashed.[15] This case has been the subject of books,[16] a popular film[17] and even an opera.[18]

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[6] Notably, C Mullin, *Error of Judgement : The Birmingham Bombings* (Chatto & Windus, London 1986); R Kee, *Trial and Error : The Maguires, the Guildford Pub Bombings and British Justice* (Hamish Hamilton, London 1986); B Woffinden, *Miscarriages of Justice* (Hodder & Stoughton, London 1987); G Conlon, *Proved Innocent : The Story of Gerry Conlon of the Guildford Four* (Hamish Hamilton, London 1990).
[7] *In the Name of the Father* (Universal Pictures, United Kingdom, 1994).
[8] See the sources cited in *Nobles and Schiff* (n 5) 117-149.
[9] See, e.g., the declaratory title of the 1994 collection M McConville and L Bridges (eds) *Criminal Justice in Crisis* (Elgar, Aldershot 1994).
[10] DA Yallop, *Beyond Reasonable Doubt?* (Hodder & Stoughton, London 1978).
[11] *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas* (New Zealand Government Printer, Wellington 1980).
[12] See *MacFarlane* (n 1) 421-431. The Supreme Court of Canada reflected on this in 2001, stating that "The possibility of miscarriages of justice in murder cases has long been recognized… but our state of knowledge of the scope of this potential problem has grown to unanticipated and unprecedented proportions in [recent years]" – *United States v Burns* [2001] 1 SCR 283 (SCC) para 95.
[13] See generally L Weathered, 'Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia ' (2005) 17 Current Issues in Criminal Justice 203; J Langdon and P Wilson, 'When Justice Fails: A Follow-up Examination of Serious Criminal Cases since 1985 ' (2005) 17 Current Issues in Criminal Justice 179.
[14] Albeit in a split decision - *Chamberlain v R (No 2)* [1984] HCA 7; (1984) 153 CLR 521 (HCA).
[15] *Chamberlain, Re Conviction Of* [1988] NTSC 64 (Northern Territory SC).
[16] Most notably J Bryson, *Evil Angels* (Viking, Ringwood 1985).
[17] *A Cry in the Dark* (Warner Brothers, Australia, 1988).
[18] "Lindy" the Opera premiered at the Sydney Opera House on 29 October 2002.

The increase in public concern has led to attempts to craft an official response by various means,[19] and the development of a number of mechanisms to remedy perceived deficiencies with the outcomes of current criminal procedures. The subject has also become a focal point of academic debate regarding the criminal justice system. In the United Kingdom, this was most evident in the debate which surrounded the proceedings and findings of the Runciman Royal Commission, the inquiry established to investigate the 'crisis'.[20] A similar level of debate has sprouted around the work of the bodies[21] which were established on the recommendation of the Runciman Commission to replace the existing machinery for reviewing potentially flawed convictions.[22] Again, such debates are not unique to the United Kingdom. The conviction review process in Canada was examined in the early 1990s, and again in 1998 following the emergence of further high profile alleged miscarriages.[23] Official consideration was given to the adoption of a body akin to the English Criminal Cases Review Commission, although this was rejected in favour of minor reform of the existing procedures.[24] In New Zealand, amidst ongoing public concern regarding a number of high profile cases, two reports, one by the Ministry of Justice and one by an independent former Judge, have recommended the adoption of an independent conviction review body.[25]

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[19] The approaches taken across a number of jurisdictions are detailed in *MacFarlane* (n 1) and T Thorp, *Miscarriages of Justice* (Legal Research Foundation, Auckland 2005) at 11ff.
[20] The literature is too voluminous to list exhaustively, but the two edited collections *McConville and Bridges* (n 9) and C Walker and K Starmer, *Justice in Error* (Blackstone, London 1993) provide a good cross-section of the debates.
[21] The Criminal Cases Review Commission and the Scottish Criminal Cases Review Commission.
[22] See, e.g., the exchange between R Nobles and D Schiff, 'The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal' [2005] Crim LR 173 and G Zellick, 'The Criminal Cases Review Commission and the Court of Appeal: The Commission's Perspective' [2005] Crim LR 937 (and the response at R Nobles and D Schiff, 'A Reply to Graham Zellick' [2005] Crim LR 951).
[23] See *Applications for Ministerial Review - Miscarriages of Justice Annual Report 2003* (Department of Justice, Ottawa 2003) and P Braiden and J Brockman, 'Remedying Wrongful Convictions through Applications to the Minister of Justice under Section 690 of the Criminal Code' (1999) 17 Windsor YB Access to Just 3.
[24] The current process is prescribed by the Criminal Code of Canada ss 696.1 to 696.6.
[25] New Zealand Ministry of Justice, *The Royal Prerogative of Mercy - A Review of New Zealand Practice* (Wellington 2003); *Thorp* (n 19).

(b) The Absence of Definition

All of these developments have occurred without any real debate or discussion as to precisely what it is that is objectionable and in need of remedy. As this discussion has seldom occurred, the terms 'miscarriage of justice' and 'wrongful conviction' have become, to some extent, placeholders. Their meaning is often assumed, but only rarely expressed. This is troublesome, as the absence of a cognisable benchmark (or benchmarks) makes the evaluation of these mechanisms extremely difficult.[26] This is a deficiency which can be addressed by settling on a definition of 'miscarriage of justice' which is both functional and principled.

The definitional exercise is complicated by the fact that this term can, and does, mean many things to many people. Indeed, it is capable of being defined in 'nearly... whatever way one wishes'.[27] Taking the term at face value, it could mean simply a failure to achieve 'justice', however defined.[28] If defined in this way, it is inevitable that the acceptance of any definition will be contingent on the acceptance of an underlying theory of justice itself.[29] However, this is not the sense in which the term is used in either common or legal parlance. Rather, the term is usually confined to the realm of criminal justice, and to refer to a situation where a particular individual has either been subjected to compulsory state interventions (usually conviction and sentence) in circumstances where they ought not to have been, or to have avoided these consequences when they ought to have occurred.

This is not to say that there is any agreement as to what amounts to such a

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[26] See in this regard S Greer, 'Miscarriages of Justice Reconsidered' (1994) 57 MLR 58, 59.
[27] *Nobles and Schiff* (n 5) 14.
[28] *Nobles and Schiff* (n 5) 14.
[29] See C Walker, 'Miscarriages of Justice in Principle and Practice' in C Walker and K Starmer (eds) *Miscarriages of Justice: A Review of Justice in Error* (Blackstone Press London 1999) 31; A Hall, 'It Couldn't Happen Today' in M McConville and L Bridges (eds) *Criminal Justice in Crisis* (Elgar Aldershot 1994) 316.

situation – indeed, there is general *dis*agreement between lawyers and those in other disciplines, the media, and the general public.[30] Further, there is considerable disagreement within the legal academy itself. Some contend that miscarriages of justice can occur when an individual who *ought to be convicted* is acquitted – whether 'on a technicality' or due to a lack of evidence; or that they occur in situations where the outcome of a criminal proceeding fails to provide satisfaction to the victim. Others argue that a focus on the traditional model of conviction and punishment ignores the fact that most criminal justice encounters occur at a lower level – and that abuses which occur in these situations ought also to be acknowledged as miscarriages. Given the range of situations which might be included, it necessarily follows that the criteria by which attempts to identify and remedy miscarriages of justice ought to be judged are entirely contingent on the definition settled on.

(c) Why 'Miscarriage of Justice'?

Before going any further, it is necessary to take a step back and question why the term 'miscarriage of justice' is itself of any significance. If it is accepted that it is not (at present, at least) a term of art with a concrete and consistent definition, why spill yet more ink attempting to discern its meaning?

One potential reason is that the phrase 'miscarriage of justice' has a popular currency which ought not to be underestimated. Indeed, the term has such public resonance that former Prime Minister Tony Blair used the term four times in the space of four sentences in his agenda-setting June 2002 speech on 'rebalancing' the criminal justice system, asserting variously that it was 'a miscarriage of justice when delays and time-wasting deny victims justice for months on end'; 'a miscarriage of justice when the police see their hard work and bravery thrown away by courts who let a mugger out on

[30] See *Nobles and Schiff* (n 5) in particular 37-38.

bail for the seventh or eighth time to offend again; or when courts don't have the secure places to put people'; and 'perhaps the biggest miscarriage of justice in today's system when the guilty walk away unpunished'.[31]

This level of recognition is certainly important, and should be noted. As well as its use in political rhetoric, the term appears in key legislation in a number of jurisdictions[32] as well as in media[33] and academic accounts of the subject area. The term immediately locates the subject matter within the broader field of criminal justice. However, such recognition is not necessarily desirable, and can easily become a straightjacket, arbitrarily limiting the field of enquiry by reference to established (but not necessarily principled, consistent, or well reasoned) conceptions of what a miscarriage of justice is or is not.[34] Indeed, two prominent academic writers who acknowledged that 'a definition that is too restrictive runs the risk of missing important facets of injustice' have nonetheless argued that care ought to be taken not to adopt too broad a definition, lest the 'legal, moral and political salience of the term' be diminished.[35]

In light of this, it might be thought better to abandon the term and its baggage, and embark on the instant inquiry without the corset of an existing label. However, the benefits of using a term that locates a subject matter immediately, and has a place in the public consciousness, ought not to be trivialised. Further, any term which was selected as an alternative would be similarly likely to be contested, and ultimately develop the same problems. As long as care is taken not to allow preconceptions to limit the meaning

[31] Rt Hon Tony Blair 'Re-balancing of criminal justice system' (18 June 2002) London.
[32] Eg Criminal Appeal Act 1968 s 1, Criminal Justice Act 1988 s 133, Crimes Act 1961 (NZ) s 382, Supreme Court Act 2003 (NZ) s 13, Evidence Act 2006 (NZ) s 126, Criminal Code of Canada ss 696.1 – 696.6.
[33] *Nobles and Schiff* (n 5) 38.
[34] See H Quirk, 'Identifying Miscarriages of Justice: Why Innocence in the UK Is Not the Answer ' (2007) 70 MLR 759, 776-777.
[35] K Roach and G Trotter, 'Miscarriages of Justice in the War against Terror' (2005) 109 Penn State LR 967, 972, 1034. To a related end, Nobles and Schiff argued that any analytical account that strayed too far from common understandings of the term would be unconvincing - *Nobles and Schiff* (n 5) 16.

given to the term, there is no good reason to abandon it. Indeed, a number of recent works on miscarriages of justice demonstrate that it is entirely possible to recognise the rhetorical strength of the term, and to challenge popular conceptions as to its meaning at the same time.[36]

The term 'wrongful conviction' is sometimes used interchangeably with 'miscarriage of justice', although the terms are more often viewed as carrying separate meanings.[37] For present purposes, the term 'wrongful conviction' will not be used, in large part due to the fact that in academic writing the term is used almost exclusively to refer to situations in which an individual is convicted of a crime of which they were factually innocent. Indeed, this term dominates the literature in the United States, where it is almost invariably used as a synonym for 'conviction of the factually innocent'.[38] As factual innocence forms a part, but not all, of the definition to be proposed, this term is avoided.[39]

3 Towards a Functional Definition

[36] See M Naughton, 'Redefining Miscarriages of Justice' (2005) 45 B J Crim 165, 178 where the term was challenged in order to 'undermine the predominant perception that miscarriages of justice are exceptional occurrences and small in number'. See also T Anderson, 'Miscarriages: What Is the Problem?' (1993) 5 Current Issues in Criminal Justice 72 and A Ashworth, *The Criminal Process : An Evaluative Study* (2nd edn Oxford University Press, Oxford 1998) 15.

[37] Naughton, for example, distinguishes the two concepts - M Naughton, *Rethinking Miscarriages of Justice : Beyond the Tip of the Iceberg* (Palgrave Macmillan, Basingstoke 2007) 17 and Anderson argues that if the focus is to be on convictions that label ought to be used, as to do otherwise is to 'pretend that [wrongful convictions] are the only serious wrong committed by the criminal justice system' – *Anderson* (n 36) 74.

[38] *Quirk* (n 34) 771; and see CR Huff, F Sagarin and A Rattner, *Convicted but Innocent : Wrongful Conviction and Public Policy* (Sage, London 1996) xxii, 10-11; M Zalman, 'Criminal Justice System Reform and Wrongful Convictions: A Research Agenda' (2006) 17 Crim J Policy R 468; M Radelet, 'Wrongful Conviction of the Innocent' (2002) 86 Judicature 67; J Liebman, 'Rates of Reversible Error and the Risk of Wrongful Execution' (2002) 86 Judicature 79; L Griffin, 'The Correction of Wrongful Convictions: A Comparative Perspective' (2001) 16 Am U Int'l L Rev 1241, 1243 fn 2; but cf S Gross, 'Lost Lives: Miscarriages of Justice in Capital Cases' (1998) 61 Law & Comtemp Probs 125. This approach is also evident in some of the Canadian academic literature – see P Howden, 'Judging Errors of Judgment: Accountability, Independence and Vulnerability in a Post-Appellate Conviction Review Process' (2002) 21 Windsor YB Access Just 569, 573; *Roach and Trotter* (n 35) 1037.

[39] Academic writing on 'wrongful convictions' will still be referred to where relevant, as the problem is not necessarily with the substantive accounts, but rather with the tendency for the term itself to be misleading.

Writing in the wake of the Runciman Royal Commission's report, Steven Greer argued that almost no academic consideration had been given to precisely what a miscarriage of justice is.[40] While it is accurate to say that this area is *under*-theorised (especially considering the importance of the topic), it is not entirely *un*-theorised. Indeed there are now a number of academic treatments which offer an equal number of conflicting perspectives on what a miscarriage of justice is, or is not.

A review of these definitions reveals that they are heavily influenced by the purpose for which they were intended. For present purposes, a definition of what constitutes a miscarriage of justice is sought in order to provide the basis for an examination of how individual miscarriages can best be identified and remedied. As such, it is important that the chosen definition encapsulates clearly the matters which an appellate or other review body ought to be concerned with. Unfortunately none of the existing definitions appear particularly helpful in this regard. The following section attempts to explain why the main definitions offered to date are not promising, and to move towards a more useful definition.

(a) Naughton's 'Radical Redefinition'

The most prominent recent attempt at definition (in Michael Naughton's *Rethinking Miscarriages of Justice*)[41] is in fact an attempt to craft a 'radical redefinition' of miscarriages of justice. This is coloured almost entirely by the purpose for which it was intended – that is, to facilitate a better critique of the current criminal justice system as a whole by demonstrating both that miscarriages of justice are more widespread, and the harm thereby caused more extensive, than popularly understood.[42] This account starts from the position that if the extent of the problem is properly acknowledged, a stronger

[40] S Greer, 'Miscarriages of Justice Reconsidered' (1994) 57 MLR 58, 58.
[41] *Naughton* (n 37).
[42] *Naughton* (n 37).

counter-discourse to the current governing criminal justice discourse will be enabled, and that (following Foucault's theories of power) there will be a stronger impetus for reform as the government is forced to mediate between these contrary voices.[43] Such a starting point effectively presupposes the result, and it is therefore unsurprising that it proceeds to define miscarriage of justice in a way that allows the quantum of miscarriages to be easily and authoritatively calculated – something which is achieved by limiting the definition to a claim that a miscarriage of justice occurs every time an appellate court overturns a conviction.

The biggest flaw in this definition is that it is, as Naughton admits, entirely positivistic.[44] What constitutes a miscarriage of justice under this definition is dependent on both what amounts under extant law to grounds justifying the overturning of a conviction and also on the willingness of appellate judges to apply this.[45] Further, it is contingent on appellate judges *getting the decision right*.[46] This may not be a problem if the aim is, as it is in Naughton's study, to facilitate reform of the factors which contribute to convictions being overturned on appeal. However it is not helpful if the aim is to gain an understanding of which convictions *ought* to be overturned on appeal or otherwise vitiated. Naughton is not oblivious to this problem – and draws a distinction between 'miscarriages of justice' and 'wrongful convictions'.[47] Such an approach is unhelpful for present purposes, as 'wrongful convictions' form no further part of Naughton's analysis, which is instead limited to the matters which fall within his definition of 'miscarriages of justice'. Naughton's approach thus only has utility so long as the appellate courts

[43] *Naughton* (n 37).
[44] Or, as he puts it, 'legalistic' - *Naughton* (n 37) 17.
[45] *Naughton* (n 37) 43.
[46] Naughton obliquely refers to this problem, by noting an 'acute technical problem... as the decisions of the judges are... subject to their own interpretation of the law' - *Naughton* (n 37) 45.
[47] The latter includes wrongful convictions which do not form part of the 'official miscarriage of justice iceberg' such as convictions obtained via unfair guilty plea bargains or following improper disclosure, or where factually innocent people are unable to successfully challenge their conviction due to overly narrow application of appeal powers or through the existence of institutional disincentives for appeals - *Naughton* (n 37) 68-78.

themselves are doing a reasonable job of overturning convictions which are unsound (although what makes them unsound is not considered in Naughton's account). This is troublesome, as it does not provide any means by which success or failure at this task can be assessed.

As such, Naughton's approach to the definitional task must be considered of limited utility outside the purposes for which it is intended – and even then its utility could quickly be frustrated if a legislative change were to limit the appellate courts' powers, or if appellate judges were to consistently err in their duties.

(b) Intuitive Definitions

Other approaches have similar objectives in that they aim to effect changes in the criminal justice system by convincing a sceptical or cynical audience that there is a problem in need of a remedy. Such approaches typically focus on situations which individuals find intuitively unjust – paradigmatically, where a factually innocent person has been convicted of a crime.

This is particularly evident in accounts of miscarriages of justice provided by the media, where the motivation to provide a credible, intuitive narrative means that the label is almost invariably reserved for cases where individuals were convicted of (usually serious) crimes of which they were factually innocent.[48] Further, the focus is predominantly on situations where the flawed conviction is the result of official malfeasance rather than more mundane factors such as official error, or where the system worked 'as it should', but where a factually innocent person was nonetheless convicted.[49] As public discussion surrounding these issues is predominantly media-led, it is inevitable that the public conception of what constitutes a miscarriage of justice will be along

[48] See *Nobles and Schiff* (n 5) ch 4.
[49] *Greer* (n 40) 59.

similar lines.[50]

It is not solely media accounts of miscarriage of justice which confine discussion to issues of the convictions of innocents for serious crimes. Many academic treatments simply implicitly assume that it is only factual innocence which is worrisome, without any discussion or acknowledgment.[51] In other accounts the assumption is explicit, with one leading United States commentator going so far as to insist on 'proof of innocence beyond reasonable doubt' before a conviction would become troublesome.[52]

Further, due to a perceived need to 'make a sceptical public and profession accept wrongful convictions as a problem' the United States scholarship has been dominated by case studies of the conviction of factually innocent people[53] – reaching the point where academic papers have been authored urging that the wrongful conviction 'movement' shift some of its energies to addressing broader issues.[54]

One argument is that intuitive responses ought not to be dismissed too readily. Nobles and Schiff contend that the definitional exercise ought not to occur in the abstract, but should instead be tied to 'the events that are generally recognised as examples of this phenomenon'.[55] However, such an approach is unlikely to be helpful for present

[50] *Greer* (n 40) 59.
[51] For example *MacFarlane* (n 1) most evidently at 483. This was also the approach of the Runciman Royal Commission – see M McConville and L Bridges, 'Keeping Faith with Their Own Convictions: The Royal Commission on Criminal Justice' in M McConville and L Bridges (eds) *Criminal Justice in Crisis* (Elgar Aldershot 1994) 11, fn23; R Nobles and D Schiff, 'Optimism Writ Large: A Critique of the Runciman Commission on Criminal Justice' in M McConville and L Bridges (eds) *Criminal Justice in Crisis* (Elgar Aldershot 1994).
[52] CR Huff, 'What Can We Learn from Other Nations About the Problem of Wrongful Convictions?' (2002) 86 Judicature 92.
[53] K Roach, 'Wrongful Convictions and Criminal Procedure' (2003) 42 Brandeis LJ 349, 358-359. See, for e.g. D Medwed, 'Innocence Lost... And Found' (2006) 37 Golden Gate U L Rev 1. This charge has also been levelled at the academic debate in the United Kingdom - *Naughton* (n 37) 120, although much of the recent scholarship, notably Naughton's own work and that of Nobles and Schiff, is considerably more systematic.
[54] AM Siegel, 'Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Conviction Scholarship and Advocacy' (2005) 42 Am Crim L Rev 1219; *Roach* (n 53) 359.
[55] *Nobles and Schiff* (n 5) 16.

purposes, unless one is content to tie the circumstances in which a conviction cannot be upheld to public perceptions of when this should be so. Such an approach would be dangerous as it could be used to justify gross abuses of power if the public accepted that these were justified.[56]

Another explanation for the focus on factual innocence in the context of serious crimes is that these are not intended to be exhaustive definitions, but are rather used as a means of legal triage. That is, as a technique with which to ensure that scarce campaigning and legal resources are used only in cases where a positive outcome is likely.[57] Indeed, this was the dominant approach in the United Kingdom for many decades.[58]

While legal triage might explain the focus, it does not provide a justification for taking such a narrow approach at the definitional stage. Resource concerns will inevitably arise at some stage, but these are best dealt with after the scope of the problem has been identified. In this regard, Walker refers to guidance from the Council of Europe in concluding that 'cost considerations cannot be ignored, but should be applied proportionately and ultimately without detriment to fundamental rights rather than in trade offs with them'.[59] The best way to ensure that this occurs is not artificially to limit the field of inquiry at the definitional stage by reference to resource constraints, but to consider them, to the extent they may be relevant, when contemplating what the appropriate response to potential miscarriages of justice is in any given context. This would render transparent any departure from principle, thus ensuring that the process of identifying miscarriages of justice does not become a smoke-and-mirrors chamber used

[56] A Ashworth and M Redmayne. *The Criminal Process* (3rd edn Oxford University Press, Oxford 2005) 24-25; A Ashworth, 'Testing Fidelity to Legal Values' (2000) 63 MLR 633, 651.
[57] *Quirk* (n 34) 772; although such an approach is not confined to the United States, and is also present to some extent in the working practices of the English Criminal Cases Review Commission – see A James, 'Miscarriages of Justice in the 21st Century' (2002) 66 J Crim Law 326, 329.
[58] *Naughton* (n 36) 168.
[59] *Walker* (n 29) 56.

to disguise flaws in an imperfect system,[60] and that critics (or would-be critics) of the system have an accurate picture of its flaws.[61]

Thus, while there might be good practical reasons for adopting an intuitive approach, the resulting definitions are neither satisfactory or complete.

(c) Comprehensive Definitions

Other definitions attempt something altogether different – to provide a comprehensive and internally consistent account of what a miscarriage of justice is for all purposes. One such definition which has obtained some prominence in the academic literature is that offered by Walker.[62] Walker takes as his starting point the notion that justice is about distributions, and that therefore in a liberal democracy a state ought to treat individuals with equal respect for their rights and the rights of others,[63] explicitly rejecting other, more communitarian, conceptions of justice.[64] From this, Walker constructs a comprehensive definition of the circumstances in which a miscarriage of justice could be said to have occurred. Walker's definition embraces a number of miscarriages related to the treatment of those suspected, charged or convicted of crimes – specifically, situations in which they are: treated by states in breach of their rights, whether because of deficient process, the laws which applied to them, or because of the lack of a factual justification for any applied treatment or punishment; or where they are treated adversely by the state to a disproportionate extent in comparison with the need to protect the rights of others.[65]

(d) Failure to Vindicate Victims' Interests

[60] This is the essential charge levelled against the present arrangements in *Nobles and Schiff* (n 5).
[61] Viewed this way, the 'critical voice' referred to by Naughton would not be arbitrarily limited - see *Naughton* (n 37).
[62] *Walker* (n 29). Other definitions are similarly expansive – e.g. *Anderson* (n 36); *Greer* (n 40) - however Walker's is the most detailed, and most prominent.
[63] Drawing upon R Dworkin, *Taking Rights Seriously* (Duckworth, London 1977).
[64] *Walker* (n 29) 31-32, 38-42.
[65] *Walker* (n 29) 33-36.

Thus far, these are matters which could profitably feed into the present discussion. However, Walker's definition goes further, and argues that a miscarriage of justice is also occasioned in situations where the 'rights of others are not effectively or proportionately protected or vindicated'.[66] This raises the issue of victims' rights and how they ought properly to be incorporated within a criminal justice system - a significant and contentious matter which requires scrutiny. Upon closer examination, it becomes clear that protecting the rights of victims ought to be viewed as conceptually separate from the matter of how the criminal justice system ought to treat defendants or those convicted of criminal offences. This conclusion follows from an investigation of the relative position of the victim and the defendant in the criminal process.

There are two reasons why a failure to vindicate victims' rights or expectations ought not to be considered a miscarriage of justice. First, the system of criminal justice which currently obtains in liberal common law jurisdictions is premised on a principle, dating back to the Norman Conquest, by which the state (rather than the victim) assumes responsibility for punishing the guilty in criminal proceedings.[67] As Ashworth puts it: 'punishment is a function of the state, to be exercised in the public interest ... a crime is more than a harm inflicted on a victim. It is a (serious) wrong against society.'[68] This is not to deny that harm has been suffered by the individual – indeed, as Duff and Marshall explain, 'it is 'our' wrong *because* it is a wrong done to [the victim], as one of us'.[69] It instead recognises that inherent in criminal activity are harms additional to and separate from the harms visited on the individual victim, and that these harms are public in nature. The criminal act consists of 'wrongs against their particular victims *and*, through them,

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[66] *Walker* (n 29) 33, 36-37.
[67] For a discussion of the historical derivation (and challenges to) this notion, see D W Van Ness, 'New Wine and Old Wineskins: Four Challenges of Restorative Justice ' (1993) 4 Crim LF 251, 252-257.
[68] A Ashworth, 'Some Doubts About Restorative Justice' (1993) 4 Crim LF 277, 284.
[69] RA Duff and SE Marshall, 'Criminalization and Sharing Wrongs' (1998) 11 Can J Law & Juris 7, 21. Emphasis in original.

against the larger community'.[70] The individual victim's interest is therefore separate from the community's interest, and can be satisfied in other ways – for example by a compensation order obtained through a civil process;[71] it does not require a criminal conviction to be sated.

Given this framework, it is wrong to say that the *failure to convict* a particular offender amounts to an additional harm suffered by the individual victim – any such harm would rather be suffered by the community as a whole. The separate question of whether *the community* ought to be viewed as the victim of a miscarriage of justice in circumstances where a factually guilty individual goes unpunished is discussed below, but for present purposes it is sufficient to note that it is incorrect to say that the *victim* would have suffered a miscarriage of justice in such situations.

Second, the criminal law in modern liberal democracies revolves around structures which generalise the harms and wrongs suffered by victims into categories. Ensuring that the rights of each individual victim were proportionately vindicated would cut against this in a fundamental way, requiring a move towards a much more individualistic calculus of harm.[72] Thus, inclusion of rights to a particular outcome within the instant definition would require resiling from what is a key feature of most modern criminal justice systems: that the conviction and punishment of criminals is a public matter of which victims have no more claim to a particular outcome than the public at large.[73]

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[70] RA Duff and SE Marshall, 'Communicative Punishment and the Role of the Victim' (2004) 23 Criminal Justice Ethics 39, 40 (emphasis in original). This sentiment finds reflection in the Sentencing Act 2002 (NZ) s 7, which states that one purpose of sentencing is to "to hold the offender accountable for harm done *to the victim and the community* by the offending" (emphasis added).
[71] See A Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 B J Crim 578, 584-588.
[72] B Hudson, 'Balancing the Rights of Victims and Offenders' in E Cape (ed) *Reconcilable Rights? : Analysing the Tension between Victims and Defendants* (LAG London 2004) 125-136.
[73] A Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in A Crawford and J Goodey (eds) *Integrating a Victim Perspective within Criminal Justice : International Debates* (Ashgate Aldershot

Admittedly, this framework has been challenged in recent decades. The most visible evidence of this is the provision in some jurisdictions of a means by which victims can provide a personal account of the impact of the offence to the sentencing judge.[74] The judge may then be bound to give consideration to the victim's views – although not necessarily to give effect to them.[75] While this signals a move towards a more visible role for victims in the criminal process, it does not suggest that there has been a departure from the principle that victims' subjective views as to the appropriate penalty are irrelevant to the sentencing exercise. Where such procedures are in operation, the information which the victim is permitted to convey is almost always limited to factual (or allegedly factual) information surrounding the impact of the crime on them, rather than a statement of the victim's opinion as to the appropriate sentence.[76] Given these limitations, such procedures do not provide a means for sentencers to evaluate a victim's views as to the appropriate penalty, nor do they create a duty to give effect to them. As such, it is not possible to draw the conclusion that these developments elevate failures to give effect to a victim's subjective views into miscarriages of justice.

While victims might not have as strong a claim as Walker asserts, there are still strong reasons - moral, practical and legal - for recognising that victims do hold some

2000); M Hildebrandt, 'Trial and 'Fair Trial': From Peer to Subject to Citizen' in A Duff and others (eds) *The Trial on Trial* (Hart Oxford 2006) 34-35.

[74] For e.g. Victims Rights Act 2002 (NZ) ss 17-21, *Practice Direction (Criminal Proceedings: Victim Personal Statements)* [2001] 1 WLR 2038 (CA), Criminal Code of Canada s 722, Criminal Justice Act 1993 (Ireland) s 5.

[75] Eg Sentencing Act 2002 (NZ) s 8(f).

[76] J Chalmers, P Duff and F Leverick, 'Victim Impact Statements: Can Work, Do Work (for Those Who Bother to Make Them)' [2007] Crim LR 360, 363 – the exceptions being "a few operating in the United States and Australia". As the New Zealand Court of Appeal put it, statements "must be factual and relevant… [o]therwise they are likely to hinder rather than help the sentencing judge in his task" *R v Haddon* (1990) 6 CRNZ 508 (NZCA) 511. See the decision of the English Court of Appeal (Criminal Division) to similar effect in *R v Perks* [2001] 1 Cr App Rep (S) 66 (CACD). This narrowing of focus to "information" rather than "opinion" has been the subject of criticism – see P Sankoff, 'Is Three Really a Crowd? Evaluating the Use of Victim Impact Statements under New Zealand's Revamped Sentencing Regime' [2007] NZ Law Review 459.

rights.[77] Indeed, recent years have seen a move towards greater provision for victims within the criminal justice system.[78] However within the current criminal justice framework, the rights which victims can legitimately claim are those which have been variously described as 'service'[79] or 'process'[80] rights. These are rights not to a particular outcome from a criminal justice process, but rather to services such as information, protection and support.[81] While a victim could legitimately claim that a failure to provide for these needs means that society has failed to fulfil its obligations towards them, the nature of the obligation does not appear to be such that it provides a basis for founding a claim that something as fundamental as a miscarriage of justice has occurred.[82] A victim may also have a legitimate interest in receiving compensation – whether it is from the offender or from the state – for their injuries, but the rationale for this is separate, and the liability is civil in nature rather than criminal.[83]

Thus, despite recent moves to contest dominant views about the proper place of the victim, the current approach to criminal justice in liberal states does not provide a sufficient basis for viewing a failure to protect or vindicate victims' rights or interests 'effectively or proportionately' as miscarriages of justice. This might be different if the criminal justice paradigm were different. There are those who argue that both aspects of

[77] Practically, the state is reliant on victims to come forward with complaints about the crimes they have suffered, and to participate in the prosecution of offenders. Morally, the victims have suffered harm, and are therefore a vulnerable group. Legally, victims now have some rights under domestic law and under the European Convention on Human Rights – see *Doorson v Netherlands* (1996) 22 EHRR 330 (ECtHR), *Van Mechelen v Netherlands* (1997) 25 EHRR 647 (ECtHR), although the limitations of these rights are evident in the recent treatment of these authorities by the House of Lords in *R v Davis* [2008] UKHL 36.
[78] See PE Rock, *Constructing Victims' Rights : The Home Office, New Labour, and Victims* (Oxford University Press, Oxford 2004) esp ch 4; J Dignan, *Understanding Victims and Restorative Justice* (Open University Press, Maidenhead 2005) ch 3.
[79] *Ashworth* (n 68) 281.
[80] J Jackson, 'Justice for All - Putting Victims at the Core?' (2003) 30 J Law & Soc 309.
[81] See J Jackson, 'Putting Victims at the Heart of Criminal Justice: The Gap between Rhetoric and Reality' in E Cape (ed) *Reconcilable Rights? : Analysing the Tension between Victims and Defendants* (LAG London 2004).
[82] See *Ashworth* (n 68) 282, which argues that victims have a claim to these services for the 'same cluster of reasons that underlie health care and social services for the suffering and the disadvantaged'.
[83] Although compensation may be ordered as part of a criminal process – see *Ashworth* (n 71) 584.

this dominant paradigm are flawed: that the state ought not to be in the business of 'stealing conflicts' from victims (and offenders),[84] and that there is no reason why 'equal justice for offenders should be a higher value than equal justice ... for victims'.[85] For example, if a restorative justice framework were enthusiastically adopted, then there would be a strong case for arguing that a failure to achieve a subjective notion of justice for individual victims amounted to a miscarriage of justice. However, such frameworks are neither common nor comprehensive in any modern liberal state, with adoption being rather at the level of small-scale pilots, or in specialised areas such as youth justice. As a New Zealand Parliamentary inquiry recently concluded: 'at present ... [the state] is responsible for prosecuting offenders in the interests of the public, not of the victim... A fundamental change ... would be necessary for the formal role of the victim to change significantly.'[86] Even if Braithwaite is correct, and there is a 'new social movement' calling for the adoption of a victim-centred criminal justice system, and that this movement is 'beginning to take off',[87] its work product is far from mainstream[88] and there may be formidable obstacles to this ever being so.[89]

In summary, under the present paradigm, victims have a legitimate interest in the *process* but do not have any greater interest than the public at large in the *outcome* of a criminal trial. As Roach and Trotter rightly note, 'in a liberal society, the imprisonment of the innocent has a special significance that is different from a failure to respect victims

[84] N Christie, 'Conflicts as Property' (1977) 17 B J Crim 1, 4, 7.
[85] A Morris, 'Critiquing the Critics. A Brief Response to Critics of Restorative Justice' (2002) 42 B J Crim 596.
[86] New Zealand House of Representatives Justice and Electoral Committee, 'Report of Inquiry into Victims' Rights' (Wellington, December 2007) 30.
[87] J Braithwaite, *Restorative Justice & Responsive Regulation* (Oxford University Press, Oxford 2002) ch 1.
[88] See the contributions to I Aertsen, T Daems and L Robert, *Institutionalizing Restorative Justice* (Willan Publishing, Cullompton 2006) which suggest that restorative justice and cognate victim-centred conceptions of criminal justice are currently very much at the periphery of the criminal justice system.
[89] See M Tonry, 'The Prospects for Institutionalization of Restorative Justice Initiatives in Western Countries' in I Aertsen, T Daems and L Robert (eds) *Institutionalizing Restorative Justice* (Willan Publishing Cullompton 2006).

or vindicate their interests or rights'.[90] This point can be more broadly stated: it is not simply the imprisonment of the innocent which has a special significance, but the treatment of the accused at all stages of the criminal process, for reasons which will be elaborated below. As such, the protections or rights offered to victims are an important topic, but one which ought to be viewed as outside the scope of the instant inquiry; although this is not to say that either the *community* or the *state* does not have a particular stake in ensuring that offenders are punished for their crimes, a point which is also considered in some detail below.

The conflation of victims' and defendants' rights is representative of a tendency in attempts to provide an umbrella definition of miscarriages of justice to give insufficient attention to what are often significant conceptual differences. While the authors of such ambitious accounts can hardly be faulted for not considering these distinctions in any detail, these differences are of considerable moment in terms of what is necessary by way of remedy. The impossibility of applying one single remedy, or approach, to the diverse and divergent species of miscarriages of justice Walker identified is evidenced by the fact that he felt it necessary to limit his substantive discussion of these to only one subset – process-related miscarriages.[91]

(e) Lessons

What this brief summary of existing attempts at definition reveals is that the purpose for which a definition is created is of immense significance. Definitions offered for one purpose invariably have deficiencies which make them ill-suited for others. Perhaps because of these difficulties, a number of accounts have avoided the definitional exercise altogether, focusing instead on high profile cases of wrongful conviction (in the factual

[90] *Roach and Trotter* (n 35) 1037.
[91] *Walker* (n 29) 35. The justification for this was that it was these situations which had been at the heart of the controversial cases, reviews and reforms which formed the immediate factual background against which the then extant discussion of miscarriages of justice was occurring.

sense) for reasons of 'analytical simplicity',[92] or have adopted working definitions, while acknowledging that it may be impossible to come up with anything more comprehensive.[93]

There is a way through this maze. That is to recognise the immense, and likely insurmountable, hurdles which face anyone attempting to frame an internally consistent account of what constitutes a miscarriage of justice in all circumstances, and to set one's sights slightly lower; aiming for a consistent functional definition to serve a particular purpose. Under such an approach, the objective is not to provide a holistic account of everything which might be considered unjust in a criminal justice context, nor to offer a more limited definition which purports to be of general application. A functional account ought to clearly identify the purpose for which it is intended, and provide a principled account of what falls within its scope and why.

4 The Definition

Simply calling something a functional definition does not obviate the need to clearly explain why any given element is or is not being included within that definition. This is the task of the following section.

The starting point is the purpose outlined above: to provide the basis for an examination of the how individual miscarriages can best be identified and remedied once they have occurred. As the survey of previous attempts at definition demonstrates, for such an exercise to be successful it is important not to attempt to bring too many discrete matters within the one heading, due to the conceptual confusion this creates. This, coupled with the breadth of matters which could conceivably fall within the scope of the

[92] Eg G Edmond, 'Constructing Miscarriages of Justice: Misunderstanding Scientific Evidence in High Profile Criminal Appeals' (2002) 22 Oxford J Legal Stud 53, 56.
[93] Eg RG Hammond, 'The New Miscarriages of Justice' (2006) 14 Waikato LR 1, 3-5.

term 'miscarriage of justice', means that it is necessary to be explicit about what is and is not included.

A common feature of almost all existing definitions of miscarriage of justice is that they include the situation where someone is convicted of a criminal offence in circumstances where they ought not to have been. That such situations are a miscarriage of justice is an important conclusion which recognises that the act of convicting someone of a criminal offence is a significant one, and marks out that individual as someone who is worthy of moral censure and sanction.[94] It is this act – conviction – which will be used as the departure point for the definition of miscarriage of justice proposed here.

Such a focus is justified by the singular importance of the act of conviction both to the criminal law and society more generally. The notion of conviction is 'central to [the criminal law's] distinctiveness from other areas of our legal system', as it 'has the effect of labelling the defendant as a criminal' and 'in so doing... makes a public, condemnatory statement about that defendant: that [he or] she is blameworthy for doing the *actus reus* – the inflicting the harm or wrong proscribed'.[95] By convicting an individual of a criminal offence, the court or tribunal changes the status of an individual – from law abiding citizen to morally culpable offender. This change occurs irrespective of whether any sanction is imposed subsequently.[96] As such, ensuring that convictions are not imposed in circumstances where they ought not to be is of crucial importance. It is on this foundational element of criminal law which the definition proposed here will focus.

[94] See A Von Hirsch and A Ashworth, *Proportionate Sentencing : Exploring the Principles* (Oxford University Press, Oxford 2005) 17-27; C Wells, 'The Royal Commission on Criminal Justice: A Room without a View' in M McConville and L Bridges (eds) *Criminal Justice in Crisis* (Elgar Aldershot 1994) 57; AAS Zuckerman, *The Principles of Criminal Evidence* (Clarendon, Oxford 1989) 5.
[95] AP Simester and ATH Smith, 'Criminalization and the Role of Theory' in AP Simester and ATH Smith (eds) *Harm and Culpability* (Clarendon Press Oxford 1996) 6-7. The possible exception of strict liability offences is considered later in this chapter.
[96] J Horder, *Excusing Crime* (Oxford University Press, Oxford 2004) 144; GR Sullivan, 'Making Excuses' in AP Simester and ATH Smith (eds) *Harm and Culpability* (Clarendon Press Oxford 1996) 152.

The working definition of a miscarriage of justice offered for the purposes of this study is therefore: *any case in which a person who ought not to have been convicted of a criminal offence is nonetheless convicted.* Even stated this narrowly (by comparison to other definitions), this is a very broad conception. The obvious question is: 'what criminal offences ought we be concerned with?', but other matters require consideration – what about those convicted of offences which one might argue ought never to have amounted to crimes, or those convicted of strict liability offences? There are also a number of remaining issues surrounding what is excluded: why are convictions prioritised over situations where a factually guilty person walks free?; or the myriad low-level criminal justice interventions which, while not resulting in convictions, still blight the lives of those to whom they are directed?

(a) Which Criminal Offences?

The first question arising from the above definition is what constitutes a 'criminal conviction'? One must determine whether the definition ought to be limited to serious crimes, or whether it ought also include less serious offences.

Many accounts of miscarriages of justice focus either primarily or exclusively on serious, indictable crimes.[97] To the extent that this reflects concerns about resourcing, similar to the 'legal triage' concept discussed above, these should be put to one side at the definitional stage for the same reasons.[98] In many cases the reasons for this focus are not concerns as to resourcing but rather reflect a conclusion that problems with comparatively minor offences can safely be put to one side as they are less important, both individually and in aggregate, than those which arise in the area of serious indictable crime.[99] This is most obvious in the United States academic literature, which is

[97] *Hammond* (n 93) 2.
[98] See 14-16, above.
[99] In some instances this is rendered explicit – see *Howden* (n 38) 598-599 and also the Runciman Royal Commission which saw the fact that the high profile miscarriages which prompted its formation had related

dominated by discussion of miscarriages of justice as they arise in a death penalty context.[100] However, when one considers that the vast majority of convictions are for comparatively minor offences, following a summary proceeding with lowered procedural safeguards, the justification for adopting this assumption becomes considerably less convincing.[101]

Further, there is an observable trend towards having an ever greater proportion of criminal offences heard summarily.[102] Even if this was not the case, the fact remains that, irrespective of the objective level of seriousness attributed to the offence, if a conviction ought not to have occurred there is still no justification for the imposition of censure or sanction, no matter how minimal – an especially pressing concern when one bears in mind that the effects of a conviction for even a minor offence can be considerable for an individual.[103] Given this, convictions for both indictable and summary offences will be

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to convictions for serious crimes as providing reason for its attentions to be directed at this area – *McConville and Bridges* (n 51) 10.

[100] See notably the contributions to SD Westervelt and JA Humphrey, *Wrongly Convicted : Perspectives on Failed Justice* (Rutgers University Press, New Brunswick 2001); J Dwyer, P Neufeld and B Scheck, *Actual Innocence : Five Days to Execution and Other Dispatches from the Wrongly Convicted* (1st edn Doubleday, New York 2000); S Gross, 'Lost Lives: Miscarriages of Justice in Capital Cases' (1998) 61 Law & Comtemp Probs 125.

[101] *McConville and Bridges* (n 51) 12; *Ashworth and Redmayne* (n 56) 338; L Bridges, 'Normalising Injustice: The Royal Commission on Criminal Justice' (1994) 21 J of Law and Society 20, 22; P Darbyshire, 'An Essay on the Importance and Neglect of the Magistracy' [1997] Crim LR 627; *Naughton* (n 37) 46; C Walker, 'The Judiciary' in C Walker and K Starmer (eds) *Miscarriages of Justice: A Review of Justice in Error* (Blackstone Press London 1999) 203-204; D Dixon, 'Police Investigative Procedures: Changing Legal and Political Contexts of Policing Practices' in C Walker and K Starmer (eds) *Miscarriages of Justice: A Review of Justice in Error* (Blackstone Press London 1999) 81; *Quirk* (n 34) 769; R Auld, *Review of the Criminal Courts of England and Wales : Report* (Stationery Office, London 2001) 94, noting that Magistrates' Courts deal with over 95% of all prosecuted crime, and that 91% of that work is handled by lay magistrates.

[102] See Criminal Law Act 1977 s 15, Criminal Justice Act 1988 ss 37, 39, Criminal Procedure and Investigations Act 1996 s 49; J Jackson, 'Trial Procedures' in C Walker and K Starmer (eds) *Miscarriages of Justice: A Review of Justice in Error* (Blackstone Press London 1999) 184-186; *Auld* (n 101) 213-214.

[103] For example, by blighting a young person's career prospects - M Brogden, 'Gatekeeping and the Seamless Web of the Criminal Justice Process' in M McConville and L Bridges (eds) *Criminal Justice in Crisis* (Elgar Aldershot 1994) 153 or by barring individuals from participation 'in activities of intrinsic worth to their pursuit of an autonomous life' - J Horder, 'Strict Liability, Statutory Construction, and the Spirit of Liberty' (2002) 118 LQR 458, 459. Also, any criminal conviction almost invariably carries with it a degree of social stigma – see N Walker, *Punishment, Danger and Stigma : The Morality of Criminal Justice* (Blackwell, Oxford 1980) ch 7.

included within this definition.

(b) Strict Liability and Unjustified Proscriptions

A complication arises as a result of the continued use of 'strict liability' offences - that is offences where moral blameworthiness is not a necessary prerequisite for liability.[104] In such cases, it is questionable whether the state is necessarily labelling the offender as morally culpable, as it could be said that strict liability crimes are not as stigmatising as those which require mens rea. Such an argument relies on a distinction between 'stigmatic' and 'non-stigmatic' offences, as well as public awareness of this distinction and its contours – two matters which are difficult to establish.[105] However, if this distinction is rejected, it follows that by convicting a person of a strict liability offence, the state is declaring that the individual is morally blameworthy, even when this has not been established – and is therefore indulging in what Simester describes as 'systematic moral defamation' of those convicted.[106] If this is the case, then it is arguable that *any conviction* for a strict liability offence would amount to a miscarriage of justice under the definition proposed above.

This creates a real difficulty, which can only be resolved by reference to the (functional) purpose for which the present definition is sought. If one wishes to evaluate the ability of a system to identify and correct miscarriages of justice in individual cases, then it is necessary to focus on deviations from what the system is intended to achieve. Thus, a conviction for a strict liability offence per se would only be of interest for present purposes if there was some rule of law which precluded convictions in such

[104] Cf A Duff, *Answering for Crime : Responsibility and Liability in the Criminal Law* (Hart, Oxford 2007) ch 10, which suggests that it may be possible 'at least in principle', to argue that there are circumstances in which strict liability can be justified on the grounds of blameworthiness, although these will be rare.
[105] AP Simester, 'Is Strict Liability Always Wrong?' in AP Simester (ed) *Appraising Strict Liability* (Oxford University Press Oxford 2005) 40-41.
[106] *Simester* (n 105) 34.

circumstances.[107] This means that, in the absence of a specific prohibition on strict liability offences, the present definition would only encompass a subset of those convicted of a strict liability offence – those who were convicted in the circumstances falling within the ambit of the substantive definition proposed below.

For similar reasons, this definition does not concern itself with the issue of whether the criminalisation of the proscribed conduct is itself justified.[108] This is a matter which has caused difficulties in other proposed definitions. Although Greer argues that the lack of a moral justification for a substantive proscription means that a conviction ought to be considered a miscarriage of justice, he frankly acknowledges that there is no easy way in which determinations as to moral validity could be made, apart from a suggestion that a human rights or due process approach may require that the harm principle be applied.[109] This provides a very poor basis for determining whether a miscarriage of justice has occurred in individual cases. What would be required is a clear articulation of the conditions of validity for criminal offences, something which is much more a matter of constitutional law than of criminal procedure.

This might seem troubling as a state could, in theory, significantly reduce the number of miscarriages of justice by adopting broadly worded criminal prohibitions such

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[107] For example, under the Canadian Charter of Rights and Freedoms, offences that do not require proof of mens rea are impermissible if they may result in imprisonment - *Reference Re Section 94(2) of the Motor Vehicle Act* [1985] 2 SCR 486 (SCC). This is clearly *not* the position in England, where the House of Lords has recently rejected the notion that strict liability offences are subject to such constraints - see *R v G* [2008] UKHL 37.

[108] Absent any argument as to the formal or constitutional validity of the legislation in question. In this sense, the definition concerns itself with what Huff et al label 'behavioural innocence' – *Huff, Sagarin and Rattner* (n 38) xxii who argue that in this sense Jesus would not have been the subject of a Miscarriage of Justice as he was condemned for breaching a then extant legal proscription; c.f. Australian High Court Judge Michael Kirby who seizes on the same example, and argues that Jesus' trial *was* a Miscarriage of Justice ('an example of how something can be lawful, but profoundly unjust') – M Kirby, 'Miscarriages of Justice - Our Lamentable Failure' [1991] Denning LJ 97, 100.

[109] *Greer* (n 40) 67.

that a wide range of conduct was proscribed,[110] or by abolishing mens rea requirements such that the evidential threshold required for conviction was considerably lowered. From a functional perspective, if this were to occur on a widespread basis, it would suggest that there was a fundamental problem with the criminal justice system as a whole, which was best remedied by means of adherence to a rule, such as that that which obtains under Article 6 of the European Convention on Human Rights, that 'a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his [or her] conduct: he [or she] must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[111] Conviction in the face of a failure to comply with such a requirement, or by discriminatory application of such wide proscriptions, may amount to a miscarriage of justice of the third category discussed below,[112] but would not amount to a miscarriage under the instant category.

(c) Administrative or Quasi-Criminal Proceedings

What about situations where the liability is administrative, quasi-criminal, or involves military or other cognate proceedings of a kind which have become increasingly common as part of the so called 'War on Terror'?[113] This is not of solely marginal importance. There is an observable trend in a number of countries towards moving conduct which was previously labelled 'criminal' out of the criminal law and into the area of regulatory or administrative law. Such reclassification will usually have the effect of subverting the human rights protections which would otherwise obtain, meaning that an individual is

[110] It has been argued that this is actually occurring at present in the terrorism context – see *Roach and Trotter* (n 35) 993-994. Such broadly worded offences also accord considerable low-level discretion, inviting discrimination and inequalities into the process – *Brogden* (n 103) 153.
[111] *The Sunday Times v United Kingdom (No 1)* (1979) 2 EHRR 245 (ECtHR) para 49 – see also *Hashman and Harrup v United Kingdom* (2000) 30 EHRR 241 (ECtHR).
[112] See 66-78, below.
[113] *Roach and Trotter* (n 35).

subject to (often significant) penalties without standard procedural protections.[114]

These instances are not included within the instant definition, although this is not to degrade the seriousness of such proceedings, or to suggest that they are not capable of occasioning injustices. It is rather in recognition of the fact that the problem is distinct. Roach and Trotter justify their classification of the treatment of some terrorist suspects outside of a formal criminal process as a miscarriage of justice by arguing that governments ought not to be able to avoid 'concerns about innocence and the political problems that accompany the detention of the innocent simply by selecting procedures that do not result in formal determinations of guilt and innocence'.[115] As to the latter statement, they are undoubtedly correct. It is admitted that privations equivalent (or greater) in severity to those imposed following criminal convictions can be imposed in circumstances where there is no such conviction – whether via special legislative schemes which formally obviate the necessity for such requirements,[116] or by other extra-judicial means. However, it is not the case that excluding such actions from a functional definition of the type proposed here allows governments to escape criticism for their actions. The point is that either the processes by which these privations are imposed do not comply with the standard criminal model, and are objectionable for this reason, or that the situation is such that extant criminal processes are inapt and a new model is needed.[117] It is these very factors which make such processes unsuitable for inclusion within the current definition. It is not the case that there has been a miscarriage in the criminal justice system, but rather that the criminal justice system has not been engaged

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[114] See B Emmerson and A Ashworth, *Human Rights and Criminal Justice* (1st edn Sweet & Maxwell, London 2001) 149-155; S Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, Oxford 2005) 13-31; A Ashworth, 'Social Control and "Anti-Social Behaviour": The Subversion of Human Rights?' (2004) 120 LQR 263.

[115] *Roach and Trotter* (n 35) 1034.

[116] As in the anti-terrorism context - *Roach and Trotter* (n 35) 1039-1040.

[117] See R Dworkin, 'Terror & the Attack on Civil Liberties' (2003) 50(17) New York Review of Books 37; C Gearty, 'Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant, Or Indispensable?' [2005] Current Legal Problems 25; NK Katyal and LH Tribe, 'Waging War, Deciding Guilt: Trying the Military Tribunals' (2002) 11 Yale LJ 1259 .

at all – a quite distinct problem, which can best be solved by separate processes such as the anti-subversion doctrines which international and supranational human rights bodies have developed to counter such attempts.[118]

(d) 'Wrongful Acquittals'

Also controversial is that this definition does not include situations where a factually guilty person escapes conviction. This too puts the definition at odds with those proposed elsewhere, a number of which view the situations of the acquittal of the innocent and conviction of the guilty as equivalent[119] or nearly equivalent.[120] This point is crucial to any account of miscarriages of justice. If it is accepted (as will be argued below) that the acquittal of a factually guilty person is a categorical miscarriage of justice, and also that it can be a miscarriage of justice to convict a factually guilty person in some circumstances, then occasionally the awkward situation will arise under which a 'miscarriage of justice' will result no matter what the outcome. One possible approach is to argue that the two problems are functionally distinct, and that therefore the two ought to be treated separately for purely practical reasons. While this could perhaps be justified for present purposes, disposing of such a fundamental question in this way would not be an entirely satisfying response. As such, it is necessary to examine why it is that the conviction of the innocent is a graver error than the acquittal of the guilty. A number of explanations have previously been offered, not all of which are convincing.

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[118] See in the context of the European Convention on Human Rights *Engel v Netherlands* (1979) 1 EHRR 647 (ECtHR); *Benham v United Kingdom* (1996) 22 EHRR 293 (ECtHR); *Ezeh and Connors v United Kingdom* (2003) 39 EHRR 1 (ECtHR); and under the International Covenant on Civil and Political Rights, *Van Duzen v Canada* Communication No R12/50, UN Doc Supp No 40 (A/37/40) (1982) (UNHRC) para 10.2.

[119] Former Prime Minister Tony Blair went even further in a key speech in June 2002 and stated that 'It is perhaps the biggest miscarriage of justice in today's system when the guilty walk away unpunished' – Rt Hon Tony Blair 'Re-balancing of criminal justice system' (18 June 2002) London. See also *R v Stirland* [1944] AC 315 (HL) 324; Royal Commission on Criminal Justice, *The Royal Commission on Criminal Justice : Report* (Cm 2263, 1993) 1-2; D Givelber, 'Lost Innocence: Speculation and Data About the Acquitted' (2005) 42 Am Crim L Rev 1167.

[120] *Greer* (n 40) 74.

Lacey has argued that viewing the two as equivalent 'both contradicts normal usage and expresses a symmetry which is contradicted... by the presumption of innocence and the burden of proof'.[121] It is easy to see how, if one accepts the 'classical theory' of presumption of innocence – i.e. that the presumption of innocence 'protects citizens from being convicted of a criminal offence where it has not been proved beyond reasonable doubt that his conduct falls within that criminal offence as defined'[122] - as an absolute moral principle, this would be so. If guilt is not proved, the factually guilty defendant is entitled to be released[123] – this is not only not a miscarriage of justice, but also an example of the justice system behaving precisely as it should. Indeed, the very adoption of 'beyond reasonable doubt' as the standard of proof in criminal matters can be seen as an acceptance that there is a significant difference between the conviction of the innocent and the acquittal of the guilty – if this were not so, the burden would be one that was largely indifferent as to which consequence occurred – viz, the balance of probabilities.

However, this is not a sufficient justification for disregarding the problem altogether. The presumption of innocence may not stand alone. Indeed, there is a wide variety of criminal offences for which the presumption of innocence either does not apply at all, or applies in an attenuated form.[124] This is not only the case at the margins of criminality, with 'reverse burden' provisions playing an important part in the prosecution

[121] N Lacey, 'Missing the Wood... Pragmatism vs Theory in the Royal Commission' in M McConville and L Bridges (eds) *Criminal Justice in Crisis* (Elgar Aldershot 1994) 34 see also *Naughton* (n 37) which argues that the term Miscarriage of Justice 'do[es] not and cannot relate to the wrongful acquittal of the guilty in any practical or strict legal sense as this undermines fundamental principles that underpin the legitimacy of the entire criminal justice process'.
[122] V Tadros, 'Rethinking the Presumption of Innocence' (2007) 1 Crim Law and Philos 193, 197.
[123] A Sanders, 'Thinking About Criminal Justice' in M McConville and L Bridges (eds) *Criminal Justice in Crisis* (Elgar Aldershot 1994) 144.
[124] See V Tadros and S Tierney, 'The Presumption of Innocence and the Human Rights Act' (2004) 67 MLR 402; A Ashworth and M Blake, 'The Presumption of Innocence in English Criminal Law' [1996] Crim LR 306.

of many serious offences punishable by considerable periods of imprisonment.[125] While courts occasionally interpret such provisions as only imposing an evidential, rather than a substantive, burden,[126] there is no strict rule to this effect (the overriding consideration usually being a pragmatic assessment of proportionality),[127] and substantive burdens have been upheld in a number of cases.[128]

Nor does reference to the presumption of innocence explain situations where a factually guilty person does not even face the prospect of conviction because of actions by those in the prosecutorial process – for example a decision *not* to charge someone based on an incorrect application of the prosecutor's discretion.[129]

Given this, the matter requires much closer scrutiny than it has hitherto been given in miscarriage of justice literature, much of which merely recites Blackstone's aphorism that it is 'better ten guilty men go free than one innocent be punished' without further elaboration.[130] The first step must be to identify why the acquittal of the guilty is problematic. This requires a consideration of the source and extent of any duty to punish those who are guilty of criminal offences.

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[125] *Ashworth and Blake* (n 124) 314 concluded that, as of 1996, 'no fewer than 40 per cent of offences triable in the Crown Court appear to violate the presumption'. There is little reason to suspect that this figure has improved in the intervening decade.

[126] As in *A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264 (HL), which concerned a terrorism-related offence.

[127] In the British and European contexts, this is a largely unstructured assessment, see *Salabiaku v France* (1988) 13 EHRR 379 (ECtHR); *Brown v Stott* [2000] UKPC 3, [2003] 1 AC 681 (PC); and *R v G* [2008] UKHL 37, whereas under the Canadian Charter of Rights and Freedoms, the test is more structured, and insists on stricter proportionality between the object sought to be achieved and the means used - *R v Oakes* [1986] 1 SCR 103 (SCC). A similar test obtains in New Zealand with regard to whether the presumption of innocence has been violated, however as the New Zealand Bill of Rights Act 1990 is not supreme law, legislation which unambiguously places a reverse onus on a defendant will prevail, even if it is inconsistent with the presumption of innocence - *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 (NZSC).

[128] For example, *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264 (HL); *R v Johnstone* [2003] UKHL 28, [2003] 1 WLR 1736 (HL); *R v Phillips* [1991] 3 NZLR 175 (NZCA); *R v Whyte* [1988] 2 SCR 3 (SCC). See generally I Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] Crim LR 901.

[129] See *Greer* (n 40) 63-66.

[130] For a detailed discussion of the history and modern usage of 'The Blackstone Ratio' see A Volokh, 'N Guilty Men' (1997) 146 U Penn LR 173.

(e) A Duty to Punish?

The crucial question here is whether there is a duty to punish the guilty, and if so, whether this is as stringent as the obligation to punish only those who are guilty. While the most obvious source of such a duty lies in the moral sphere, recent developments in human rights law lend support to a claim that there are, under some circumstances, legal duties to prosecute particular individuals.

The source of a potential legal duty is the fact that states party to key international or supranational human rights treaties – such as the International Covenant on Civil and Political Rights or the European Convention on Human Rights - are in some circumstances under an obligation to investigate crime with a view towards prosecution and, therefore, conviction and sanction.[131] However, it is doubtful that this could establish a foundation for the inclusion of wrongful acquittals in the definition of miscarriage of justice, as this is not an independent obligation, but is one which arises only when a substantive right is triggered, as part of the positive obligation to secure these rights to all within the state's jurisdiction.[132] To date, it is only in the contexts of the right to life, the right to be free from torture or inhuman or degrading treatment or punishment and the right to respect for family and private life that this obligation has been taken to even arguably require the prosecution of particular individuals.[133] The present high water mark appears to be the statement that the right to life requires that 'there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances' and that the investigation 'must be capable of establishing the cause of the injuries and the identification of those responsible *with a view to their punishment*.'[134] A

[131] The obligation has been most clearly articulated in jurisprudence under the European Convention on Human Rights, but the International Covenant also protects materially similar substantive rights and requires states party to 'respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind' (Article 2(1)), the source of the duties recognised under the European Convention – see *Bautista De Arellana v Colombia* Communication No 563/1993, UN Doc CCPR/C/55/D/563/1993 (1995) (UNHRC). Similar obligations potentially arise under other core human rights treaties, for example the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of Racial Discrimination and the Convention on the Rights of the Child – see F Klug, 'Human Rights and Victims' in E Cape (ed) *Reconcilable Rights? : Analysing the Tension between Victims and Defendants* (LAG London 2004) 112-113.

[132] *Klug* (n 131) 114.

[133] See generally AR Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart, Oxford 2004) and B Emmerson, A Ashworth and A Macdonald, *Human Rights and Criminal Justice* (2nd edn Sweet & Maxwell, London 2007) ch 18.

[134] *Menson and Others v United Kingdom* [2003] ECHR 47916/99 (ECtHR), emphasis added. The ability to bring civil proceedings against the perpetrator has been rejected as a means of complying with this

similar obligation appears to obtain in circumstances where there has been an alleged breach of the right to be free from torture,[135] or a serious alleged violation of the right to respect for family and private life.[136]

The logic underlying these decisions is a functional concern with securing the underlying rights themselves[137] and there is nothing to suggest that there is a broad duty on the state to prosecute every person who is guilty of criminal offending.[138] The obligation is only a very limited one, and it would not appear to be a sound basis on which to hang a claim that all wrongful acquittals amount to miscarriages of justice. To the extent that there is a legal duty, breach of it is best viewed not as a miscarriage of justice, but rather as a breach of the underlying right, as it is this interest, rather than broader conceptions regarding the proper purpose of the criminal process, which the duty serves to protect.

The foundations of a moral duty to convict and punish the guilty are much clearer.[139] The main question is the extent of the duty. Many strict retributivists claim that there is an absolute moral duty to punish the guilty, 'come what may'.[140] Such a

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obligation, in part because 'it does not involve the identification or punishment of any alleged perpetrator' - *Jordan v United Kingdom* (2001) 11 BHRC 1 (ECtHR) [141].

[135] *Assenov v Bulgaria* (1998) 28 EHRR 652 (ECtHR).

[136] *X & Y v the Netherlands 8978/80* [1985] ECHR 4 (ECtHR); *Whiteside v United Kingdom* (1994) 18 EHRR CD 126 (EComHR).

[137] This is explicitly acknowledged by Lord Bingham in *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653 at [31], who says that the duty to investigate can 'fairly be described as procedural'. See also *Jordan v United Kingdom* (2001) 11 BHRC 1 (ECtHR) [105]: 'The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility.'

[138] Any such claim is explicitly disclaimed in the ICCPR context, with the United Nations Human Rights Committee stating that, even in the context of the right to life, 'criminal proceedings would not be the only available remedy' - *Croes v the Netherlands* Communication No 164/1984 (7 November 1988), UN Doc Supp No 40 (A/44/40) at 259 (1988) (UNHRC) para 10.

[139] Whether as a result of a retributivist theory – see A Duff, *Punishment, Communication and Community* (Oxford University Press, Oxford 2001) 19, or under a consequentialist theory – see RJ Allen and L Laudan, 'Deadly Dilemmas' (June 24 2008) Available at SSRN: http://ssrn.com/abstract=1150931 .

[140] As Kant argued - I Kant, *The Philosophy of Law : An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (T. & T. Clark, Edinburgh 1887) 195-198.

claim is, as Duff notes, 'quite implausible' as a practical matter, as it would require the legal system to 'devote all the resources [it could] muster to detecting and punishing those who commit offences'.[141] However, the same can be said with regard to the impossibility of acquitting all innocent people, so practical impossibility does not provide a good reason for rejecting this notion – the state is still under '*a* duty to detect, convict and punish the guilty', albeit one which 'must compete with other duties and demands that might sometimes defeat it'.[142] As such, it must be agreed that there is a moral duty on the state to prosecute (with a view to punishment) those who it believes to be guilty of crimes.

(f) Is there a Meaningful Distinction?

If there is a moral (if not a legal) duty to punish the guilty, why should a failure to convict someone who ought to be convicted not be considered a miscarriage of justice, when the conviction of someone who ought not to be convicted is? There are a number of potential grounds for arguing that the two situations are materially distinct.

One argument is that acquitting a guilty person is less objectionable, as the 'injury ... is spread over the whole of society', whereas where an innocent person is convicted, the harm is 'concentrated in the suffering of one man'.[143] While initially appealing, this claim loses much of its force once one recognises that the guilty individual who escapes punishment may then go on to 'commit crimes which they might have been disinclined or unable to commit if they had been duly convicted and sentenced'.[144] Any such subsequent offending which involves injury to an individual will therefore inflict the

[141] *Duff* (n 139) 19; see also DN Husak, 'Why Punish the Deserving?' (1992) 26 Noûs 447, 451.
[142] *Duff* (n 139) 19 (emphasis in original); and *Allen and Laudan* (n 139) which reaches the same conclusion under a social contract analysis.
[143] Lord Devlin, *The Criminal Prosecution in England* (Oxford University Press, London 1960) 113.
[144] A Ashworth, 'Concepts of Criminal Justice' [1979] Crim LR 412, 418.

'suffering' on 'one man'.[145] However, even once this is acknowledged there are still strong grounds for drawing a distinction on this basis. It is not the case that every guilty individual who goes free will then go on to re-offend in a way that they would not have done had they been convicted.[146] Further, in cases where a factually innocent person is convicted for a crime which was actually committed by another person, that other person remains at large, and is thus liable to produce the same effects.[147] Even so, this is contingent and does not provide a sound basis on which to distinguish the two situations so as to elevate one to the status of a categorical miscarriage of justice.[148] This distinction is also unable to deal with the contention that '[t]he two duties, to punish the guilty and not to punish innocents, are ends in themselves, independent of the losses or gains of beneficiaries'.[149]

With these problems in mind, a better explanation of why there is a crucial difference between the two situations follows from an examination of the role of the state. To properly understand this, it is necessary to draw a distinction between the questions of: first, whether an individual is deserving of conviction (and therefore censure and sanction) and, second, whether this ought actually to be inflicted on that person. Once this distinction is drawn the roles of the impugned individual and the state can be clearly identified:

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[145] In this regard *Allen and Laudan* (n 139) refers to statistics from the United States and argues that 'When one's lifetime risk of being the victim of a serious crime hovers around 83% and one's lifetime risk of being falsely convicted of a serious crime is miniscule, it seems irrational to hold that we must spare no efforts to reduce the latter risk still further, even if the measures that achieve that reduction significantly increase the risk of being a crime victim.'

[146] *Ashworth* (n 144) 418 - the extent to which this would occur depends on empirical matters regarding the degree to which incapacitation, rehabilitation and deterrence actually influence rates of offending.

[147] *Ashworth* (n 144) 418. Although in many cases identity will not be in doubt, for example where the decisive question is whether an alleged murderer acted in self-defence or not - V Halvorsen, 'Is It Better That Ten Guilty Persons Go Free Than That One Innocent Person Be Convicted?' [2004] Criminal Justice Ethics 3, 4.

[148] See V Halvorsen, 'Is It Better That Ten Guilty Persons Go Free Than That One Innocent Person Be Convicted?' [2004] Criminal Justice Ethics 3.

[149] J Reiman and E Van Den Haag, 'On the Common Saying That It Is Better That Ten Guilty Persons Escape Than That One Innocent Suffer: Pro and Con' in EF Paul, FD Miller and J Paul (eds) *Crime, Culpability, and Remedy* (Basil Blackwell Oxford 1990) 242.

> [t]he voluntary choice of the agent to commit a crime he knows is subject to punishment is crucial in establishing his desert; to this extent, the offender brings punishment on himself. But the decision to treat him as he deserves, and to actually punish him, can only be made by the state.[150]

In cases where an individual is convicted in circumstances where they ought not to be, there is a positive exercise of state power which results in the unjust censure and sanction of an individual. The consequences of this are significant, with the individual suffering from the range of social, psychological, physical and financial harms which flow from conviction.[151] The counter to this is that the acquittal of the guilty results in what is arguably an equally grave injustice – the non-imposition of these deserved consequences on a guilty individual. But this ignores the injustice inherent in the abuse of state power. While it is acknowledged that the non-imposition of deserved punishment *may* result from an abuse of state power – for example, due to corruption or more prosaic acts of official malfeasance[152] – it may equally occur due to the operation of legal processes which act to *limit* the abuse of state power. By comparison, it is an unavoidable and invariable feature of the conviction of the factually innocent that a moral harm is generated by the abuse of state power which is additional to the usual harm which follows from all criminal convictions.[153]

It might also be argued that this distinction fails to recognise the state's pre-

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[150] *Husak* (n 141) 448.

[151] These are the 'bare harms' to which Dworkin refers to in R Dworkin, 'Principle, Policy, Procedure' in C Tapper (ed) *Crime, Proof and Punishment : Essays in Memory of Sir Rupert Cross* (Butterworth London 1981). More recently Naughton has argued that the harms caused by factually incorrect convictions are much more significant than has been traditionally acknowledged - *Naughton* (n 37) ch 8.

[152] Arguably the widespread practice of prosecutors obtaining fact, plea or charge bargains which do not reflect the factual criminality of an offender falls into this category, especially where it occurs in direct contravention of clear official guidance that such bargaining should not occur – see, for example, 'Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise' (London October 2005) C1: '[t]he basis of a guilty plea must not be agreed on a misleading or untrue set of facts', and generally *Ashworth and Redmayne* (n 56) 269ff.

[153] R Dworkin, *A Matter of Principle* (Harvard University Press, Cambridge, Mass 1985) 85.

existing obligation to prosecute (with a view to punishing) those who it believes to be guilty,[154] and that failure to fulfil this duty results in an equally severe moral harm. However, it is the unjustified marshalling of state power against an individual which transforms these two categories.[155] The same is simply not true in cases where a guilty person goes unpunished. The state is not abusing its power to directly inflict harms on an individual; nor are the victim's rights diminished, for the reasons identified above.[156]

Thus, the unjust conviction of a person can justifiably be considered as a distinct and more pressing concern than the failure to convict a guilty person, although this is not to say that the state does not have an interest in convicting the guilty, or that the failure to do so is not regrettable.

(g) Other Exclusions

Also excluded are the injustices endemic in lower level criminal justice encounters – for example in the exercise of powers (or asserted powers)[157] of stop-and-search, questioning and arrest, where these do not proceed to a criminal conviction.[158] This can be criticised as failing to deal with the 'normal' lived experiences of the 'vast majority of recipients of criminal justice', reinforcing a culture of 'poor justice for poor people' by ignoring their plight in preference for higher profile cases.[159] Nor does it deal with situations where a flimsy prosecution collapses following perhaps years of pre-trial processes, media

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[154] *Reiman and Van Den Haag* (n 149) 229.
[155] See *Halvorsen* (n 148) 11.
[156] As the victim does not have any greater claim to a particular outcome in a criminal matter than the public generally – see 16-22, above; and also *Reiman and Van Den Haag* (n 149) 242.
[157] See D Dixon, *Law in Policing: Legal Regulation and Police Practices* (Oxford University Press, Oxford 1997) ch 2.
[158] See *Brogden* (n 103) 153-154 who points to research evidence regarding discriminatory treatment in the exercise of stop-and-search powers and concludes that this demonstrates that a significant number of people 'unjustifiably experience policing without proceeding through the trial process'. Greer also explicitly excludes such matters - *Greer* (n 40) 59.
[159] *Brogden* (n 103) 152.

speculation and possible pre-trial detention.[160] Significant as these exclusions are, the argument here is that the act of criminal conviction carries such public censure that there is a clear conceptual difference between cases where a conviction has been obtained and one where it has not. This does not mean that significant injustices cannot be occasioned in cases which do not conclude in convictions, but rather that the considerations are different – most significantly in terms of what is required by way of remedy. Where a criminal conviction is in existence there is a continuing statement of the community's condemnation of the convicted person's conduct. An unjustified conviction is therefore a continuous injustice, which can only be remedied by removing the stigma which flows from conviction.

Also troublesome is the exclusion of disproportionate sentences. A credible argument could be made that a disproportionate sentence for an offence ought also to qualify as a miscarriage of justice under this definition, as there is support from both utilitarians[161] and retributivists[162] for the notion that only punishment of a level of severity proportionate to the gravity of the offence can be justified. For the purpose of this work, however, the problem of disproportionate sentences will be viewed as separate from the problem of miscarriages of justice. This is because the act of convicting someone of a criminal offence is significant irrespective of the level of punishment warranted or inflicted – it carries 'a formal and solemn pronouncement of the moral condemnation of the community' *in addition* to the threat of punishment.[163] Again, this

[160] Cf *Anderson* (n 36) 73-74 which argues that such processes ought to be included within the definition due to the serious consequences on the accused, and the abuse of state power involved.
[161] See Bentham's oft cited exhortation that '[e]very particle of real punishment that is produced more than what is necessary for the production of the requisite quantity of apparent punishment, is just so much misery run to waste' - J Bentham and E Dumont, *The Rationale of Punishment* (R. Heward, London 1830) 29 and more latterly M Bagaric, *Punishment and Sentencing : A Rational Approach* (Cavendish, London 2001) ch 10.
[162] See, e.g. *Von Hirsch and Ashworth* (n 94).
[163] HM Hart, 'The Aims of the Criminal Law' (1958) 23 Law and Contemporary Problems 401, 405 quoted in ALT Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Clarendon Oxford 1993) 11; see similarly *Horder* (n 96) 144.

is not to say that disproportionate sentences do not represent a serious problem which warrants serious attention, bur rather that it is a problem which is conceptually separate from that of convictions which ought never to have been.[164]

(h) Self Correcting?

It is also necessary to consider at which stage of the criminal process a miscarriage of justice crystallises. One possibility is that for something to be so troubling as to amount to a miscarriage of justice the ordinary processes of criminal justice must have come to a conclusion. That is, all standard appeal possibilities have been exhausted, and the only avenues for redress are extraordinary – for example by means of an application to a criminal cases review body, petitioning for the exercise of the prerogative of mercy or some cognate procedure. Walker has argued for precisely such an approach, on the basis that 'one must allow the system some time to correct itself, whether through acquittal or the payment of damages' as 'the notion of 'miscarriage' involves a completion of a process (in failure) and not simply a mistake'.[165]

The other possibility is that the miscarriage of justice occurs at an earlier stage. As, for the reasons given above, this account is limited to situations in which a conviction ought not to have occurred, the earliest time at which this could materialise is when the conviction itself is imposed.[166] For present purposes, this approach is the best one. The argument for allowing for self-correction would be much stronger if an appeal or post-conviction review was mandatory.[167] In such cases, it could truly be said to be part of the

[164] See *Thorp* (n 19) 4 which reached the same conclusion 'principally because the correction of such an error would involve quite different expertise and considerations than the correction of an unjust conviction'.
[165] *Walker* (n 29) 35.
[166] To some extent this is Naughton's approach, although at this early stage Naughton would argue that all that was present was an 'alleged miscarriage of justice', as a 'miscarriage of justice' could not properly be so called until an appellate court had overturned the conviction - *Naughton* (n 36) 170: *Naughton* (n 37) 2.
[167] As is the case in most United States jurisdictions in capital cases - J Culver, 'Capital Punishment Politics and Policies in the States, 1977–1997' (1999) 32 Crime, Law & Social Change 287, 295-296.

proceeding – a guilty plea could not be confirmed by the system without the completion of such a process. This is certainly not the case with appeals in most western common law jurisdictions.[168] In England, for example, the opposite is true in that there are structural mechanisms in place to deter putative appellants.[169] Whether in consequence of this or not, the actual appeal rate is extremely low – less than one percent of those convicted in the Magistrates' Court, and three percent of those convicted in the Crown Court, appealed against their conviction in 2005.[170] Given this, it would be unduly restrictive to require the completion of an appellate process, or the expiry of any prescribed time limit for appeals, before a miscarriage of justice is considered to be in existence.

5 The Three Categories of Miscarriage

With these preliminary matters dealt with, it is now necessary to elaborate upon the rough definition proposed above. It will be recalled that the objective of this definition is not to provide a complete taxonomy of all conceivable miscarriages of justice, but rather to provide a functional definition, based upon sound distinctions, of the circumstances in which a conviction ought not to have occurred and cannot therefore be allowed to stand. This is intended to provide a means by which to examine and to critique the practices of bodies charged with the review of extant convictions. With this in mind, it will be argued that there are three general reasons why someone might find themselves the victim of a miscarriage of justice, giving rise to three categories of miscarriage of justice. These categories are not mutually exclusive – there can, and often will, be situations where an

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[168] Pattenden suggests that such an approach would be 'too costly to be practical' - R Pattenden, *English Criminal Appeals 1844-1894 : Appeals against Conviction and Sentence in England and Wales* (Clarendon, Oxford 1996) 58.

[169] *Ashworth and Redmayne* (n 56) 341; *Monnell and Morris v United Kingdom* (1987) 10 EHRR 205 (ECtHR).

[170] Home Office, 'Criminal Statistics 2005' (November 2006) London 17. The rate of appeal against sentence in the Crown Court was higher, at 7%.

individual conviction will be a miscarriage of justice for several reasons.

The first category concerns cases of actual factual innocence, regardless of procedural propriety; the second category concerns situations where there has been a material breach of due process rights provided in positive law; and the third category concerns cases where there has been a failure to observe fundamental procedural or rule of law norms, such that allowing a conviction would amount to an affront to the rule of law, even if the risk of a factually incorrect outcome is not present. The matters which fall within each of these categories are troubling for different reasons, and not as a consequence of any grand uniting theory of criminal justice - a conclusion which is unsurprising when one considers the differing contexts in which they arise.[171]

6 Category One: Factual Innocence

The first situation in which a miscarriage of justice exists is where an individual is factually innocent of a crime of which they have been convicted. This category would also include situations where an individual was convicted of a more serious crime than they ought to have been – for example, it would cover the situation of someone who ought to have been convicted only of manslaughter (due to, for example, lack of the requisite mens rea) but was instead convicted of murder.[172]

(a) Why is the Conviction of the Innocent a Miscarriage of Justice?

While it is often thought to be such an intuitive conclusion that it needs no explanation, it is necessary to understand *why* the conviction of a factually innocent individual ought to

[171] See generally A Von Hirsch and A Ashworth, 'Not Not Just Deserts: A Response to Braithwaite and Pettit' (1992) 12 Oxford J Legal Stud 83, 98.
[172] This follows from the reasons identified above – the act of conviction is significant per se, and central to this is *what* one is convicted for – see *Horder* (n 96) 144. In this regard, this might mark a departure from some 'public' conceptions about factual innocence which arguably view such distinctions as 'legal technicalities' of little moment – see *Naughton* (n 37) 99.

be viewed as a miscarriage of justice. The best explanation for this conclusion is provided by an examination of the rationale(s) for sanction and punishment, and therefore for criminal conviction, in the first place.

In a retributive system of punishment, the conviction of an innocent person is unjustified as there is no moral basis on which either censure or sanction can legitimately be imposed on the person subject to it. This is because implicit in the punishment is authoritative censure for morally reprehensible conduct by the individual being punished.[173] If the individual is not morally culpable (i.e. factually guilty), there is no basis for censure and therefore no basis for the punishment.[174] Situations in which this occurs must therefore amount to a miscarriage of justice under the definition proposed above – the conviction ought never to have occurred.

This is the case in all circumstances. It does not matter for this purpose whether the innocent person is convicted deliberately, or due to a mistake. Whether the system that led to this state of affairs can nonetheless be justified on the basis that it was not an intended consequence is a quite separate question – a perfectly legitimate and justifiable system is still capable of generating miscarriages of justice.[175] This is so even if one accepts that procedures by which the conviction of the innocent is an incidental, but not intended, consequence can be morally justified.[176] To conclude otherwise would be to lose sight of the underlying justification for the system of punishment. Even if the system itself can be considered just, any instance in which a factually innocent person is convicted must still be viewed as unjustified, and therefore, a situation in which a conviction ought not to have occurred. For completeness' sake, it should be noted that a

[173] See *Von Hirsch and Ashworth* (n 94) 17-21. The possible exception to this, with regard to strict liability offences, is discussed at 27-29, above.
[174] This is a proposition which has a long pedigree – see particularly I Kant, *Metaphysische Anfangsgrèunde Der Rechtslehre* (F. Nicolovius, Kèonigsberg 1797).
[175] Cf *Bagaric* (n 161) 99-103.
[176] Eg RA Duff, 'Retributive Punishment — Ideals and Actualities' (1991) 25 Israel L Rev 422, 435-441.

small minority of retributivist theorists concede that in truly extreme cases an innocent may be punished.[177] However, even if one were to accept this approach, the punishment of the innocent would still be regarded as unjust and would not cease, therefore, to be a miscarriage of justice.[178]

The same is true of constrained consequentialist systems of punishment which explicitly forbid the punishment of the innocent.[179] Indeed, the evolution of such constrained systems was a response to one of the most frequent criticisms of utilitarian justifications for punishment – that they allowed for the punishment of innocent people as they 'do not include a principle for the distribution of punishment which restricts it to those properly convicted of an offence'.[180]

Some argue that the notion of utility maximisation itself provides such a principle, and thus a utilitarian justification for viewing the conviction of the factually innocent as a categorical miscarriage of justice. One common claim is that 'every time an innocent offender is wrongfully convicted, the actual offender typically remains free to continue victimising the public'.[181] Another is that there is an inverse relationship between the number of factually incorrect convictions and confidence in the criminal justice system,

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[177] See, e.g., RL Christopher, 'Deterring Retributivism: The Injustice Of "Just" Punishment' (2002) 96 NW U Law Rev 843, 877-880 and the sources cited therein - notably WD Ross and P Stratton-Lake, *The Right and the Good* (New edn Clarendon Press, Oxford 2002) 61 and MS Moore, *Placing Blame : A General Theory of the Criminal Law* (Clarendon Press, Oxford 1997) 719.
[178] As Hart put it: 'In extreme cases many might still think it right to resort to these expedients but we should do so with the sense of sacrificing an important principle. We should be conscious of choosing the lesser of two evils…' - HLA Hart, *Punishment and Responsibility* (Clarendon, Oxford 1968) 12.
[179] See, notably, *Hart* (n 178) 1-53, although note that even on such accounts the prohibition may not be absolute. Space does not permit an extended discussion of the validity of such an approach – as to this, see *Duff* (n 139) 11, 13-19 and ch 3.
[180] A Von Hirsch and A Ashworth, *Principled Sentencing : Readings on Theory and Policy* (2nd edn Hart Publishing, Oxford 1998) 47 referring to AH Goldman, 'Deterrence Theory: Its Moral Problems' in A Von Hirsch and A Ashworth (eds) *Principled Sentencing : Readings on Theory and Policy* (2nd edn Hart Publishing Oxford 1998).
[181] *Huff, Sagarin and Rattner* (n 38) xxiii; Nicola Lacey has argued that a similar belief motivated the Runciman Royal Commission – *Lacey* (n 121) 33.

which will in turn reduce the conviction rate.[182] These arguments are at best contingent, and do not provide the basis for a categorical conclusion that each conviction of an innocent person occasions a miscarriage of justice. This is unsurprising. In a purely consequentialist system, any status that a right not to be convicted of a crime which one is factually innocent of 'must be derivative from, contingent on, the fact that recognising such a right will serve the consequentialist ends of the criminal justice system'.[183] As there are many potential reasons why the act of convicting a factually innocent person, or the adoption of a general rule which makes this more likely, might maximise the goals of a criminal justice system, it is impossible to say that this will always be the case.[184] Arguments that the only situations in which the punishment of an innocent person could ever be justified in a consequentialist fashion are fanciful[185] do not assist here as, at best, they support the contingent and defeasible categorisation of the conviction of the innocent as a miscarriage of justice.[186]

Some utilitarian theorists do not view this as problematic, arguing that 'hard cases lead to hard decisions' and that the conviction of the innocent can, in some extreme circumstances, be justified.[187] This position is different to that adopted by the small minority of retributivists discussed above – for these utilitarians, the conviction of the innocent person is entirely justified, and there is no '[sacrifice of] an important principle'.[188] If this extreme approach to the requirements of utilitarianism is adopted,

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[182] *Huff, Sagarin and Rattner* (n 38). This is in many ways similar to Rawls' argument in J Rawls, 'Two Concepts of Rules' (1955) 64 The Philosophical Review 313 that a system which envisaged the intentional punishment of the innocent could never be justified in utilitarian terms – as to the correctness of this view, see CL Ten, *Crime, Guilt, and Punishment : A Philosophical Introduction* (Clarendon Press, Oxford 1987) 68-71.
[183] *Duff* (n 139) 10.
[184] See *Dworkin* (n 151) 203-205: 'It… does not follow that when we discover a past injustice we also discover an occasion when utility could have gained, even just considering the direct consequences of that injustice, had it been avoided.'.
[185] See the oft cited exchange between HJ McCloskey, 'A Non-Utilitarian Approach to Punishment' (1965) 8 Inquiry 239 and TLS Sprigge, 'A Utilitarian Reply to Dr. Mccloskey' (1965) 8 Inquiry 264.
[186] See *Ten* (n 182) 18-32 and *Bagaric* (n 161) 94.
[187] *Bagaric* (n 161) 94-98.
[188] Cf *Hart* (n 178) 12.

then it cannot be said that the conviction of an innocent person is a categorical miscarriage of justice.[189] However, as its adherents acknowledge, the occasions in which utility requires the conviction of an innocent will be rare.[190] Given this, while it cannot be said that the conviction of an innocent person will *categorically* amount to a miscarriage of justice in extreme utilitarian terms, this will usually, absent truly extraordinary circumstances, be the case.

(b) Potential Problems

A number of objections have been made to definitions which focus on factual innocence. These objections raise real issues which must be addressed.

Some have argued that such a focus is conceptually flawed, as the characterisation of the trial as a vehicle which arrives at 'truth' (in a scientific sense) is incorrect, as 'truth' is itself a legal construct,[191] and the trial process is not 'a laboratory in which technicians generate truth in a test-tube', but rather the 'final ritualised act in a process by which the state asserts culpability and seeks to apply sanctions to an individual'.[192] This is admitted; however if this highly ritualised process returns a verdict which is *objectively factually incorrect*, to the effect that an individual is found guilty when he or she is factually innocent, the conclusion that a miscarriage of justice has occurred is inescapable. While it must be acknowledged that, in practice, absolute proof of the guilt or innocence of an individual is almost impossible, this does not mean that one should lose sight of the purpose for which the criminal process was intended when framing a definition such as that proposed here.

[189] *Bagaric* (n 161) 95, goes further and argues that punishing the innocent as the 'morally correct action in some circumstances'.
[190] *Bagaric* (n 161) 105.
[191] *Greer* (n 40) 74; *Lacey* (n 121) 33; *Sanders* (n 123) 142.
[192] *Hall* (n 29) 314; see generally G Williams, *The Proof of Guilt : A Study of the English Criminal Trial* (3rd edn Stevens, London 1963) 183-190 and H Jung, 'Nothing but the Truth? Some Facts, Impressions and Confessions About Truth in Criminal Procedure' in A Duff and others (eds) *The Trial on Trial* (Hart Oxford 2004).

One possible means of addressing these concerns would be to express this ground such that a conviction following a failure by the state to prove an offence beyond reasonable doubt amounts to a miscarriage of justice. Such an approach would have the advantage of expressly recognising that at no stage in the criminal process as it presently stands is a finding of factual innocence ever called for,[193] and that while an appellate court may comment on the factual guilt or innocence of an appellant in the course of overturning a conviction, this does not mean that the conviction is being quashed on this basis.[194] However, this approach moves us away from the justification outlined above. It would be difficult to argue that acceptance of a retributive, let alone a utilitarian, rationale for punishment would make failure to achieve this standard presumptively or categorically unjust, even in situations where the individual concerned was factually guilty of the crime. Such a failure could, however, amount to a miscarriage under the second category *if the extant rules of criminal procedure established such a standard.*

But this is often not the case - the adoption of standards lower than beyond reasonable doubt, or which require the defendant to bear a substantive burden of proof, is widespread practice.[195] Even in cases where the higher standard is provided, there is considerable confusion as to precisely what this entails.[196] Whether some or all of these practices lead to an increase in the number of innocent people convicted of crimes is obviously a matter of concern, as this would lead, in aggregate, to an increase in the number of miscarriages of justice under this category. However, even if this were demonstrated empirically, this would not render an *individual conviction* imposed

[193] *Quirk* (n 34) 767; *Wells* (n 94) 57; *Naughton* (n 37) 17.
[194] S Roberts, ''Unsafe' Convictions: Defining and Compensating Miscarriages of Justice' (2003) 66 MLR 441 citing *R v Callaghan* [1999] EWCA Crim 606; G Zellick, 'Facing up to Miscarriages of Justice' (2006) 31 Manitoba LJ 555, 561.
[195] *Ashworth and Blake* (n 124).
[196] See the divergent approaches taken across (and even within) jurisdictions – *R v Starr* [2000] 2 SCR 144 (SCC); *R v Russell* [2000] 2 SCR 731 (SCC); *R v Avetysan* [2000] 2 SCR 745 (SCC); *R v Rhee* [2001] 3 SCR 364 (SCC); *Green v R* (1971) 126 CLR 28 (HCA); *R v Bentley (Deceased)* [1998] EWCA Crim 2516[2001] 1 Cr App R 307 (CA); *R v Wanhalla* [2007] 2 NZLR 573 (NZCA); HA Diamond, 'Reasonable Doubt: To Define, or Not to Define' (1990) 90 Colum L Rev 1716.

following such a process a miscarriage of justice on the basis that there was no justification for the imposition of censure and / or sanction.

Adopting this or a similar standard as the benchmark would also be under-inclusive, as those who were convicted following a flawless process, or who entered guilty pleas when they were in fact innocent,[197] would not fall within such a definition. This is problematic as the imposition of punishment is morally legitimised by the fact that an offender *has actually* committed a crime – not that such a finding has been made by a particular process.

Defining this ground in any way which fails to include all situations in which a factually innocent person is convicted provides an inadequate and under-inclusive account of why this is a miscarriage of justice. However, one major practical problem remains. The fact that no imaginable criminal process would require absolute proof of innocence to secure an acquittal (and that such a standard would be almost impossible to achieve) creates a risk of implicitly creating three tiers of criminal appellant in the eyes of the community, mirroring the three categories proposed by the instant definition: 'the innocent', where factual innocence could be demonstrated; 'the probably guilty', where guilt could not be proved to the requisite standard, but neither could factual innocence; and 'those who escaped on technicalities' where factual guilt was not in doubt.[198] Drawing such a distinction between the first two of these categories would be particularly pernicious, as the ability to prove factual innocence is almost totally contingent on factors entirely beyond the control of the individual concerned. Only a limited number of

[197] A considerable problem – see M McConville, 'Plea Bargaining: Ethics and Politics' in S Doran and J Jackson (eds) *The Judicial Role in Criminal Proceedings* (Hart Oxford 2000); M McConville and C Mirsky, 'Redefining and Structuring Guilt in Systematic Terms: The Royal Commission's Recommendations Regarding Guilty Pleas' in M McConville and L Bridges (eds) *Criminal Justice in Crisis* (Elgar Aldershot 1994); A Sanders and R Young, *Criminal Justice* (3rd edn Butterworths, London 2006) 425-442; A Mulcahy, 'The Justification of Justice: Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates' Courts' (1994) 34 B J Crim 411.

[198] *Quirk* (n 34) 768, although Quirk omits the second category, implying that the public would not draw a distinction between it and the third category. See also *Givelber* (n 119).

offences are amenable to anything approximating conclusive proof of innocence, but even in the case of those which are, much depends on factors such as whether the prosecuting authorities collected and retained vital evidence. Further, as will be discussed below, in cases which fall into the final category, there is an insufficient moral basis for a conviction to be maintained, and therefore no basis on which the individual concerned may legitimately be subject to the stigma which a conviction carries. Thus, the drawing of such distinctions by the community would inevitably lead to the unfair stigmatisation of individuals.[199]

Thus the notion that miscarriages under this first category are worse than those which arise in other categories is flawed and must be guarded against. However the drawing of a distinction between the factually innocent and those who are not factually innocent is, at a conceptual level, unavoidable for the reasons given above. If an individual is convicted of a crime of which they are factually innocent, this is unjust, even if the process by which they came to be convicted was procedurally fair and flawless. Yet it is possible to recognise that the conviction of the factually innocent is a miscarriage of justice, and that a material failure to comply with due process standards designed to prevent the innocent from being convicted is too – *but for different reasons*. This is the subject of the next section.

7 Category Two: Material Breach of Due Process Rights

The second category of situations which ought to be considered miscarriages of justice is, in some senses, related to the first. It recognises that a miscarriage of justice has occurred when there is a breach of an established due process protection provided in positive law in circumstances where this could materially influence the determination of guilt or innocence. In order to explain the rationale behind, and reach of, this category, it is

[199] *Quirk* (n 34) 768.

necessary to briefly consider why this ought to be considered a separate category, before moving on to consider what is meant by 'due process protections' and 'material breach'.

(a) A Separate Category?

Due to the focus on the consequences of the breach itself, a miscarriage of justice is occasioned under this head irrespective of factual guilt or innocence. Other, similar, approaches have been criticised on the basis that they are more concerned with whether the defendant received a fair trial than whether they are factually innocent or not.[200] Such criticisms can only be sustained if one accepts that actual factual innocence is the only ground on which a conviction ought to be overturned. This conclusion is not self-evident, and requires closer examination.

What, then, makes material departures from due process guarantees a miscarriage of justice? As this category is not concerned with the innocence of the individual, the rationale for these situations being included must be distinct from that in the first category. What might this rationale be?

One possibility is that failure to comply with applicable due process standards fails to provide 'sound justifications' for convictions.[201] Greer argues that irrespective of the model of criminal justice adopted in a given system, what is central is the requirement for sound justifications to be offered for a criminal conviction. While precisely what constitutes a sound or unsound justification would depend on what theory of criminal justice is selected, it is argued that under systems premised on compliance with human rights, a conviction obtained in consequence of a breach of human rights cannot stand as it does not provide a sound justification for doing so.[202] The problem with such an

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[200] *Naughton* (n 37) 14-15.
[201] *Greer* (n 40) 74.
[202] *Greer* (n 40) 61, 74.

approach is that it is unclear to whom such justifications are addressed; are they directed to the general public, such that justifications are provided to secure the popular legitimacy of the system, or is rather to a particular group of actors within the system?[203]

If they are offered to the general public,[204] then this explanation is not convincing. As Ashworth and Redmayne caution, focusing on what the public might find to be legitimate is concerning, as such an approach may allow even grave breaches to be sanctioned in order to punish a publicly unpopular person or class of people.[205] The better approach is to acknowledge that a material departure from established due process protections is always unjustified – irrespective of whether a conviction could be said to be 'justified' for other (presumably consequentialist) reasons.

If, however, the justifications are offered to some specific actors within the system, then this is incomplete, as it does not provide an answer for why the justifications offered are not 'sound', other than a contestable claim as to the pre-eminence of particular due process standards. As such, it is necessary to delve a little deeper.

The first step is to acknowledge that, for precisely the reasons highlighted above, no system of justice can divine truth in all cases.[206] Thus, even if a polity decided to devote all of its resources (forgoing all other social goods) to the goal of ensuring those convicted of a crime had every opportunity to demonstrate their innocence, and therefore allocated unlimited resources to providing endless avenues of appeal, it would still be impossible to identify every situation where an innocent person had been convicted. In a more practical sense, such a society would never exist – at least not without significant

[203] This lack of specificity would appear to be part of Greer's conception of miscarriages of justice – what constitutes a miscarriage varies from system to system, as, one can infer, would the role of determining what is and is not a 'sound justification' - see *Greer* (n 40) 61.
[204] As is the case for Hall, who argues that 'failures of due process' amount to a miscarriage of justice as they produce 'determinations which are unfair by common standards, and likely not to reflect factual responsibility' – *Hall* (n 29) 316.
[205] *Ashworth and Redmayne* (n 56) 24-25; *Ashworth* (n 56) 651.
[206] *Greer* (n 40) 74; *Lacey* (n 121) 33; *Sanders* (n 123) 142.

technological developments.[207] The level of resources which would have to be expended to even approximate that level of certainty would be prohibitive. Given this, the processes by which convictions are achieved and reviewed are always going to be the result of a trade off between competing interests – those of convicting the guilty, protecting the innocent, and pursuing the myriad other social goods which devoting resources to the functioning of a criminal justice system diverts funds away from.[208]

Dworkin has provided some guidance as to the situations in which such trade offs could be said to be fair.[209] His account commences with the contention that the conviction of an innocent person causes a 'moral harm' which is additional to the bare harm of conviction (i.e. the usual effects of punishment).[210] He then posits two principles of 'fair play' which must govern this process: first, any political decision must treat all citizens as equally deserving of concern and respect, a consequence of which being that no individual must be put at greater risk of this moral harm than another; and second, the later enforcement of any such decision must also be equal in its impact.[211] Thus, the decision to adopt a particular rule of criminal procedure designed, say, to speed up the prosecution process at the risk of an increase in the number of factually innocent people convicted will be just only if it puts all citizens at an equal risk of an erroneous conviction, and if all citizens benefit equally from the savings made by the increased efficiency.[212]

These rules of fair play provide the best explanation of why material deviation

[207] The technology required to make such a task achievable would be immense – for example, a machine which could determine whether an individual was telling the truth with perfect accuracy, presently the stuff of science fiction – see JL Halperin, *The Truth Machine* (Simon & Schuster, London 1997).
[208] Indeed, this is one of the most frequent criticisms of retributive theories of punishment – that in pursuit of the (necessary) punishment of the guilty, some innocent people will fall victim – *Christopher* (n 177) 899-904.
[209] In *Dworkin* (n 151) and *Dworkin* (n 153).
[210] See the discussion at 31-40, above.
[211] *Dworkin* (n 153) 84-85.
[212] *Dworkin* (n 153) 85.

from due process protections ought to be viewed as a miscarriage of justice. Established due process protections – that is, those provided in positive law, including human rights law – are the result of a political assessment of the 'relative importance of moral harm'.[213] Once this assessment has occurred, citizens have a right to consistent weighing and application of these norms. To do otherwise is to place citizens at an unequal risk of factually incorrect convictions. Thus, a failure to comply with these protections amounts to a rebalancing of the importance of the moral harm, and therefore a fresh political decision – in violation of acceptable principles of fair play.

(b) What are 'Due Process Rights'?

Dworkin's approach also suggests an answer to the question of what rights we ought to be concerned with at this stage. The concern under this head is with the equitable distribution of the risk of factually incorrect convictions. Thus, if a right or process intended to defend individuals from this risk is provided in the positive law, then it falls within the ambit of this category.

What the rules of fair play described above do not address is the prior question of whether there is a set of minimum protections which every criminal justice system must provide to defendants, itself a matter of considerable debate. Dworkin has argued that an individual does not possess a pre-existing moral right to any particular standard of criminal procedure, and that any such right is instead created by the political process.[214] Duff, by contrast, has argued that retributivists must accept 'reasonable safeguards against mistaken convictions' as 'a feature of any human system of punishment'.[215]

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[213] *Dworkin* (n 153) 89.

[214] *Dworkin* (n 153) 87-89. This is a position that has been trenchantly criticised in M Plaxton, 'Are Wrongful Convictions Wrong? The Reasonable Doubt Standard and the Role of Innocence in Criminal Procedure' (2002) 46 Crim LQ 407 which argues that there is a baseline beneath which a system of criminal procedure cannot fall.

[215] RA Duff, 'In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekara' (2000) 24 Melb U L Rev 411, 424, see also *Plaxton* (n 214) 419. Walker seems to advocate a similar position - *Walker* (n 29) 33-34.

However, under either account there are limits on the extent of the protection offered to the criminal defendant; there is no absolute right to all resources necessary to eliminate any risk of an innocent person being convicted.[216] As such, there will always be debate as to what the protections afforded to defendants ought to be, and variation between jurisdictions.[217]

For present purposes it is not necessary to resolve either the controversy as to whether there are any pre-existing moral rights, or as to what these might be. This is unnecessary for two reasons. First, the basis for Duff's claim is that retributivists have a duty to ensure that only the guilty are convicted - a matter which is acknowledged by the inclusion of situations where an innocent person has *actually* been convicted in the first category. Cases which fall within this category are miscarriages of justice for an altogether different reason – that is, because in such cases an individual is being put at a *greater risk* of suffering the moral harm of a factually incorrect conviction than the rest of the population.

The second reason why this is unnecessary, in the context of the present, functional, definition is that there are a key set of due process protections which are common to most modern liberal criminal justice systems.[218] As the focus in this category is on the consistent application of a particular political decision as to what protections to provide, it does not matter that the definition, or expression, of such protections varies from jurisdiction to jurisdiction. For example, if the right to adequate time and facilities to prepare a defence was interpreted in one way in jurisdiction X, the fact that it was interpreted differently (or not applied at all) in jurisdiction Y would not, without more,

[216] See *Ashworth* (n 36) 50-52.
[217] See *Griffin* (n 38) 1243-1245, although this is not to say that there no bounds to this debate – Dworkin's approach demands that a proper weight be accorded to the moral harm of the conviction of a factually innocent person, a requirement which should prevent a descent to the 'shadowy world of balancing' - *Ashworth* (n 36) 51; M Plaxton, 'Arguments of Virtue and Constitutional Criminal Procedure' (2008) 58 UTLJ 355.
[218] *Ashworth and Redmayne* (n 56) 27-28

amount to a miscarriage of justice under this category.[219] This is because this account does not rely on a claim that these rights are an 'embodiment of a higher law',[220] and thus that it is the violation of an abstract ideal that occasions the miscarriage of justice. To restate: what is critical is that the protections offered to defendants within any one system are applied in an even fashion, such that no individual is placed at an unjustified risk of the moral harm of a factually incorrect conviction. This category is not, therefore, open to challenge on the frequently articulated basis that an 'inevitable gap between the articulation of… rights and their practical effects' makes human rights an inapt basis for founding a definition of miscarriages of justice.[221]

This is not to say that it would not be possible to approach this category on the basis of an appeal to a higher law. One possible approach would be to appeal to the legitimacy of a particular supranational or international document, and argue that any derivation from it, as authoritatively interpreted by the institution with ultimate responsibility for doing so, amounted to a miscarriage of justice. In the European context, the European Convention on Human Rights and Fundamental Freedoms could fulfil this role, with the European Court of Human Rights the ultimate arbiter. At an international level, the International Covenant on Civil and Political Rights, which contains similar, but not identical criminal process guarantees to the European Convention, could be used, with the United Nations Human Rights Committee as arbiter.

While basing the claim in the legitimacy of such a document would provide a defence against an argument that the rights were mere abstract ideals, it remains unclear what advantages this approach would have for present purposes. The main reason for

[219] See in this regard *Ashworth and Redmayne* (n 56) 26-28, which draws a distinction between 'internal' and 'external' values in the criminal process, noting that certain rights take on a particular significance in some jurisdictions relative to others.
[220] Cf *Nobles and Schiff* (n 5) 29.
[221] Such is Nobles and Schiff's critique of human rights based definitions - *Nobles and Schiff* (n 5) 29-31; R Nobles and D Schiff, 'Review Of "Justice in Error"' (1994) 34 B J Crim 383.

this is that while the obligations themselves might be binding as a matter of international, supranational, or even domestic, law, states party to the various conventions are given leeway as to how to interpret and apply these obligations in the domestic context.[222] The indeterminacy objection, while lessened, therefore remains.

The practical effect of this should not be overstated. Where a state has accepted the legitimacy and binding nature of such a regime, this usually amounts to a political decision to offer the protections provided by it to all defendants. As such, material breach of these protections – when they are intended to apply in individual cases - will amount to miscarriages of justice under the definition offered here.

Thus, recognising that inequality of treatment which increases the potential of an individual being convicted in circumstances where he or she is factually innocent occasions a miscarriage of justice is not to say that there is a stand-alone right to a particular standard of procedure. Adopting a higher standard of procedure might help reduce the incidence of the first category of miscarriages of justice; the failure to adopt such a standard is not itself a miscarriage of justice under this head.[223]

(c) What is a 'Material' Breach and why is it Necessary?

It is possible to advance a definition along the lines that any breach of a fair trial right would mean that a conviction ought to be quashed.[224] However, it is not the case that every breach of a procedural right has, or will have, a material effect on the trial.[225] If the concern is to ensure that citizens are put at equal risk of the moral harm which comes

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[222] See HC Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Kluwer Law International, The Hague 1996); E Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 NYU J Int'l L & Pol 843.
[223] As such, the discussions in the miscarriage of justice literature about potential procedural reforms which might lower the incidence of factually incorrect convictions are irrelevant at this definitional stage.
[224] See *Ashworth and Redmayne* (n 56) 355-356, noting that the English courts flirted with such an approach in *R v Togher and Others* [2001] 3 All ER 464 (CA) and *R v A (No 2)* [2002] AC 45 (HL)
[225] *Ashworth and Redmayne* (n 56) 356.

from a factually incorrect conviction, then departures only become problematic for this purpose in circumstances where there is *a risk of a factually incorrect conviction.*[226] Therefore, for a breach of due process to amount to a miscarriage of justice under this category, the breach must increase the risk of a factually incorrect result. Crucially, as the concern is with equal allocation of risk, the actual factual guilt or innocence of the individual is irrelevant – what is important is whether the breach increases the risk that an innocent person in the defendant's position would be found guilty. This is what is meant by a 'material breach'.

This focus on materiality disposes of Nobles and Schiff's contention that current 'due process' practices[227] provide an unsuitable basis for a definition of miscarriage of justice as they are essentially 'historical relics' which do not conform to any universal value or set of values.[228] If one focuses not on every breach of a legal right which one might label a 'due process' right, but rather on those breaches which could influence the factual correctness of the outcome of a criminal proceeding, the basis becomes much clearer.

Determining whether a particular breach has caused such a risk will be straightforward in some cases – for example, where significant bad character evidence is put before a jury in breach of an evidential rule prohibiting it. In other cases it will be more difficult. What this category is not directly concerned with are what might be described as the traditional 'abuse of process' situations – for example, the unlawful rendition of an individual in violation of extradition arrangements,[229] or where evidence

[226] Similarly Ashworth and Redmayne argue that as defendants 'should not be disadvantaged by breach of their rights. Where a conviction is gained via a breach of [fair trial rights] ... the conviction should be held to be unsafe and quashed' - *Ashworth and Redmayne* (n 56) 357. This is not to say that there may not be room for other remedies for breaches of due process rights, such as damages or sentence reduction (see *Emmerson and Ashworth* (n 114) paras 17-33 and 17-34) although in such a situation, it would not be regarded as a miscarriage of justice, as the conviction could legitimately be left intact.
[227] In England and Wales, at least.
[228] *Nobles and Schiff* (n 5) 26-27
[229] As in *R v Horseferry Road Magistrates' Court Ex Parte Bennett* [1994] 1 AC 42 (HL).

is obtained through entrapment.[230] The reason for this is that in neither case is the individual put at greater risk of a factually incorrect conviction as a result of the impugned action. If these situations are amount to miscarriages of justice, this must be for another reason – a contention at the heart of the third category, discussed below.[231]

There may be instrumentalist arguments to the effect that it is only by insisting on strict compliance with human rights obligations, and refusing to uphold convictions obtained following any breach (material or otherwise), that those rights can be properly protected.[232] Even if such arguments could be borne out empirically,[233] they do not provide a reason for viewing every conviction obtained in such circumstances as a miscarriage of justice in the sense that there is an identifiable discrete injustice.

(d) The Fairness / Safety Debate

This discussion has some resonance with the recent judicial and academic debates regarding the relationship between 'fairness' and 'safety'.[234] Indeed, the question is almost identical: when, if ever, can a conviction obtained following a trial conducted in breach of criminal process rights be allowed to stand?

One area of conceptual confusion in many of these analyses results from a failure to distinguish material errors from immaterial errors, therefore conflating situations where there has been an error which renders the likelihood that the defendant will be

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[230] As in *R v Looseley; Attorney General's Reference (No 3 of 2000)* [2001] UKHL 53 [2001] 1 WLR 2060.
[231] See 65-78, below.
[232] As is the rationale behind, for example, exclusion of evidence where it is obtained in breach of the United States Constitution – see *United States v Calandra* 414 US 338 (1974) .
[233] This may prove difficult - see MW Orfield, Jr, 'The Exclusionary Rule and Deterrence: An Empirical Study of Chicago' (1987) 54 U Chicago L Rev 1016; LT Perrin and others, 'If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule' (1997 - 1998) 83 Iowa L Rev 669.
[234] See N Taylor and D Ormerod, 'Mind the Gaps: Safety, Fairness and Moral Legitimacy' [2004] Crim LR 266; I Dennis, 'Fair Trials and Safe Convictions' [2003] Current Legal Problems 211, 211-213; D Mathias, 'The Accused's Right to a Fair Trial: Absolute or Limitable?' [2005] NZ Law Review 217; *Hammond* (n 93) 10-12.

convicted in circumstances where he or she might be factually innocent, with those which do not. This distinction is crucial for the reasons surveyed above: in the former situation, the defendant faces an increased risk of being convicted of a crime he or she did not commit. In the latter scenario, there is no such increased risk. This is not to say that situations where there is no such risk may not amount to a miscarriage of justice. Indeed, the third category discussed below argues that in many situations they might. However, it is important to recognise that this is for an entirely separate reason.[235]

This confusion is evident in Taylor and Ormerod's conclusion that 'all abuses are unsafe (and unfair), but not all unfairness constitutes unsafety (or an abuse)'.[236] To some extent the second half of this conclusion mirrors the analysis above, if unfairness is taken as a shorthand term for non-compliance with a due process protection provided in positive law, and unsafety taken to mean that such non-compliance has a material effect on the determination of guilt or innocence.[237] However, the first half of this statement conflates situations where an individual faces the prospect of being found guilty of an offence they are factually innocent of with situations where there is no such risk. This may just be a case of confusion in the terminology itself - 'abuse' is used to mean 'abuses of process', 'unsafety' to mean a conviction which ought to be quashed under the Criminal Appeal Act, and 'unfairness' being a necessary, but not sufficient, condition for quashing a conviction on the basis of either 'abuse' and 'unsafety'. In England, this confusion is arguably inevitable, as the English Court of Appeal has jurisdiction to allow

[235] Discussed in more detail at 65-78, below. Dennis also distinguishes the two kinds of situations, arguing that they are two different species of abuse of process which degrade the legitimacy of the process – *Dennis* (n 234) 214; see similarly *Choo* (n 163) 14.
[236] *Taylor and Ormerod* (n 234) 275.
[237] Although this is not always clear, which is why I have avoided using these terms, as while occasionally a useful shorthand, they are apt to mislead – Dennis, for example, looks at the courts' approach to the matter and notes both the problems caused by the fact that 'fairness and safety are both difficult concepts to define with precision' and argues that matters which do not affect the factual accuracy of a conviction can nonetheless affect the 'safety' of a conviction - *Dennis* (n 234) 211-213.

an appeal against conviction only if it thinks that the conviction is *unsafe*.[238]

While this distinction is important conceptually, it does not mean that the essence of these analyses is unhelpful or incompatible with what is being proposed here. Indeed, the conclusion reached is that 'when the procedure is flawed to the extent that it jeopardises the moral integrity of the process' a conviction cannot stand, and situations where there is a material breach of a due process right are included within this definition (at least presumptively).[239] However, the identification of the reason *why* deviations from due process guarantees jeopardise the moral integrity of the process in the first place goes some way to addressing the difficulties that Taylor and Ormerod, and Dennis, find when determining whether a particular deviation from due process guarantees ought to preclude a conviction. Further, it provides a fuller explanation of why the moral integrity of the process is not necessarily implicated in cases where the breach was immaterial and it is thus 'incorrect to quash the conviction'.[240]

(e) Limitation of Appeal Powers - a Separate Category?

There is one further matter which requires examination before leaving this category. Hammond argues that there is a species of miscarriage of justice which arises in circumstances where, for example, appeal courts unduly narrow their jurisdiction.[241] This is of some practical significance, as Nobles and Schiff argue that such a narrowing of jurisdiction, or at least significant deference to the decisions of lower courts, is an

[238] Criminal Appeal Act 1968 s 2; and note the debate within the Court of Appeal as to the scope of this provision - *R v Chalkley* [1998] 2 Cr App R 79 (CA) and *R v Mullen* [1999] 2 Cr App R 143 (CA) discussed in *Dennis* (n 234) 219-220; and the cases and discussion noted above at n 224. This problem was presaged in Professor Zander's Note of Dissent to the Runciman Royal Commission which proposed the sole ground of appeal - Royal Commission on Criminal Justice, *The Royal Commission on Criminal Justice : Report* (Cm 2263, 1993) 223, paras 62-72, see also A Clarke, 'Safety or Supervision? The Unified Ground of Appeal and Its Consequences in the Law of Abuse of Process and Exclusion of Evidence' [1999] Crim LR 108; JR Spencer, 'Quashing Convictions for Procedural Irregularities' [2007] Crim LR 835, 841-842.
[239] *Taylor and Ormerod* (n 234) 276; *Dennis* (n 234) 214.
[240] *Dennis* (n 234) 236.
[241] *Hammond* (n 93).

inevitable consequence of the current appellate structure.[242] Such undue narrowing arguably falls within this second category, the question being: if an appellate court has the statutory power to receive fresh evidence, but (perhaps via a guideline judgment)[243] limits the extent to which it will exercise this power, does this amount to a miscarriage of justice?

Similar issues arise with the application of provisos in criminal appeal statutes. These statutes grant appellate courts broad powers to uphold convictions in the face of apparent trial errors in some circumstances, but it is usually left to the court itself to determine the scope of the power (as a matter of statutory interpretation).[244] In some jurisdictions there is firm appellate guidance as to when to apply such provisos,[245] whereas in others the position is more fluid.[246] These are not the only situations in which a court might arguably narrow its jurisdiction unduly – any formulation of an appeal court's powers to overturn convictions will almost inevitably leave scope for such an argument.[247]

Hammond argues that anything less than a standard which provides 'appropriate adherence' to applicable human rights obligations is insufficient, and that as a result a court is obligated to adopt a strong presumption that convictions obtained in consequence

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[242] R Nobles and D Schiff, 'The Right to Appeal and Workable Systems of Justice' (2002) 65 MLR 676; *Nobles and Schiff* (n 5); R Nobles and D Schiff, 'Criminal Appeal Act 1995: The Semantics of Jurisdiction' (1996) 59 MLR 573. See also K Malleson, 'Appeals against Conviction and the Principle of Finality' (1994) 21 J of Law and Society 151; A Furgiuele, 'The Self-Limiting Appeal Courts and Section 686' (2007) 52 Crim LQ 237; *Kirby* (n 108) 112-113; P Scraton, 'Denial, Neutralisation and Disqualification: The Royal Commission on Criminal Justice in Context' in M McConville and L Bridges (eds) *Criminal Justice in Crisis* (Elgar Aldershot 1994) 109; M Colvin, 'Miscarriages of Justice: The Appeal Process' in M McConville and L Bridges (eds) *Criminal Justice in Crisis* (Elgar Aldershot 1994) 287, 290-291; cf *Zellick* (n 194) 73-78.

[243] See, for e.g. *R v Bain* [2004] 1 NZLR 638 (CA) in New Zealand and *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72 (HL) in England and Wales.

[244] See C Penhallurick, 'The Proviso in Criminal Appeals' (2003) 27 MULR 800: C Corns, 'Proven Miscarriages of Justice: Retrial or Acquittal?' (2007) 37 HKLJ 41, 48.

[245] As in Australia, see *Weiss v R* [2005] HCA 81 (HCA) and *Evans v R* [2007] HCA 59 (HCA)

[246] As in New Zealand, see *Hammond* (n 93) 10; and note the oblique statement at *R v Bain* [2007] UKPC 33 (PC) 119.

[247] See the discussion in *R v Munro* [2007] NZCA 510 (CA) [237]-[240].

of a breach of fair trial guarantees ought to be overturned.[248] It is not clear why this must be so.

As Dworkin notes, when actors in a criminal justice system act according to established procedures, they are merely applying a prior political decision.[249] While an appeal court may have a level of freedom to choose its own procedure (within any given statutory framework), it is within its competence to choose whatever approach it is mandated by the legislature to adopt. While a court may be criticised for adopting a more restrictive interpretation of the scope of its powers on the basis that this decreases the likelihood of convictions of the factually innocent being remedied, such an approach would not, so long as it is applied consistently, amount to a miscarriage of justice in its own right. This is because, as long as this is applied consistently by courts, an individual would not be subjected to an unfairly greater risk of moral harm. The requirement of consistency does, however, require that the court applies its criteria consistently, as a failure to do so *would* be a fresh political decision which, if it could have materially affected the outcome, would amount to a miscarriage of justice under this head.

8 Category Three: Immaterial Breaches

There is a further category of cases where one might object to a conviction being upheld, even if there is no connection between the impugned action and the assessment of factual guilt in an individual case.[250] The two previous categories have, in essence, been about truth – a miscarriage of justice is occasioned in the first category because the trial process has returned a false result, with the consequence that an individual has been baselessly

[248] *Hammond* (n 93) 15.
[249] *Dworkin* (n 153) 84-85.
[250] Nobles and Schiff refer to such cases as 'Dirty Harry' situations in reference to the release of a factually guilty defendant in the eponymous film on the basis that the pivotal evidence was obtained by torture - R Nobles and D Schiff, 'Due Process and Dirty Harry Dilemmas: Criminal Appeals and the Human Rights Act' (2001) 64 MLR 911.

subjected to censure and sanction. Similarly, in the second category an individual has been placed at an unjustifiably greater risk of such a result occurring. However, these are not the only situations in which a conviction ought to be viewed as unsustainable, and as such a third category ought to be recognised – situations where while there was a *fair trial*, it was nonetheless *not fair to try* the defendant.[251] This category contains those situations where the departures from what was required were so grave or fundamental that, even if they could not possibly have influenced the inquiry as to the guilt or innocence of a defendant, the conviction ought to be overturned.[252]

(a) Justification

The conclusion that this category is entirely unrelated to truth may be controversial. It is possible to fashion an argument that, viewed in the context of the criminal justice system as a whole, the process of eliciting truth is dependent on confidence in the system itself – a system which is in turn dependent on notions of fairness which might not have any apparent relationship to the search for truth in individual cases.[253] If this could be demonstrated, the inclusion of this category could be justified because, if it were to be omitted, truth in the instant case would be the superior virtue in the system and rights which did not *directly* contribute to the search for truth would be degraded, thus diminishing the ability of the system *as a whole* to discern truth.[254] However this is a deeply contestable contention which relies for its validity upon an empirical claim which would be difficult to prove either way.[255]

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[251] While helpful in terms of illustrating the distinction, these descriptors can lead to confusion (as noted in *Ashworth and Redmayne* (n 56) 323), and will for this reason not be used for the remainder of this thesis.
[252] As Galligan commented in the context of criminal evidence, 'These are issues *external* to proof; they are based on values which compete with rectitude' - DJ Galligan, 'More Scepticism About Scepticism' (1988) 8 Oxford J Legal Stud 249, 255 quoted in *Choo* (n 163) 14.
[253] *Nobles and Schiff* (n 51) 49.
[254] *Nobles and Schiff* (n 51) 49; *Hall* (n 29) 315.
[255] Opponents of this point of view argue that quashing convictions on this basis would 'bring the criminal justice system into disrepute, rather than protect its integrity' - Office for Criminal Justice Reform,

A different justification is therefore necessary. As with the second category, matters within this category ought not to be considered miscarriages of justice solely on the basis that patent breaches of rights undermine the self-restraint of officials (by signalling that breaking the rules can pay), partly due to the difficulty in establishing an empirical basis for this claim,[256] but more importantly due to the fact that this provides a very weak justification for arguing that an individual case ought to be viewed as a miscarriage of justice. This is especially so when one considers that the interests involved can, generally speaking, be vindicated by alternative means.[257]

It is better to view this category as disconnected from any contestable claim about the beneficial practical consequences of its adoption. Given this, recognition of such matters as miscarriages of justice is likely to be controversial. The House of Lords, for example, has held that the distinction between cases where factual guilt was and was not in issue was so important that statutory compensation for miscarriages of justice[258] was unavailable where a conviction was overturned due to a 'gross abuse of executive power', but where guilt was not in doubt.[259]

To accept that there is a basis independent of the search for truth for the recognition of a conviction as a miscarriage of justice, one must accept two things: first, that the criminal process has goals other than the conviction of the guilty and the protection of the innocent, and secondly, that in at least some instances actions which are inconsistent with those other goals mean that a trial should not be allowed to proceed or a

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Quashing Convictions: Report of a Review by the Home Secretary, Lord Chancellor and Attorney General (2006) 12.

[256] See *Orfield* (n 233); *Perrin and others* (n 233) but cf S Penney, 'Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence under Section 24(2) of the Charter' (2003) 49 McGill LJ 105.

[257] Zuckerman has suggested two such mechanisms: a disciplinary court and a 'cheap and easy procedure that would encourage aggrieved persons to sue' - AAS Zuckerman, 'Illegally-Obtained Evidence - Discretion as a Guardian of Legitimacy' (1987) 40 Current Legal Problems 55, 64-65.

[258] Under the Criminal Justice Act 1988 s 133.

[259] *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1 (HL). For background to this decision (not including the House of Lords' decision) see *Roberts* (n 194).

conviction to stand.[260] With regard to the second aspect, the questions of whether a trial should proceed and whether a conviction should stand should be judged by the same yardstick, as once it is accepted that contravention of certain principles means that a prosecution cannot proceed, it is difficult to sustain an argument that these same considerations do not mean a conviction obtained by such means ought to be vitiated.[261]

Turning to the first matter, the criminal process ought not to be viewed as a machine programmed to achieve the conviction of the guilty at whatever cost.[262] More properly, it should be viewed as a process which must respect the dignity of each individual subject to its jurisdiction, and is therefore obligated to respect certain baseline rights and rule of law principles – contravention of which undermines the dignity of the individual.[263] As Ashworth and Redmayne argue, 'given that effective criminal procedure requires that prosecuting agencies be given coercive powers, it seems that a key facet of criminal procedure will be the provision of limits on these powers to ensure that the human interests connected to the respect for dignity are not unnecessarily infringed'.[264]

If a conviction was obtained in circumstances which evince a manifest lack of respect for such interests, it ought therefore to be viewed as carrying insufficient moral

[260] See Lord Griffiths in *Ex Parte Bennett* (n 229) 61-62: 'In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.'
[261] This was the conclusion reached by the Court of Appeal in *R v Mullen* (n 238); see also *Dennis* (n 234) 226.
[262] See *Choo* (n 163) 10-14 and IH Dennis, *The Law of Evidence* (2nd edn Sweet & Maxwell, London 2002) 41-49.
[263] *Ashworth and Redmayne* (n 56) 45. 55: 'the process should have the twin goals of regulating the process for bringing suspected offenders to trial so as to produce accurate determinations, and of ensuring that fundamental rights are protected in these processes'.
[264] *Ashworth and Redmayne* (n 56) 22, see similarly *R v Looseley* (n 230) at para 1: 'every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state.'

authority to be sustained.[265] Central to this is a notion that the criminal justice system is not merely about convicting the guilty and acquitting the innocent, but that 'there is an additional and onerous responsibility to maintain the moral integrity of the criminal trial process and its application to the appeals process'.[266] Thus, irrespective of whether the factual outcome of the process was in jeopardy, in some situations a conviction ought not to be sustained.

(b) Who is the Victim?

An interesting question arises as to who the victim of a miscarriage of justice is under this category. Walker has argued that it might be said that the community as a whole is the victim in such cases, as 'the damage [where there is a] conviction arising from deceit or illegalities [is that it is] corrosive of the state's claims to legitimacy on the basis of its criminal justice system's values such as respect for individual rights'.[267] Such a claim suffers from the deficiency that it is contingent on there actually being a degradation of the state's claims to legitimacy in the eyes of the community, as how else has the community suffered a loss? It is not difficult to conceive of situations in which the state's claims to public legitimacy are in fact strengthened by acting in violation of individual rights – for example, where irrefutable evidence of a defendant's culpability for a serious crime was obtained by such a violation.[268] Given this difficulty it is preferable to avoid claims that rely on such notions of legitimacy.[269] The better view is that it is the individual who has suffered. It is his or her dignity which has been infringed

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[265] As Zuckerman put it, '[t]he moral standing of the criminal process is … affected by the judicial attitude towards breaches of the law' – AAS Zuckerman, 'Miscarriage of Justice and Judicial Responsibility' [1991] Crim LR 492, 498. See also *Dennis* (n 234) 233-236; *Spencer* (n 238) 863.

[266] *Taylor and Ormerod* (n 234) 267 this was also the argument made by Zander in his partial dissent from the report of the Runciman Royal Commission – Royal Commission on Criminal Justice, *The Royal Commission on Criminal Justice : Report* (Cm 2263, 1993) Note of Dissent, para 66.

[267] *Walker* (n 29) 37.

[268] *Zuckerman* (n 257) 56.

[269] See also *Ashworth and Redmayne* (n 56) 24-25; *Ashworth* (n 56) 651.

by what is (by definition) an improper exercise of state power.[270] It is therefore properly the convicted individual who ought to be viewed as the victim of the miscarriage of justice under this head.[271]

(c) What Qualifies?

Significant difficulty arises when it comes to articulating a framework for discerning what types of situations might fall within this category. The first step is to recognise that to justify the inclusion of this category within the broad definition proposed above – where the *conviction* itself ought not to have occurred – it is necessary to query whether a lesser remedy would suffice, for example, the payment of compensation for the infringement of the individual's human rights.[272] We ought thus to be concerned only with situations where any remedy short of a stay of proceedings or quashing of the conviction would be inadequate.[273] The question thus becomes: what constitutes an unjustified incursion on human dignity interests sufficient to require the setting aside of a conviction?

Dennis has argued that the distinguishing feature of cases of this type is bad faith (in the sense of 'knowing breach of the investigating or prosecuting authority's legal obligations in order to secure some advantage that might not be obtainable by compliance with the law') on the behalf of the executive.[274] This would appear to place too much of a premium on the public legitimacy of the process, rather than the moral integrity.[275] While such knowing breaches are likely to be the paradigm cases of situations falling

[270] See *R v O'Connor* [1995] 4 SCR 411 (SCC) paras 62-63, 71.
[271] This may have very real practical consequences – particularly when it comes to the payment of compensation, which victims of miscarriages of justice of this type are currently ineligible for – *R (Mullen) v Secretary of State for the Home Department* (n 259).
[272] See *Dennis* (n 234) 213-214; *Emmerson and Ashworth* (n 114) paras 17-33, 17-34.
[273] *Ashworth* (n 56) 652.
[274] *Dennis* (n 234) 227, 229; see also *Greer* (n 40) 69-73.
[275] This resonates with Ashworth and Redmayne's criticism of Dennis' account as one which is concerned more with appearances than reality - *Ashworth and Redmayne* (n 56) 25.

within this category, the bar should not be set this high. It is not difficult to think of cases where the dignity interests of individuals can be unknowingly affected during the criminal process in quite profound ways – for example, an individual who is held on remand for inordinately long periods pending trial due to systemic delays or simple mistake.[276]

Another attempt to discern what might fall within this category was recently made by Spencer, who has provided a theoretical scheme for when a conviction should not stand even where there is 'little doubt' about the factual guilt of a convicted person.[277] Spencer identifies six categories of such cases: where the court had no jurisdiction to try an offence; where the court fundamentally misapplied the substantive criminal law; where rules of natural justice were broken; disregard of other procedural rules of major importance which exist for the particular protection of the defendant and 'spell out the basic elements of criminal procedure' (but not those which 'merely add the details'); where there was some formal bar to the prosecution; and gross misconduct in the course of the investigation or pre-trial processes.[278] To some extent, this list conflates categories two and three,[279] although even if this is overlooked one might have reservations about the utility of attempting to exhaustively catalogue the situations which might qualify.[280] Unforeseen, rare or unfathomable circumstances can and often do arise in criminal proceedings, and technological or procedural changes may alter the basis on which decisions as to what is permissible are made.[281] As such, it is necessary to accept that the

[276] C.f. *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68 [2004] AC 72 para 25.
[277] *Spencer* (n 238) 842-846.
[278] *Spencer* (n 238).
[279] This would seem apparent in Spencer's subsequent observation that retrial is possible under some of these heads but not in others - *Spencer* (n 238) 842-846.
[280] Lord Bingham described attempts to describe such cases in advance as 'unwise' - *Attorney General's Reference (No 2 of 2001)* (n 276) para 25; Brennan J has declared such a feat as 'impossible' - *Jago v District Court of New South Wales and Ors* (1989) 87 ALR 577 (HCA) 589.
[281] See D Corker and D Young, *Abuse of Process in Criminal Proceedings* (2nd edn Butterworths, London 2003) 103 which refers to one of the standard definitions of abuse of process and notes that '[t]here are an infinite number of situations in which an allegation of prosecutorial manipulation or misuse of the process of the court can be made' and that the examples provided in their (comprehensive and encyclopaedic) work

types of situation which fall to be considered as a miscarriage of justice on this ground, 'like the categories of negligence, are never closed'.[282]

However, by drawing attention to the range of situations which might qualify, Spencer provides a number of examples with which to test whichever general framework is proposed. Take the first situation Spencer hypothesises – where a conviction is obtained by a court which had no jurisdiction to try the offence. Ought this to qualify as a miscarriage of justice? Or is it only in some circumstances, considering that the lack of jurisdiction might be the result of the failure of an official to take a purely technical step, such as signing an indictment before presenting it to the relevant court?[283] This has caused controversy in the English courts in recent years, with the Court of Appeal drawing a distinction between situations where there is a 'jurisdictional defect' – for example, where an inferior court convicts a defendant of a crime triable only in a superior court[284] – and situations where a court which 'in principle has the power to deal with the instant case, fails to respect the procedural rules which it is required to follow'.[285] In the former situation, 'the proceedings will usually be invalid',[286] whereas in the latter invalidity will only follow if some form of prejudice or 'consequential injustice' flows from the failure.[287]

The Court of Appeal's approach has been described as 'flexible' and 'justice-

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were 'but mere examples of this head of abuse and the situations in which this can arise cannot be fully predicted. Fairness is obviously a concept whose parameters cannot be fixed or discerned'. This is because, as Zuckerman wrote in the context of the civil abuse of process jurisdiction, a category such as this can 'fill… the gap where rules run out' and 'enable the court to deal with problems to which the rules either provide unsatisfactory solutions, or altogether fail to address' - AAS Zuckerman, *Zuckerman on Civil Procedure : Principles of Practice* (2nd edn Sweet & Maxwell, London 2006) 474.

[282] *R v Martin (Alan)* [1998] AC 917 (HL) 926.

[283] As was the case in *R v Clarke & Mcdaid* [2008] UKHL 8.

[284] Or vice versa, as was the case in the constituent case of *O'Reilly* in *R v Ashton, Draz and O'Reilly* [2006] EWCA Crim 794.

[285] M Panzavolta, 'Keeping Procedural Errors at Bay' (2007) 66 Cambridge LJ 284, 285.

[286] *R v Ashton, Draz and O'Reilly* (n 284) para 5.

[287] *R v Ashton, Draz and O'Reilly* (n 284) para 70.

driven'[288] - indeed the distinction between cases where prejudice to an accused is present and where it is absent is based on a solid conceptual foundation, for the reasons discussed above.[289] If this were where the line was drawn in all cases, the jurisdictional ground would fall for consideration under the second category, and not here. However, this was not the case, as the Court accepted that some jurisdictional errors require the quashing of a conviction irrespective of any prejudice, suggesting that at least in some situations prejudice is not the touchstone. The House of Lords grappled with this problem when it unanimously rejected the Court of Appeal's approach, holding that it was the courts' duty to overturn convictions where legislation provided that a procedural step must be followed, irrespective of the presence or absence of prejudice to the accused.[290] In delivering the main speech, Lord Bingham argued that while '[t]echnicality is always distasteful when it appears to contradict the merits of a case… the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place.'[291] This strongly suggests that the courts' concern in such cases is with ensuring that executive power is exercised properly – that is, that it is not abused. As Lord Griffiths put it in the seminal abuse of process case *Ex Parte Bennett*, in criminal law as in administrative law 'it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended… and if it comes to the attention of the court that there has been a serious abuse of power it should… express its disapproval by refusing to act upon it.'[292]

This is an opportune point at which to return to the proposition that this category

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[288] DC Ormerod, 'R v Clarke (Ronald Augustus)' [2006] Crim LR 1011, 1012.
[289] See 52-55, above.
[290] *R v Clarke & Mcdaid* (n 283).
[291] *R v Clarke & Mcdaid* (n 283) para 17, the reference to 'serious crime' presumably reflects the fact that the case was concerned with a defective indictment, and consequently the curative power which applies in respect of summary trials was unavailable.
[292] *Ex Parte Bennett* (n 229) 62. Lord Hoffman approved of this characterisation of the courts' jurisdiction to intervene in such cases in *R v Looseley* (n 230) para 40.

is, at heart, about protecting the dignity interest of the accused in the face of state coercion. Is this interest infringed in a case such as *R v Clarke & McDaid*, where the prosecution failed to properly sign the indictment on which the accused were tried and convicted?[293] In large part, this depends on how generous an interpretation one gives to 'dignity'. The term is not one with inherent content, and can colour in various ways depending on the legal and social context in which it arises.[294] Indeed, Kant viewed this indeterminacy as one of dignity's virtues – meaning that the concept had 'no price'.[295] Whatever the merits of this argument, this indeterminacy does not provide a basis for resolving individual cases, and bare reference to the concept of dignity risks substituting rhetorical flourish for reasoned argument.[296] Any utility that the term possesses in this context must derive from the fact that it provides a basis for assessing whether any given situation ought to be considered a miscarriage of justice. However, the lack of a generally accepted interpretation of the term means that 'human dignity' can only be of use when, as a concept, it is elaborated and contextualised so that it has some flesh.[297]

Similarly unhelpful is the broad language which is characteristic of senior appellate courts' attempts to circumscribe the limits of this ground. Take the House of Lords' statements that a conviction will be impermissible where: 'it offends the court's

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[293] *R v Clarke & Mcdaid* (n 283).
[294] See D Weisstub, 'Honor, Dignity and the Framing of Multiculturalist Values' in D Kretzmer and E Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International The Hague 2002) esp 265: 'What is interesting about human dignity is how it colours differently, depending upon the social needs in question. Its centrality and attractiveness for global ethics may be, thereby, its malleability rather than the tightness of its logic'; D Feldman, 'Human Dignity as a Legal Value (Part 1)' [1999] PL 682; D Feldman, 'Human Dignity as a Legal Value (Part 2)' [2000] PL 61; C McCrudden, 'Human Dignity' Oxford Legal Studies Research Paper No 10/2006 (April 27, 2006) .
[295] I Kant, *Grundlegung Zur Metaphysik Der Sitten* (Riga 1785) cited in E Klein, 'Human Dignity in German Law' in D Kretzmer and E Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International The Hague 2002) 149.
[296] As to this, see *McCrudden* (n 294).
[297] This is a task which has been undertaken by courts in other jurisdictions – notably Germany, see *Klein* (n 295); and Canada – e.g. *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (SCC). This development also appears to be occurring in Israel – see D Kretzmer, 'Human Dignity in Israeli Jurisprudence' in D Kretzmer and E Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International The Hague 2002).

sense of justice and propriety to be asked to try the accused in the circumstances of a particular case';[298] where the impugned conduct is 'an affront to the public conscience';[299] or was 'so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding';[300] or even that such cases will be 'recognisable when they appear'.[301] The guidance from other senior Commonwealth courts is at a similar level of generality – for example, the Supreme Court of Canada stated that it would intervene 'where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency';[302] the New Zealand Court of Appeal would do so 'if … the Court processes are being employed for ulterior purposes or in such a way ... as to cause improper vexation and oppression',[303] or where the situation is 'of a kind that is so inconsistent with the purposes of criminal justice that for a Court to proceed with the prosecution on its merits would tarnish the Court's own integrity or offend the Court's sense of justice and propriety';[304] and the High Court of Australia would 'generally' intervene in cases where the criminal process was being used 'inconsistently with some aspect of its true purpose, whether relating to the hearing and determination, its finality, the reason for examining the accused's conduct or the exoneration of the accused from liability to punishment for the conduct alleged against him.'[305] Nor did a recent, ultimately abandoned, legislative attempt to circumscribe this power in England and Wales provide any more clarity – while the Court of Appeal was to

[298] *Ex Parte Bennett* (n 229) 74.
[299] *R v Looseley* (n 230) para 19; see also *R v Latif* [1996] 1 WLR 104 (HL) 112 where Lord Steyn suggested that such a conclusion could only be reached after '[w]eighing countervailing considerations of policy and justice'.
[300] *Hui Chi-Ming v the Queen* [1992] 1 AC 34 (PC) 57.
[301] *Attorney General's Reference (No 2 of 2001)* (n 276) para 25.
[302] *R v Jewitt* [1985] 2 SCR 128 (SCC) para 20 citing *R v Young* (1984) 40 CR (3d) 289 (Ont CA) 329 – this passage has formed what the Supreme Court of Canada has more recently described as the 'general test for abuse of process' in Canada – *R v O'Connor* (n 270) para 59.
[303] *Moevao v Department of Labour* [1980] 1 NZLR 464 (NZCA) 482.
[304] *Fox v Attorney-General* [2002] 3 NZLR 62 (NZCA) para 37.
[305] *Jago v District Court of New South Wales and Ors* (n 280) 594.

be directed not to allow appeals in circumstances where there was no doubt as to factual guilt, this was to be subject to the proviso that this did not apply where upholding the conviction 'would seriously undermine the proper administration of justice'.[306]

Each of the formulations offered above suffers from almost total indeterminacy, and reference to them does not advance the position much further than reference to other general terms – such as 'miscarriage of justice' itself. Lord Hoffman has acknowledged this, stating that while '[a]t the highest level of abstraction, the … principles are easy to state', only 'limited assistance can … be gained from distinctions which restate the question rather than provide a criterion for answering it.'[307]

Perhaps the best guidance available is that of Lord Clyde: '[n]o single formulation will readily cover all cases, but there must be something so gravely wrong as to make it unconscionable that a trial should go forward, such as some fundamental disregard for basic human rights or some gross neglect of the elementary principles of fairness.'[308] As to whether a particular situation may fall within such a category, it is probably impossible to come up with any more specific guidance.

This is not an entirely satisfying conclusion, and will make the task of those reviewing convictions difficult, as well as giving rise to concerns regarding the potential for arbitrariness.[309] It does not provide, for example, a definitive answer to whether the facts of *R v Clarke & McDaid* would always give rise to a miscarriage of justice under this category.

It is important to emphasise that, though its boundaries are drawn broadly, this

[306] Criminal Justice and Immigration Bill 2007 cl 42.
[307] *R v Looseley* (n 230) para 47-49.
[308] *R v Martin (Alan)* (n 282) 946-947.
[309] As the rather loose definition offered above resembles the articulation of evidentiary discretions, the concerns often raised about extending discretion to individual actors in a legal system are apposite here – see classically, AV Dicey, *Introduction to the Study of the Law of the Constitution* (6th edn Macmillan, London 1902) 184.

category is not entirely open-textured. As with matters falling within the second category, once a decision has been reached as to whether a particular factor requires that a conviction be vitiated, principles of fair play requires that this decision be applied equally to all. Thus, within individual jurisdictions, it is likely that the contours of what amounts to a miscarriage under this category will be sketched out over time by the courts. One can see the development of such a corpus of law in many jurisdictions at present under the abuse of process rubric, with superior courts laying out increasingly specific rules about the circumstances in which convictions cannot stand, even where there is no concern about factual guilt.

Thus, in England and Wales, it is now clear that there are certain circumstances in which a conviction cannot stand – notably in cases where the conviction was the result of impermissible state entrapment[310] or where the individual arrived in the jurisdiction by means of unlawful rendition.[311] There is also an embryonic jurisprudence from the European Court of Human Rights with regard to the circumstances in which Article 6 can be violated even where a factually correct verdict is not imperilled.[312] While these do not yet provide the clear and authoritative guidance which may be desired, principles are beginning to emerge, which will make the task of reviewing bodies easier, and reduce the scope for arbitrariness.

9 Conclusion

The search for a comprehensive and consistent definition of 'miscarriage of justice' is an elusive, and likely impossible, quest. In light of the significant conceptual distinctions

[310] *R v Looseley* (n 230).
[311] *Ex Parte Bennett* (n 229).
[312] Notably *Teixeira De Castro v Portugal* (1999) 28 EHRR 101 (ECtHR) with regard to entrapment and *Jalloh v Germany* (2006) 44 EHRR 667 (ECtHR) with regard to self-incrimination, although it is admitted that these developments are at an early stage, and that the pronouncements are at times unhelpfully elastic - see D Ormerod and A Roberts, 'The Trouble with Teixeira: Developing a Principled Approach to Entrapment' (2002) 6 Intl J Evidence & Proof 38.

which must be drawn between the numerous flaws and injustices which can arise at each stage of the criminal justice system, the best which can be hoped for is a principled and consistent functional definition.

Central to such a definition must be the act of criminal conviction - a significant step which marks the convicted person out as worthy of moral censure and the imposition of sanctions. The act of conviction is central to the criminal process, and therefore central to any meaningful account of miscarriage of justice. Furthermore, it is an act which is conceptually distinct from any other activity in the criminal justice system, and one which is of such significance that its improper imposition is of such concern that it warrants consideration in isolation.

At the same time, the potential list of factors which might make a conviction improper is so broad that it is necessary to give this matter close and sceptical consideration. In a modern liberal criminal justice system which is premised on the fair and equal treatment of its citizens as moral actors, there are three distinct circumstances in which a conviction cannot stand. The first two concern themselves with situations where an individual is either innocent, or has been put at unfair jeopardy of conviction in circumstances where they may not be guilty. That is: when the individual is factually innocent of the crime of which they have been convicted or when there has been a material breach of a due process protection provided by positive law. The final situation where a conviction ought not to be upheld is not one in which the innocence of an individual is in doubt, but rather where the integrity of the criminal justice system as a whole is impugned.

Other definitions are both possible and plausible, as the distinctions drawn in order to arrive at this point are contestable, as was rendered transparent at many stages in the preceding analysis. However, taken together, these three categories provide a

consistent and principled account of the matters which an entity charged with reviewing criminal convictions ought to concern themselves with, and therefore a tool for analysing their success or failure.

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