Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer

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This article examines two contrasting proposals for the reform of criminal appeals: the government’s recent proposal that the guilty should no longer have their convictions quashed on ‘technicalities’; and calls by campaigners for the Court of Appeal to consider innocence rather than the ‘safety of the conviction,’ together with their associated attempts to establish Innocence Projects in the UK. Despite the rhetorical power of ‘innocence’ as a campaigning tool, it is contended that to import such a standard into the legal system would be retrogressive and counter-productive, both as a safeguard against wrongful convictions and in protecting the integrity of the system. In order to be meaningful, due process protections must apply to all. The government’s proposals attack this principle directly; innocence campaigners risk unwittingly assisting their endeavours.

INTRODUCTION

In any criminal justice system, mistakes are bound to occur; the factually guilty will escape conviction and the innocent will be judged falsely. Errors of justice can have devastating consequences for the individuals wrongly convicted, as well as existing and future victims of perpetrators who avoid conviction. They may also affect the attitudes and efficiency of practitioners, the beliefs and policies of politicians, and public confidence in the administration of justice. As with art or beauty, while most people believe they would recognise a miscarriage of justice if they saw it, the expression lacks an agreed definition, and can vary in meaning depending on the context in which it is used. How errors of justice are defined is important in legal, analytical, publicity and political terms. It determines which appeals will succeed and calculations of the extent of the problem: too restrictive a definition will underestimate the scale of the issue; too broad a characterisation dilutes the meaning of the term and may diminish the credibility of critics of the system. How the media reports the issue influences public confidence in the criminal justice system and resulting political reforms. Essentially, the definition

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of what constitutes a miscarriage of justice and the extent of the safeguards implemented to minimise their occurrence depend[s] critically upon what “criminal justice” is said to mean (the nature and purpose of the system), and the resulting balance struck between deciding whether it is better that ten guilty persons escape, than that one innocent suffer, or that the acquittal of the guilty is as much a miscarriage of justice as the conviction of the innocent.

This definitional issue is of topical, practical importance as well as scholarly interest. The due process approach to assessing wrongful convictions is currently under attack from opposing trajectories. The government recently published a consultation document on changing the appellate test so that the ‘guilty’ will not have their convictions quashed on the basis of legal or procedural errors. Others have called for the introduction of an ‘innocence’ or ‘miscarriage of justice’ test in order to assist those whom they argue are left with no means of legal exculpation by the overly restrictive tests applied by the Court of Appeal. The recently established Innocence Network UK (INUUK) is encouraging the establishment of Innocence Projects in UK universities, modelled on those in the United States of America, to search for evidence to exonerate the wrongly convicted. The decline in interest shown by the media in miscarriages of justice observed by Nobles and Schiff has continued. Channel 4 apparently abandoned miscarriages of justice programmes as they were ‘a bit 1980s’ and print journalists have found it increasingly hard to publish such stories as ‘miscarriages of justice no longer command the mainstream of political debate’. Recent activity in this area has been driven instead by government and campaigners.

There are many reasons, pragmatic and principled, for resisting the introduction of an innocence criterion for appeals. Almost every measure introduced by successive governments to curtail the rights of defendants has been based upon claims of ‘criminals’ escaping justice. This includes the introduction of the jury-less ‘Diplock’ Courts in Northern Ireland, the curtailing of the right of silence (Criminal Justice and Public Order Act 1994, ss 34–8), the pre-trial

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7 As implied by The Royal Commission on Criminal Justice, Report Cm 2263 (1993) 2.
11 The Innocence Project is UK-wide; the CCRC covers England, Wales and Northern Ireland, although Northern Ireland has a separate Court of Appeal. Scotland has a separate legal system and its own CCRC. UK is used for convenience in this article.
12 See n 10 above. There are also innocence projects in Australia.
13 n 3 above, 149.
16 This includes the introduction of the jury-less ‘Diplock’ Courts in Northern Ireland, the curtailing of the right of silence (Criminal Justice and Public Order Act 1994, ss 34–8), the pre-trial
contrasted unfavourably with the rights of ‘criminals’ in order to justify the erosion of due process protections. The latest comparison is that the acquittal of the guilty is as much a miscarriage of justice as the conviction of the innocent. (Then Prime Minister Tony Blair went even further in saying that ‘It’s perhaps the biggest miscarriage of justice in today’s system when the guilty walk away unpunished.’) These ‘common sense’ amendments to due process protections are difficult but most important to resist. In a system that conforms broadly to a due process model, where the prosecution has to demonstrate guilt to a high standard of proof, ‘it must be recognised that, although conviction avoidance can be a source of injustice, its relationship with wrongful convictions is asymmetrical.’

Other considerations, such as the public interest in prosecuting and the requirements that convictions be achieved properly and in accordance with human rights guarantees must also be taken into account if the system is to avoid injustice, maintain its moral authority to punish, and enjoy public confidence.

Several writers have explored the elasticity, inconsistencies and contradictions in defining miscarriages of justice. The term may be a synonym for a wrongly convicted innocent, describe a situation in which the state has obtained a conviction improperly, or include the unjustified avoidance of conviction. Some commentators exclude convictions overturned on first appeal because the routine safeguards in the system have worked. Others have defined miscarriages of justice more widely to include detentions and arrests that do not lead to charge, and circumstances in which the state breaches the rights of individuals, acts excessively or fails to protect or vindicate the individual. Some definitions include those who escape conviction due to defects in the criminal law or procedure, or who avoid charge or prosecution. The Royal Commission on Criminal Justice (RCCJ) was criticised for making no attempt to define what it meant by a miscarriage of justice, yet treating the acquittal of the guilty and the conviction of the innocent as broadly equivalent, as though this had no consequences for its recommendations. This issue is of critical importance and the practical ramifications of using innocence as a criterion in determining appeals are explored below.

This article examines how those framing their case for reform in the absolutist language of guilt and innocence may bring about the quashing of fewer convictions; the government by design, campaigners unintentionally. It develops
the point made briefly by Nobles and Schiff\textsuperscript{26} that, by focusing on cases of actual innocence, campaigners may inadvertently facilitate restrictions upon due process rights. Those seeking to improve the protections available to the accused should be wary of moving the debate onto the government's terms. Campaigners need to acknowledge the improvements that have been made and respond accordingly; defending due process rights requires a different approach to obtaining them. At a time when the due process protections offered to defendants are under attack, it is misguided and intemperate to frame opposition to these changes, or to argue for reform, in terms of protecting the innocent. Such an approach neglects the wider protective principle of such safeguards and, at least, implies that protection for some suspects is less important than others. It is contended that the establishment of ‘freelance’ projects to do the work of the Criminal Cases Review Commission (CCRC) is ill-considered and potentially very dangerous, particularly in the current climate of restrictions on legal aid.

This article offers a brief explanation of the current appellate structure and the CCRC, the criticisms that have been made of them, and changes proposed by the government and campaigners. It considers the value of innocence as a campaign tool, examining the work of American Innocence Projects. It explores the dangers of importing a ‘campaigning’ discourse of innocence into the legal arena, concluding that the proposition that the appeal courts and CCRC should address issues of innocence is ill-founded, out-dated and potentially counter-productive. In a reasonably regulated and relatively well-funded criminal justice system, which does not see the routine, egregious abuse of suspects, the debate has to progress beyond the simplistic dichotomy of guilt and innocence. A more complex question must now be addressed; not whether or not it is wrong for innocent people to be convicted, but how the system should treat those who are probably guilty.

**APPEALS AGAINST CONVICTION: THE CURRENT POSITION**

Those convicted of a criminal offence in the magistrates' court have an automatic right of appeal. This takes the form of a retrial in the Crown Court before a judge and two lay magistrates.\textsuperscript{27} Appeals against conviction in the Crown Court require leave from the Court of Appeal. They raise more complex considerations and are the sole focus of this article. The test has altered over the years\textsuperscript{28} but, since 1995, the sole criterion to be applied is whether or not the Court thinks a conviction is ‘unsafe’.\textsuperscript{29} The Lord Chief Justice has acknowledged that unsafety ‘does not lend itself to precise definition’. He characterised it as including ‘cases in which the Court, although by no means persuaded of an appellant’s innocence, is subject to

\textsuperscript{26} n 3 above, 234.
\textsuperscript{27} Magistrates’ Courts Act 1980, s 108.
\textsuperscript{29} Criminal Appeal Act 1968, s 2, as amended by Criminal Appeal Act 1995, s 2(l) (a).
some lurking doubt or uneasiness whether an injustice has been done.\textsuperscript{30} This was expanded upon in \textit{Davis, Rowe and Johnson} in which it was held that:

A conviction can never be safe if there is doubt about guilt. However, the converse is not true. A conviction may be unsafe even where there is no doubt about guilt but the trial process has been ‘vitiated by serious unfairness or significant legal misdirection.\textsuperscript{31}

The Court of Appeal emphasises that, unlike a civil appellate court, it is more accurately a court of review of what happened at trial; it has no way of knowing how the jury reached its verdict, nor does it re-hear the evidence. As a result, it does not substitute its own view of the evidence for that of the jury.

Nothing. . . obliges or entitles us to say whether we think that the appellant is innocent. This is a point of great constitutional importance. The task of deciding whether a man is guilty falls on the jury. We are concerned solely with the question whether the verdict of the jury can stand.\textsuperscript{32}

Instead, the Court considers ‘assuming the wrong decision on law or the irregularity had not occurred and the trial had been free from legal error, would the only reasonable and proper verdict have been one of guilty?’\textsuperscript{33} There was some divergence of views after the Criminal Appeal Act 1995 reduced the test to be applied by the Court from ‘unsafe and unsatisfactory’ to simply unsafe. At first, it was held that the conviction could not be quashed if the Court considered the appellant to be factually guilty,\textsuperscript{34} but this has not been followed.\textsuperscript{35} After the Human Rights Act 1998, again after conflicting judgments, the Court held that ‘. . . if a defendant has been denied a fair trial it will be almost inevitable that a conviction will be regarded as unsafe.’\textsuperscript{36} Of the appeals determined by the Full Court in 2005, 37 per cent (228) were allowed.\textsuperscript{37}

The Court of Appeal has created for itself the controversial concept of ‘lurking doubt’\textsuperscript{38} for cases in which there are no explicable grounds for overturning a conviction. This effectively allows the Court a discretion to quash a conviction where it believes that an innocent person has been convicted. It is a rarely used provision and has been criticised for trespassing on the function of the jury, despite offering an important safety valve in the system.\textsuperscript{39}

In a small minority of cases, doubts persist about a conviction, or emerge after the appeal process has been exhausted or has expired (appeals usually have to be lodged within 28 days of conviction). Mechanisms must be established that con-

\begin{footnotesize}
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\item\textsuperscript{30} \textit{R} v \textit{Criminal Cases Review Commission, ex p Pearson} [2000] 1 Cr App R 141, 146.
\item\textsuperscript{31} [2001] 1 Cr App R 115, 131–132 per Mantell LJ.
\item\textsuperscript{32} \textit{R} v \textit{McIlkenny and Others} [1992] 2 All ER 417, 425.
\item\textsuperscript{33} n 31 above 132. See also \textit{R} v \textit{Stirland} [1944] AC 315; \textit{R} v \textit{Pendleton} [2002] 1 WLR 72.
\item\textsuperscript{34} \textit{R} v \textit{Chalkley and Jeffries} [1998] 2 Cr App R 79.
\item\textsuperscript{35} \textit{R} v \textit{Mullen} [1999] 2 Cr App R 143.
\item\textsuperscript{36} \textit{R} v \textit{Togher} [2001] 1 Cr App R 457, 468.
\item\textsuperscript{37} \textit{Judicial Statistics (Revised) England and Wales for the Year 2005}, Cm 6903 (2006). This includes referrals by the CCRC as the figures are not separated.
\item\textsuperscript{38} \textit{R} v \textit{Cooper} [1969] 1 All ER 32; \textit{R} v \textit{Bell} [2003] 2 Cr App R 13.
\item\textsuperscript{39} L. Leigh, ‘Lurking Doubt and the Safety of Convictions’ [2006] Crim LR 809.
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sider both the need to re-examine such cases and the system’s requirement for finality in decision making.40 This responsibility now lies primarily with the CCRC, the body established in the wake of the most infamous miscarriages of justice to investigate such claims. The CCRC has a derivative test of referring a conviction, verdict, finding or sentence to the appropriate appellate court where it considers there is a real possibility that it would not be upheld.41 The CCRC performs a gate-keeping role; once it has referred a case, it plays no further part in the process and the appellant instructs legal representatives to pursue the appeal. The CCRC has to predict how the Court of Appeal might decide; a task made more complicated by the different, sometimes directly contradictory, ways in which the Court can exercise its discretion.42 The statute does not define a ‘real possibility’. The Divisional Court describes it as ‘more certain than an outside chance or a bare possibility, but which might be less than a probability, or a likelihood, or a racing certainty’.43 The CCRC refers around four per cent of the applications it receives44 and around 70 per cent of its referrals have been quashed by the Court of Appeal. Referrals should be based upon evidence or argument that has not been raised previously, other than in exceptional circumstances.45 In one of the first references by the CCRC, the Court of Appeal widened the grounds of appeal that it would entertain, by holding that contemporary standards should be applied when assessing the fairness of trial proceedings.46 The position is, however, still problematic and an occasional source of tension between the CCRC and the Court of Appeal.47 The Court will also hear referrals of convictions that were obtained properly at the time but where the relevant common law has changed.

THE CASE FOR CHANGE

There are limitations to the unsafety test and to the ways in which it has been, or could in future, be applied. The quashing of the convictions of those who, by any understanding other than legal, are guilty, (what have been called ‘errors of impunity’),48 may damage public confidence in the system. As the government argues, ‘to quash a conviction where there is strong evidence of guilt, without ordering a retrial, will bring the criminal justice system into disrepute, rather than protect its integrity.’ Those who made the mistakes should be punished, if appropriate; the public and the victim should not be penalised.49 The government’s proposals for

41 Criminal Appeal Act 1995, s 13(1)(a).
43 n 30 above, 149.
46 R v Bentley (Deceased) [2001] 1 Cr App R 307.
48 Forst, n 1 above.
49 n 8 above 12.
allowing the Court of Appeal to uphold convictions following procedural irregularities where it is convinced of the appellants’ guilt echo recommendations made by the RCCJ\textsuperscript{50} and the Auld Review.\textsuperscript{51} They were rejected at the time and the impetus for their renewal is unclear,\textsuperscript{52} particularly given the multitudinous, more pressing considerations facing the Home Office/Ministry of Justice. The Consultation Paper alleges dissatisfaction with the test amongst legal commentators and suggests that up to twenty unmeritorious appeals a year will be rejected following the changes, yet it provides no supporting references or recent examples.

The government proposes three options: the first two would re-instate a proviso similar to that used before 1995, whereby the Court of Appeal need not quash an ‘unsafe or unsatisfactory’ conviction if it considers that ‘no miscarriage of justice had actually occurred’,\textsuperscript{53} the second ‘perhaps addressing more directly the Court’s view (where they have reached one) of the guilt of the appellant’. This is clearly the favoured option, expanding the judgment in \textit{Chalkley},\textsuperscript{54} which allowed convictions to be upheld despite an irregularity in the trial process, to include pre-trial impropriety. The third option would ‘recast the test and the task of the Court of Appeal so as to require a substantial re-examination of the evidence (akin to the task of the jury)’.\textsuperscript{55} A retrial would be the appropriate option where the Court is unable to form a clear view as to the appellant’s ‘guilt’. The government makes clear, however, that it ‘sees little merit in effectively reconstituting the Court as if it were akin to a court of first instance’. The implications of these troubling and flawed proposals are discussed below.

Some of those most critical of the government’s proposals advocate reforms that may, paradoxically, have similar consequences. Critics of the current system point to the possibility that there may be cases in which there are no grounds of appeal, but it is felt that an unfairness has been perpetuated. It is in these circumstances, they argue, that an innocence or miscarriage of justice test could provide a remedy denied by the strictures of the Criminal Appeal Act 1995.\textsuperscript{56} Such cases may involve the discovery of inadmissible exculpatory evidence, but are perhaps more likely to involve a belief that the jury simply reached the wrong decision; a result of the Court of Appeal’s deference to the jury as fact-finder.\textsuperscript{57} The Court of Appeal has been described as readier to quash convictions for legal or procedural reasons than on the basis of jury error or the admission of new evidence.\textsuperscript{58}

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\item[50] n 7 above, 172.
\item[52] The proposal was announced in Rebalancing the Criminal Justice System in Favour of the Law-Abiding Majority (London: COI: Ref: 275921, 2006, 16).
\item[53] Criminal Appeal Act 1968, s 2(1).
\item[54] n 34 above.
\item[55] n 8 above 15.
\item[56] See n 9 above.
\end{footnotes}
Successful appellants may regard such ‘technical’ decisions as tainted acquittals, which leave unresolved questions as to their involvement in the crimes.

Some commentators have expressed disquiet that the linkage between the tests applied by the CCRC and the Court of Appeal leaves the definition of unsafety to a Court that has been criticised for being ‘less enthusiastically committed to putting matters right than it has been to denying that the system could have made a mistake and to attempting to protect the professional reputations of public officials involved in the original proceedings’.59 Following a series of decisions upholding convictions referred by the CCRC in 2001, concerns were expressed that the Court could raise the threshold for unsafety, thus circumscribing the CCRC’s scope for referral. Malleson argues that ‘the Court’s approach to its powers is as critical as the wording of the statute.’60 Lord Steyn has expressed the view that a general change in legal culture followed the RCCJ and the setting up of the CCRC. He traced the development of the approach of the courts to miscarriages of justice from ‘ways which we would not nowadays find acceptable’ to a situation in which ‘the philosophy became firmly established that there is a positive duty on judges, when things have gone seriously wrong in the criminal justice system, to do everything possible to put it right’.61 Even if such an assertion is accepted, the outlook of the Court of Appeal, if such a thing exists, may vary over time, or between different constitutions of the court.

Naughton criticises the study of miscarriages of justice as ‘inherently legalistic and retrospective’.62 To define miscarriages of justice as solely those verdicts which the courts have overturned would mean that states with no or inadequate appeal procedures do not make mistakes, or that an individual has not been wronged until the judicial process recognises this. This may be unsatisfactory for critical or evaluative purposes, as what is lawful may also be unjust. Walker’s expansive definition of miscarriage of justice includes those convicted by ‘laws which are inherently unjust rather than unjustly applied.’63 This demonstrates the requirement for different terms for miscarriages of justice in legal and public discourse.64 In media and campaigning terms, the label may be applied long before any decision of the court, and sometimes irrespective of it, as with the Birmingham Six. Their first two appeals were dismissed, and their successful appeal in no way affirmed the Court’s belief in their innocence, yet before and after their release, they were one of the most publicly recognised miscarriages of justice.65 The emotional resonance of the term means that the media are likely reserve it for those whom they determine to be factually innocent, although they may increasingly follow the government’s focus on the acquittal of the ‘guilty.’

59 Greer, n 4 above 72. See also Malleson n 40 above.
60 Malleson, n 40 above 155.
61 R v Connor n 57 above.
63 n 21 above 34.
64 n 3 above.
65 See also R. Nobles and D. Schiff, ‘A Story of Miscarriage: Law in the Media’ (2004) 31 JLS 221, regarding the reporting of the conviction and appeal of Sally Clark.
THE IMPLICATIONS OF AN INNOCENCE TEST

While much of the discussion around criminal justice policy refers to guilt and innocence, it is important to note that at no stage in the criminal justice process is a finding of innocence ever called for. Such determinations fell from use in English criminal trials before the Enlightenment. In legal terms, all defendants, even those caught red-handed, remanded in custody or surrounded in court by heavily armed police, are to be presumed innocent until proven guilty. The defendant’s plea and the jury’s verdict is that of ‘guilty or not guilty’, rather than ‘guilty or innocent’. In order to convict, the fact-finder must be persuaded of the defendant’s guilt ‘beyond reasonable doubt’; a level of certainty which requires that those who are only ‘probably’ guilty must be acquitted. The proposals of the government and innocence campaigners fail to take sufficient account of this. Both criticise the trial and appellate process for their deficiencies as mechanisms for uncovering the truth when:

It is trite, but nonetheless fundamental, to recognize that although criminal justice processes seek to discover the truth about alleged offences and alleged offenders, the pursuit of truth is not to be done at all costs. There is always a trade-off between procedures that maximize the chances of convicting the guilty and those that maximize the chances of acquitting the innocent.

Focusing on questions of innocence fails to recognise the importance of this tension. Framing the debate in such terms has damaging consequences both for individual defendants and for the integrity of the criminal justice process; what has been described as a two-fold private and public purpose of appeals. The legal system is based on precedent which means that appellate decisions not only provide remedies in individual circumstances, but also offer guidance for the conduct of all future cases. Judgments based upon the Court’s view of the guilt or innocence of an individual appellant are the hard cases that can make very bad law. In legal terms, an individual is to be considered innocent again if the conviction is quashed, but appellate judges rarely express their decisions in such terms. In certain circumstances, innocence can overlap with unsafety, but it applies to a much narrower band of cases.

In recent years, the Court of Appeal has very occasionally recognised an individual to be entirely innocent; in other cases it has made clear that the conviction of an otherwise guilty person is being quashed solely for ‘technical’ reasons. In

66 Trial by ordeal was prohibited by the felicitously named Pope Innocent III in November 1215. There are limited circumstances in which defendants may have to rebut a presumption but this is a much lower test.
67 See the Judicial Studies Board’s specimen direction on ‘Functions of the Judge and Jury’ available at http://www.jsboard.co.uk (last visited 28 June 2007).
70 The Court of Appeal apologised for the defendants’ suffering as a result of the criminal justice system in the case of Rv Silcott and Others, TheTimes 9 December 1991 and declared that Ivan Fergus was ‘wholly innocent’ (R v Fergus, TheTimes 30 June 1993).
Davies and Rowe it was recorded ‘for the better understanding of those who have listened to this judgment and of those who may report it hereafter this is not a finding of innocence, far from it.’ That leaves a large number of appellants about whom the Court makes no comment regarding their culpability. To those involved, this may be galling, particularly if they have had to listen to unsparing remarks by the sentencing judge about their ‘crimes.’ They are also left vulnerable to public scepticism about their involvement. Yet in most cases, the Court has no way of knowing whether or not an individual is factually innocent. There are undoubtedly different kinds of successful appellant, such as Stefan Kiszko, imprisoned for 16 years for the murder of a child he had not harmed, and Michael Weir, whose murder conviction was quashed solely because the DNA profile that identified him had been improperly retained on the database. There is, however, only one verdict available to the Court of Appeal; that of unsafe. Some situations seem to clamour for recognition of the wrong that has been inflicted, both in human terms and to restore the credibility of the political and legal systems that caused the mistake. Such a process has wider ramifications, however. For example, when Tony Blair issued a public apology to the Maguire Seven and the Guildford Four, this led to an understandable, but as yet unanswered, enquiry from some of the Birmingham Six, a synonymous case in public perceptions, as to when they might expect a similar acknowledgement. A danger of the Court adopting the terminology of innocence campaigners or the media in some cases, however deserving, is that, by default, two tiers of successful appellant are created; the innocent and those who ‘escaped on technicalities.’ This would leave many individuals stigmatised unfairly. The RCCJ rejected the idea of introducing the Scottish verdict of ‘not proven’ into England and Wales for this reason, regarding it as an unsatisfactory option that would leave a cloud over the reputation of the defendant.

To restrict the debate to protecting the innocent at a time when there are very few such clear-cut cases, can only assist the government in its drive to restrict due process protections for ‘criminals’ and will harm both individuals and the administration of justice. If the test for the Court of Appeal were to be raised to innocence, very few convictions would be overturned and the CCRC would refer far fewer cases than it does at present. Other than in a diminishing number of cases, innocence is almost impossible to establish as it requires the appellant to prove a

71 See n 31 above 145–146.
72 See for example, ‘There was no apology’ The Scotsman 15 Nov 2002, reporting the successful appeal of Robert Brown 25 years after his conviction for murder; ‘Court Cannot Declare Innocence on Quashing Conviction’ The Independent 28 March 1991; ‘Court clears Maguires but casts shadow on victory’ The Guardian 27 June 1991.
73 The Attorney General issued a denial that some judges believed the Guildford Four were guilty (The Guardian 11 November 1990) whilst the Birmingham Six accepted undisclosed damages from former MP David Evans for expressing the view that they had been IRA bombers, after their convictions had been quashed (The Times 10 July 1998).
75 The Times 16 June 2000.
76 The Times 10 February 2005.
77 n 7 above 136.
negative. Most innocence cases in America are determined by DNA profiling which can provide conclusively exculpatory evidence, but the majority of cases do not have biological evidence available for testing. A test of innocence would not help those convicted of too serious an offence even though, particularly in the case of murder with its mandatory life sentence, the consequences can be profound.

Whilst recognising the limitations of a strictly legal definition, to use only a media-driven conception of miscarriages of justice distorts the debate. The cases that attract the greatest attention are the atypical ones: the high profile examples of those who have been convicted and imprisoned for many years for crimes of which they are innocent.78 By default, this has led to the neglect of convictions from the magistrates’ courts,79 those overturned at first instance,80 and those quashed due to legal or procedural irregularities. Malleson argues that this approach shaped the very establishment of the Court of Appeal as it was ‘... designed to correct the high profile and implicitly extraordinary event of an innocent man being destroyed by a false conviction for a serious offence. It was clearly not intended to be a general safety net which would filter out all, or even the bulk of the unfair and unsafe convictions.’81

Raising the threshold for overturning convictions to consider only innocence would not protect those who, whilst technically guilty, have been convicted following irregularities in the arrest, investigation or trial procedure. This would mean the loss of an important safeguard for the integrity of the process, as much as for the liberties of individuals. Under section 78 of the Police and Criminal Evidence Act 1984 (PACE), illegally obtained or unfair evidence may be excluded if it would have ‘an adverse effect on the fairness of proceedings’. Although the Court has made it clear that ‘the object of the judge... is not to discipline or punish police officers,’82 where misconduct has such an adverse effect on the fairness of proceedings as to become an abuse of process, it has allowed otherwise unmeritorious appeals.83 It has judged protecting the system to be of greater importance than achieving a conviction in the individual case.

Legislation and the approach of the courts undoubtedly have an influence on police conduct. The ‘lax judicial supervision of the suspect’s treatment during the investigation [under the Judges’ Rules meant that] not unnaturally, the police inferred from the courts’ attitude... that they had a great measure of freedom to induce suspects to speak and a considerable discretion in reporting their statements.’84 Whilst there are many reasons for the improvements in police practice,

78 Naughton, n 62 above; Greer n 4 above 59.
83 R v Mason [1988] 86 Cr App R 349; R v Mullen n 35 above.
84 Zuckerman, n 20 above 496.
one factor has undoubtedly been the fear of officers that they might ‘lose’ convictions.\footnote{M. Maguire and C. Norris, ‘Police Investigations: Practice and Malpractice’ (1994) 21 JLS 72.} This makes it more disturbing that the current proposals seem to endorse an ‘ends justify the means’ approach, seeking to ‘appeal-proof’ cases in which agencies of the state have acted improperly. The use of the term ‘rendition’ rather than ‘kidnapping’ as has been used in almost all other reports of the \textit{Mullen} case is a particularly disquieting portent. The changes proposed would sanction at the highest level what is often described as ‘Noble Cause Corruption’.\footnote{J. Woodcock, \textit{Specialist Crime and Investigating Squads, and Detection Policies} Report, Her Majesty’s Inspector of Constabulary (London: Home Office, 1992).} This could have devastating consequences for the rule of law, public confidence in the judicial system and the credibility of British justice on a world stage. Consideration will need to be given to the issue of whether or not the proposed legislation could be interpreted in a manner that is compliant with the Human Rights Act 1998 and if the government would override a declaration of incompatibility made by the courts.\footnote{Human Rights Act 1998, s 4.} If the state is to hold such extensive powers over the liberties of individuals, it is imperative that they are exercised appropriately. If confidence in the administration of justice is compromised, this can have much wider, damaging consequences.

\[\ldots\] a conviction arising from deceit or illegalities is corrosive of the State’s claims to legitimacy on the basis of due process and respect for rights,\footnote{D. Beetham, \textit{The Legitimation of Power} (London: MacMillan, 1991).} and there may be practical deleterious effects in terms of diminished confidence in the forces of law and order, leading to fewer active citizens aiding the police and fewer jurors willing to convict even the blatantly guilty.\footnote{See D. Walker, n 21 above 4, ‘Introduction’ in C. Walker and K. Starmer (eds) \textit{Justice in Error} (London: Blackstone Press Ltd., 1999).}

The consultation document sketches out the development of the case law regarding ‘unsafety’, but regrettably fails to consider the context in which the statutory developments occurred. This was largely as a result of public and parliamentary concern about wrongful convictions that the judiciary had shown itself unable or unwilling to remedy. The changes introduced by the Criminal Appeal Acts of 1968 and 1995 were designed to encourage the Court of Appeal to be more responsive to the possibility of jury error and to admit new evidence.\footnote{See D. Schiff and R. Nobles, ‘Criminal Appeal Act 1995: The Semantics of Jurisdiction’ (1996) 59 MLR 573.} If the Court of Appeal has become readier to grant leave and quash convictions than previously, then, rather than subverting Parliament’s will, as the government suggests, it is actually doing what the legislature intended. To change the appellate test as the consultation paper proposes, so that convictions are not overturned due to ‘legal technicalities’, would run counter to the measures that have been implemented since PACE to improve the treatment of suspects. To sustain these convictions, the Court would have to decide first whether or not the appellant is ‘guilty’ and, on that basis, decide how significant is the breach of the right. This
'defendant-centred subjectivity' has been criticised in cases such as Dunford, in which it was held that the denial of access to a solicitor at the police station is less serious for experienced suspects than for novices. Arguments of innocence may be criticised on the same basis, for their insinuation that some defendants are less worthy of protection than others and that fundamental rights, including the presumption of innocence, are contingent upon the appropriate conduct of recipients. Once the rights of the 'undeserving' have been eroded, it is easier for the restrictions to be widened to include all suspects. After such protections have been curtailed, the occupational cultures and practices of criminal justice actors may alter, the burden of proof becomes easier for the prosecution to discharge, and the fairness of proceedings is vitiated. At a time when we are told that 'the rules of the game are changing', safeguarding the integrity of the criminal justice process requires a more sophisticated analysis, which a focus on innocence occludes.

INNOCENCE AS CAMPAIGN TOOL – THE TIMES THEY ARE A-CHANGIN'

Peter Neufeld, co-founder of the Innocence Project in New York, has described the campaign against wrongful convictions in America as the civil rights movement of this generation. This is powerful, seductive rhetoric but to apply it to the UK fails to consider the significantly different realities, not to mention histories, of the two jurisdictions. Comparative perspectives can offer important insights into the strengths and weaknesses of domestic policy models and suggestions as to how they might be improved or adapted, but differences between systems need to be considered carefully before merely transplanting policies. Over the last fifteen years, the UK has adopted a great deal of criminal justice policy from the United States. Most of these policies have been part the 'war on crime', rather than increasing the rights of defendants, such as 'three strikes and you're out' sentencing, zero tolerance policing and privatised prisons. It is thus at first sight surprising that those campaigning against wrongful convictions should look to such a jurisdiction for answers.

The Inaugural Innocence Projects Colloquium, held in September 2004, was convened 'to explore the feasibility, and gauge support for, the establishment of innocence projects in UK universities.' Discussion focused exclusively upon the

97 Publicity material for the event.
different models and methods that might be employed; the need for such projects was assumed rather than evaluated or explained. There is, however, no obvious reason for the development of innocence projects in the UK at this time. The American projects are the legal equivalent of emergency relief, operating in desperate circumstances that do not exist in the UK. The parlous state of indigent defense, (the American equivalent of legal aid), the spectre of the death penalty in many states, judges and prosecutors who stand for election on their record of convictions, and the lack of post-conviction legal assistance means that Innocence Projects are a pragmatic, albeit inadequate, response to a pressing need; few would recommend them as a prototype. Innocence Projects in the USA are attempting to fill a void, almost anything they can do is better than nothing. In the UK, innocence projects have to navigate the CCRC which remains the only gateway through which a case can be referred back to court. This overlap has not been addressed sufficiently carefully as attempting to review cases alongside or before the CCRC risks contaminating evidence, and delaying or compromising the appeal process.

Innocence projects vary in size and structure but most are reliant upon volunteers, have limited funding and can work on only a handful of the applications they receive. Provision varies across the country. There are 42 projects; New York has three projects, twenty states have none, or rely on those from other states. Nine projects deal only with cases in which innocence can be established through DNA testing. They operate in a climate in which official bodies are often reluctant, if not hostile, to releasing material, and they have to overcome extensive procedural barriers to getting cases back into court. By comparison, the CCRC has a permanent trained staff of over 100, an annual budget approaching £7 million, a statutory right of access to material and it refers cases directly to the appropriate appellate court. There has been no analysis of the quality of the work undertaken by Innocence Projects, whereas there are mechanisms by which the CCRC may be held to account; publicly-funded legal advice is available to assist with applications to the CCRC, or to seek judicial review of any stage of its work, with no threat of costs being awarded should the claim be unsuccessful. Anybody can apply, and indeed re-apply, to the CCRC, whereas the situation in the USA means that innocence projects have to be very selective in which cases they take on. Some projects will not take certain types of case, such as rape convictions where the defence was consent. There can be issues of equality of access to justice in the criteria applied, for example, one American project requires its applicants to be able to correspond in written English.

Ashworth has described cases such as that of the Birmingham Six as ‘catalytic’. Few of these infamous miscarriages of justice, other than Ward established

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98 For those who did not appeal immediately after conviction, an application can be made directly to the Court of Appeal for leave to appeal out of time. Such applications are rarely successful.
99 Kevin McMahon, founder of Merseyside Against Injustice, was convicted of perverting the course of justice for attempting to convince a prosecution witness to make a retraction statement shortly before the appeal hearing (‘Former detective escapes prison’ Daily Post 23 June 2004).
legal precedent, yet they had a profound effect upon the criminal justice system. In addition to the personal tragedies of these cases, they are also a compelling reform tool. The Beck\textsuperscript{104} case was part of the campaign to establish the Court of Appeal; the wrongful conviction of three teenagers for the murder of Maxwell Confait was followed by the 1981 Royal Commission on Criminal Procedure and PACE; and the Birmingham Six case led to the RCCJ and ultimately, the establishment of the CCRC. In a political climate unsympathetic to due process arguments, cases of actual innocence can make reform easier, as arguments can be made that appeal to both due process and crime control perspectives; while an innocent person is in prison, the real perpetrator is still at large. A similar tactic is being used with some success by American anti-death penalty campaigners to argue that, whatever one's views of capital punishment, the current error rate means that it is not safe to be imposed.\textsuperscript{105}

Innocence can be an effective campaign tool when there are a number of sympathetic cases and relatively straightforward safeguards that can be implemented. It has the greatest effect against the most egregious abuses of the accused but, as the criminal justice system matures, so too must its critics. To equate the problems in the criminal justice system in Britain with those in the USA is a reckless misuse of language, making it impossible – were such a system to be introduced here – to call it by its proper name.\textsuperscript{106} Innocence projects in the USA investigate cases, not only to release those individuals from prison, but also to advocate changes that have been commonplace in the UK for the last 20 years. Such reforms include the tape recording of police interviews and codes of practice for the conduct of identification parades. The certainties of innocence cases may be comforting but there is a danger of romanticising the struggles of a bygone era. The circumstances in which such cases arose are much less likely to happen today, although the dangers of injustice caused by emergency legislation are still in evidence. The safeguards offered by PACE in particular have made an enormous difference. The majority of applications to the CCRC that allege police misconduct relate to investigations before PACE came into force.\textsuperscript{107} Applications regarding later convictions are usually based on 'technicalities' rather than 'actual innocence' claims. If the case for due process safeguards focuses on innocence, then the shortage of such cases makes it much more difficult to argue that the system is need of reform or that these protections must be retained. This approach also fails to consider the more insidious damage that legislation can do; lessons that should have been absorbed from opposition to the curtailment of the right to silence.\textsuperscript{108} Criticism couched in terms of principle and protecting the vulnerable was countered by the provision of limited safeguards, some of which were subsequently removed. Inadequate attention was paid to the theoretical and practical problems that the

\textsuperscript{104} See Pattenden, n 28 above.
\textsuperscript{106} C. Gearty, '11 September 2001, Counter-terrorism, and the Human Rights Act' (2005) 32 JLS 18, 25 n 44. Gearty was criticising those who describe the situation in Britain as amounting to a mini-Guantánamo, but the sentiment seems equally pertinent here.
\textsuperscript{107} Kyle, n 57 above 672.
\textsuperscript{108} n 16 above. See also Nobles and Schiff, n 3 above 258.

legislation posed. This failed to capture other damaging consequences of the Act, in particular, the ‘sidelining’ of defence solicitors. The fact that no obvious miscarriage of justice can yet be attributed to this Act undermines the credibility of such criticism of this, or similar subsequent Acts.

Effective campaigners need to recognise the improvements that have occurred in the criminal justice system following PACE and to acknowledge the stark differences that exist between jurisdictions that need innocence projects and the UK. There are undoubtedly problems in the UK, but where mistakes occur, they are likely to be less obvious than those that occurred previously and thus require a more nuanced appraisal. The problem of institutionalised or indirect racism may offer a useful analogy; non-disclosure of material or inadequate legal representation are less obvious than a beating but are equally pernicious. To continue making criticisms of the criminal justice system based upon convictions obtained thirty years ago is to risk irrelevancy and alienating those who work within the system. Focusing on these errors is to miss the changed nature of the threat to the rights of suspects, which currently appears to be emanating from Whitehall rather than the police station. Instead of acting as the generals in the adage, preparing to fight the last war, the challenge now is to ensure that the safeguards that have been won are not eroded by neglect, complacency, lack of resources, or by undermining legislation.

There are dangers in making those who have had their convictions overturned exemplars for reform. Understandably, many choose to use their experiences to campaign for change. Paddy Hill, one of Birmingham Six, established the Mis-carrriages of Justice Organisation and is a Board Member of INUK; in America, legislation seeking to improve protections for the wrongfully convicted is driven by, and often named after, individuals. Due process protections should not, however, be dependent upon the rectitude of these, often deeply damaged, individuals. In Wisconsin, the release of Steven Avery after 18 years in prison for a sexual assault he had not committed, led to an eponymous Task Force and Bill, which contained a package of measures to improve identification procedures, police interrogation and retention of DNA evidence. After Mr Avery’s subsequent arrest on suspicion of murder, there was a backlash against the Innocence Project that had secured his exoneration and the Bill’s passage through the State legislature was halted. There are dangers also for campaigners who stake their credibility upon the absolute innocence of an individual should they be proved wrong, as in the cause célèbre of James Hanratty. Whilst campaigners may claim to have an unshakable belief in the innocence of certain individuals, it is usually impossible

110 Cape, n 93 above.
111 Lord Carter’s Review of Legal Aid Procurement, July 2006, has been criticised by defence practitioners (available at www.legalaidprocurementreview.gov.uk (last visited 24 May 2007)).
112 For example the first exoneration in a US capital case due to DNA testing led to the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program, SEC 412. Innocence Protection Act of 2004 (part of the Justice for All Act 2004).
114 Mr Hanratty was hanged for the 'A6 murder' in 1963. His body was exhumed in 2002 to enable DNA profiling to be conducted, which satisfied the Court of Appeal that his conviction was safe (R v Hanratty (Deceased) [2002] EWCA Crim 114).
for them to know for certain. There is an interesting parallel between this intuitive belief in the individual’s innocence, and the process of ‘case construction’ by investigators who ‘know’ a suspect is guilty, a primary cause of wrongful convictions.\textsuperscript{115} Legal determinations should be based on evidence rather than intuition.

Righteous indignation is a powerful force and many of those who have dedicated their professional lives to fighting injustice are driven by a passionate belief in their cause.\textsuperscript{116} Sometimes miscarriage of justice campaigns may be proxies for other emotive issues, such as the constitutional status of Northern Ireland, or allegations of police racism. David Jessel, campaigning journalist turned CCRC Commissioner, contrasted the differences in approach his two jobs required, acknowledging that ‘The lawyerly notion of an “unsafe” conviction seemed somewhat anaemic compared with red-blooded innocence.’\textsuperscript{117} Those advocating a change to innocence must consider for whose benefit the test should be designed. Although innocence work can undoubtedly offer pedagogical benefits,\textsuperscript{118} students need to be taught to think beyond ‘goodies and baddies’; to understand the importance and limitations of the law, and to engage critically with the government’s ‘populist punitive’\textsuperscript{119} rhetoric about criminal justice.

Rather than reacting in a piecemeal fashion to redress individual wrongs, a broader perspective is needed in order to protect the integrity of the system. The UK government seeks to characterise the tension between the rights of ‘criminals’ and victims as a zero sum game, most disingenuously in the recent announcement that compensation for those wrongly convicted would be reduced and redistributed to victims.\textsuperscript{120} In countering these arguments, it is unhelpful to diminish the debate to a competition about victim status as, in a simple game of numbers; victims of crime will always trump the wrongly convicted. In Australia, the Sydney based Innocence Panel was suspended in 2003, because the Police Minister said there were insufficient checks and balances in place to stop victims of crime suffering further anguish.\textsuperscript{121} This is clearly a false dichotomy but at a time when no principle of due process seems beyond amendment: the right of silence, double jeopardy, jury trials, even the Human Rights Act 1998, defence of due process safeguards cannot be restricted to the innocent.

The CCRC was the first public body in the world established to investigate allegations of wrongful convictions and to facilitate their passage back to the appropriate court of appeal.\textsuperscript{122} Whilst its effectiveness undoubtedly needs evaluation and monitoring, and improvements in its methods should be considered, it

\textsuperscript{115} M. McConville, A. Sanders and R. Leng, \textit{The Case for the Prosecution} (London: Routledge, 1991).


\textsuperscript{117} Jessel, n 14 above.


\textsuperscript{120} See n 80 above.

\textsuperscript{121} L. Glendinning, ‘Injustice victims given new chance’ \textit{The Guardian} 3 September 2004.

\textsuperscript{122} Other jurisdictions have established similar institutions, the Scottish Criminal Cases Review Commission began work in April 1999 (see www.sccrc.org.uk (last visited 24 May 2007)), and the Norwegian Commission in 2004. Others are considering the possibility (including Holland, New Zealand, South Africa and Australia).
important to acknowledge what a remarkable innovation it was, and to consider what the alternatives to it might be. The CCRC has overcome much of the criticism it faced in its early years about its remit, composition and resource shortages. Although there is still a waiting list, these issues seem largely to have been brought under control\textsuperscript{123} to the point that ‘its standing is such that it is hard to imagine a better body to tackle miscarriages and inconceivable that we would wish to revert to what went before’\textsuperscript{124}.

**CONCLUSION**

There are many ways to describe the mistakes that occur within the criminal justice system; those who seek to prevent injustice in the UK must choose their words with precision. The criminal justice system is founded on the presumption of innocence; a legal fiction intended to insulate the individual from abuses of state power and reduces the likelihood of a factually innocent person being convicted. In order to cast this protective net as widely as possible, the appellate test has to be expressed in the neutral term of ‘safety’. The media and campaigners have different motivations and usually focus upon cases of innocence in order to attract public interest and to achieve reform. Despite the moral and political impact of innocence cases, for those who seek to safeguard the rights of defendants and to uphold the integrity of the criminal justice system, it is imperative to resist allowing the criminal justice debate to degenerate into competing claims of guilt versus innocence.

When the UK criminal justice system is compared to the situation in the USA, ‘better than them’ is insufficient, but to contend that circumstances are as bad is facile. The UK system rarely sees such clear-cut cases of innocence any more. It should not be forgotten how much progress has been made in the protections offered to suspects in a relatively short time. The CCRC was a pioneering approach to identifying and rectifying wrongful convictions. That assistance is available as of right to those claiming to have been wrongly convicted should be celebrated and defended tenaciously. For the UK to abdicate such work to innocence projects would be a retrogressive step. At a time when cuts are being made in the legal aid budget, and civil advice and assistance is increasingly being devolved to the voluntary sector, this is not a time for those who care about due process protections to be offering to undercut provision by the state. Access to justice should not be dependent upon individual philanthropy; structures are needed, not whims of fashion. An innocence campaign in this jurisdiction fails to incorporate both the improvements in due process safeguards that have been made, and the attacks that these protections currently face under the guise of ‘rebalancing’ the criminal justice system. Now that the challenge is to defend due process rights rather than winning them, campaigners must find a new language with which to express their concerns. Despite the superficial appeal of innocence, the wider test of safety is a stronger guarantor that matters will not slip back.

\textsuperscript{123} See the CCRC *Annual Reports* regarding waiting times and its budget.

Whilst such a test is less glamorous, it will do more to ensure the wrongly convicted have their convictions overturned and, as importantly, to maintain a climate in which such mistakes are less likely to happen. As the Court of Appeal has explained:

This court is not concerned with guilt or innocence of the appellants; but only with the safety of their convictions. This may, at first sight, appear an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair; if it is distorted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened.125

The government uses troubling simplistic language to rebalance a criminal justice system it claims has tipped too far in favour of the criminal. To resist such incursions solely in terms of protecting the innocent is misguided. This administration has looked to the USA for many crime control measures; for opponents to look to the same jurisdiction is unwise. Due process rights, in particular the presumption of innocence, if they are to mean anything, must apply to all. Innocence is not the answer.

125 Rev Hickey & Others CA 30/7/97 per Roch LJ cited in Davis, Johnson and Rowe, n 31 above, 130.