

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

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As I write this the execution of a death row inmate, Troy Davis, by the State of Georgia in the United States continues to draw media attention and expressions of outrage from around the world. The outcry over Davis' execution, the latest of more than 1,000 since the resumption of capital punishment in 1977, is a testament not to opposition to capital punishment (most executions draw little comment), but lingering doubt over Davis' guilt. Convicted of shooting an Atlanta police officer to death more than twenty years ago, Davis maintained his innocence from the start. Davis' claim has been bolstered in recent years by the fact that a number of eye-witnesses recanted their testimony and blamed heavy police coercion for their original testimony. His cause was taken up by a large number of prominent public figures, not only traditional death penalty opponents, but also a former Director of the Federal Bureau of Investigation and a conservative former Member of Congress from Georgia. In 2010 the US Supreme Court ordered a lower court to conduct a hearing into Davis' innocence claims. Despite the fact that the court failed to find sufficient reason to overturn the verdict, doubt continued up to the moment of Davis' execution, with the Georgia Board of Pardons (which has the power to commute a sentence) apparently splitting 3-2, and final temporary stay by the Supreme Court.

Twenty years ago, in the early 1990s, as death sentences and support for the death penalty surged, a small cluster of US lawyers and journalists began to promote a public awareness that potentially many US prisoners, including on death row, were wrongfully convicted; victims of heavy handed police tactics, junk science experts in forensic identification of crime scene evidence, incompetent defense lawyers and unprincipled prosecutors (all compounded by "death qualified" juries who brought something less than a presumption of innocence to their work). As new DNA technology made it possible to re-examine biological evidence from even decades-old cases, lawyers succeeded in reopening cases and winning the release of prisoners. These victories created powerful media events. Few things (except violent crimes themselves) compete in drama and televisibility with the story of a person wrongly locked in prison for decades under threat of execution. The images of middle aged men, both softened by age and hardened by prison into a dignified but non-threatening solidity, walking into the embrace of siblings and adult children who had kept their faith alive for years, touched an American public supposedly unified behind a common sense as victims of a high crime society and support for harsh and unremitting punishment.

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

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

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

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

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

As the title suggests, the first and most important move is reframing (and renaming) the problem from the presence of factually innocent people in prison (one possible meaning of wrongful conviction) to a problem of all people who are in prison (or subject to other criminal penalties) because of a procedural failure of justice, whether they are factually guilty or innocent. This is a move well justified in at least two senses. First, the legal system is simply not constituted to produce either factual guilt or innocence. To prioritize those external events, like DNA, or confessions, that can bring strong evidence of such a status into the legal process, is to render invisible a vastly larger multitude of individuals whose cases do not involve such evidence. Second, because the substantive harms of wrongful conviction, both to the individual involved and to the integrity and legitimacy of the legal system are largely the same. Troy Davis' case is a good example of this. There was no definitive evidence proving his innocence, and he was executed after a court in an extraordinary procedure ordered by the Supreme Court failed to find him innocent. Yet many features of the police investigation of his case, including coercive tactics used against witnesses reveal the kind of practices associated with the war on crime that both denies rights and undermines the reliability and, thus, the crime control mission of the law.

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

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

In this regard *Rethinking Miscarriages of Justice* anticipates Ian Loader and Richard Sparks' recent call² for criminologists to abandon the effort to wish away the public and political influence on criminal justice in favor of an effort to contribute toward a "better politics" of crime. With its focus on how the framing of wrongful conviction acts to shape the ways government itself is problematized, *Rethinking Miscarriages of Justice* is an effort to turn criminology and socio-legal studies from how criminal justice governs the population (an important topic on which much ink has been spilled), towards the possibility of counter flows of knowledge and the surveillance of government by the governed, a topic on which very little has been said and which makes this an important read well beyond criminology and socio-legal studies.

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