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Abstract

This article is premised on the straightforward notion that innocent victims of miscarriages of justice who are unable to overturn their wrongful convictions undermines the legitimacy of the criminal justice system, signalling an urgent need for transformation in the interests of justice. It acknowledges the contribution made by the existing discourses on miscarriages of justice, but argues for a distinction between such descriptive forms of information based on analyses of individual cases of successful appeal against criminal conviction and social theoretical analyses that can explain the power relations that characterise and underpin the structures and workings of the criminal justice system. In so doing, it provides a Foucauldian account and critique of current theoretical orthodoxies in understanding miscarriages of justice from Durkheimian and Marxist perspectives. This highlights the apparent ideological stance of the Criminal Cases Review Commission (CCRC), the body set up to assist alleged victims of miscarriages of justice to overturn their convictions, as well as certain miscarriage of justice practitioners and intellectuals themselves, who might be characterised as quasi-Durkheimian for their defence of the existing arrangements, which can and do fail innocent victims. The overall aim is to contribute to the project of *theorising miscarriages of justice* to provide a better understanding of the rationale and workings of the existing mechanisms for overturning alleged wrongful convictions at the post-appeal stage in the hope that they might be more effectively challenged.

Keywords: *Miscarriages of justice; Criminal Cases Review Commission (CCRC); Emile Durkheim; Karl Marx; Michel Foucault.*

Introduction

An extensive literature exists on the causes of miscarriages of justice and wrongful convictions[1] in England and Wales (see Brandon and Davies, 1973; Walker and Starmer, 1986; Walker, 2001; JUSTICE, 1989: Naughton, 2007). In this research, miscarriages of justice have been conceptualised as routine, even mundane, features of the criminal justice system if all successful appeals against criminal conviction are taken into account, affecting many thousands of primary victims and many more thousands of secondary victims per annum (Naughton, 2003a). Wrongful convictions, particularly when caused intentionally, have also been depicted as state crimes (Naughton, 2014; Stratton, 2015). They have been shown to cause extensive and profound forms of social (Naughton, 2003a; 2007; Burnett, 2016; Burnett, et al, 2017), psychological (Taylor and Wood, 1999; Grounds, 2004; 2005; Jamieson and Grounds, 2005; Grounds and Jamieson, 2003) and financial harms (Naughton, 2003b; Tan,) to victims that they and their families (Jenkins, 2013) may never recover from. And, the existing arrangements for overturning alleged miscarriages of justice in the Court of Appeal (Criminal

[1] Miscarriages of justice and wrongful convictions are used as synonymous and interchangeably in this article to indicate the wrongful conviction and/or imprisonment of an innocent victim, but for an analysis of the definitional complexity see Naughton, 2013: 15-31.

Division) (CACD) (Nobles and Schiff, 2000: Chapter 3; Pattenden, 2009; Naughton, 2013: Chapter 6; Roberts, 2017) and/or under the auspices of the Criminal Cases Review Commission (CCRC) (see Nobles and Schiff, 2002, 2005; Naughton, 2009a; Naughton, 2012; Naughton and Tan, 2013; Hoyle and Sato, 2019) have been roundly criticised for rejecting applicants who may be innocent victims of miscarriage of justice, thus exacerbating the harms that they suffer.

Looked at in this context, it seems unsurprising that the public revelation of miscarriages of justice signals bad news for government, generally, and the agencies that make up the criminal justice system, specifically. This is confirmed in the existing research on public attitudes to wrongful convictions, whether in the United Sates (Huff et al, 1996; Zalman et al, 2012; Green and Clarke, 2020) or in Canada (Bell and Chow, 2007, Ricciardelli et al, 2009), which shows, clearly, that they diminish public trust and confidence in the operations of the criminal justice system.

This chimes well with the experience in England and Wales where public awareness of certain miscarriage of justice cases which have succeeded in attaining a high profile status within society have induced widespread crises of confidence in the workings of the criminal justice system and led to the introduction of some of the most significant reforms aimed at preventing miscarriages of justice or ensuring that they can be overturned when they occur (see Naughton, 2001; 2007: xvi-xvii). This includes the introduction of the Court of Appeal (Criminal Division) (CACD) in response to the case of Adolf Beck (see Coates, 2001); the abolition of capital punishment (Block and Hostettler, 1997) in response to the case of Timothy Evans (Kennedy, 1961); the formalisation of guidelines on how the police should deal with suspects and the introduction of the Police and Criminal Evidence Act 1984 (PACE) (Royal Commission on Criminal Procedure, 1981) in response to the *Confait Affair* (Price and Caplan, 1976; Price, 1985); and, the creation of the Criminal Cases Review Commission (CCRC) (Elks, 2008) to assist victims of miscarriages of justice unable to overturn their convictions within the normal appeals system in response to the cases of the Guildford Four (Conlon, 1990), the Birmingham Six (Hill and Hunt, 1995), and a string of other cases of alleged miscarriages of justice at the time where Irish people had been wrongly convicted for alleged terrorist offences (Woffinden, 1987).

To be sure, wrongful convictions can be conceived to undermine a key and core requirement of the various agencies that make up the criminal justice system, i.e. to promote trust and confidence in the criminal justice system and the rule of law (see, for instance, Jackson et al, 2012).

Against this background, this article is premised on the straightforward notion that innocent victims miscarriages of justice who are unable to overturn their wrongful convictions undermines the legitimacy of the criminal justice system, signalling an urgent need for transformation in the interests of justice. It acknowledges the contribution made by the existing discourses on miscarriages of justice, but argues for a distinction between such descriptive forms of information based on analyses of individual cases of successful appeal against criminal conviction and social theoretical analyses that can explain the power relations that characterise and underpin the structure and workings of the criminal justice system. Whilst the existing discourse on wrongful convictions has had, undoubted, political value in fostering the necessary forms of counter discourse that have forced governmental intervention and the introduction of the aforementioned reforms, it has tended to be shaped not by social scientists but, rather, by journalists, practitioners, academics or victims themselves from a critical legal perspective. This prompted Richard Leo (2005) to characterise wrongful conviction

scholarship in the United States as 'impoverished', theoretically, conceptually, methodologically and empirically, which is generally true, also, of the terrain in England and Wales (Naughton, 2014), and to call for social scientists to conduct research to better social scientific understandings of the phenomenon.

To be sure, there is a dearth of social scientific theorisations that seek to explain the apparent reluctance by criminal justice system power to embrace the reality of miscarriages of justice and/or the limitations of the present arrangements for overturning them when they occur, which can leave innocent victims languishing in prison unable to overturn their wrongful convictions. Crucially, the existing discourse with its focus on individual cases is not able to explain why despite the reforms cited above that there remain no guarantees under the existing arrangements that innocent victims will ever overturn their wrongful convictions.

To this end, the remainder of this article seeks to contribute to the project of *theorising miscarriages of justice* in three parts, utilising the social theories of Emile Durkheim, Karl Marx and Michel Foucault, respectively. These theorists have been chosen due their 'classical' status in the discipline, as well as their enduring relevance for contemporary criminological analyses and debates that build on their social thought. In so doing, it provides a Foucauldian account and critique of current orthodoxies in understanding miscarriages of justice from a Durkheimian or Marxist perspective. This highlights the apparent ideological stance of the Criminal Cases Review Commission (CCRC), the body set up to assist alleged victims of miscarriages of justice to overturn their convictions, as well as certain miscarriage of justice practitioners and intellectuals themselves, who might be characterised as quasi-Durkheimian for their defence of the existing arrangements, which can and does fail innocent victims.

The overall aim is to provide a better understanding of the rationale and workings of the existing mechanisms for overturning alleged miscarriages of justice at the post-appeal stage in the hope that they might be more effectively challenged. Indeed, in a human system where miscarriages of justice have been conceived as 'inevitable' (Greer, 1994: 68), it is vital that the last resort for victims to overturn them, the CCRC, is fit for purpose (Lavelle, 2012).

Durkheim

The existing general criminal justice system approach to alleged miscarriages of justice can be conceptualised as quasi-Durkheimian in character. This is revealed in an understanding of his perspective on crime and punishment and his stance on their functional utility for society.

More specifically, for Durkheim, criminal law reflects a moral consensus that represents the interests of society at large and is fundamental to maintaining social order and enhancing social solidarity. Fundamentally, Durkheim saw crime in terms of disapproval, a form of behaviour strongly opposed, and, 'universally' offensive to the 'conscience collective' (cited Chambliss and Mankoff, 1976: 4). Moreover for Durkheim, crime is not regarded as pathological, but 'normal', and, indeed, 'necessary', performing a vital function: 'it strengthens social solidarity through the reaffirmation of moral commitment among the conforming population who witness the suffering and expiation of the offender (Durkheim cited Reiner, 1984: 180).

From this perspective, it can be conceived that it is vital that convictions are obtained and offenders punished when criminal offences are committed, especially in response to high profile serious offences such as the terrorist bombings and murders at the heart of the notorious

wrongful conviction cases, to show that the criminal justice system is working as it is thought it should be by the moral consensus: convicting the guilty and acquitting the innocent in criminal trials. This lay perspective on the workings of the criminal justice system was summed up by the then Home Secretary, Charles Clarke (cited in Travis, 2006) in the following terms:

> 'What individuals [the general public] want to see is a legal system which correctly finds guilty those who are guilty and acquits those who are innocent, with respect to what they did or didn't do.'

In this vision, however, miscarriages of justice are not welcome and attempts to unearth them must be thwarted as they can cause a lack of confidence in the criminal justice system by the conscience collective and undermine its legitimacy. It is in this sense that attempts to defend against critiques of the limits of the existing criminal justice system in dealing with claims of innocence by alleged victims of miscarriages of justice by criminal appeal lawyers or miscarriage of justice intellectuals can be conceived as falling under Emile Durkheim's theoretical umbrella.

A prime example is Lord Denning's refusal to permit the Birmingham Six to prosecute West Midlands Serious Crime Squad for the beatings that they had suffered before five of them 'confessed', which can be conceived to epitomise a Durkheimian approach to miscarriages of justice. Denning was known as the 'people's judge' and widely seen as having a 'tremendous feel for ordinary people' as he was claimed to be 'prepared to use the law for its true purpose in the interests of fairness and justice' (Tony Blair cited Dyer, 1999). His judgement on the application of the Birmingham Six, however, was not in line with lay discourses on how the criminal justice system should function – convict those who committed the alleged criminal offence and acquit those who did not (Naughton, 2013: 16-20). On the contrary, it was more concerned with the potential harmful consequences for the criminal justice system and, specifically, the police, in terms of lack of public trust and faith were their allegations true (which they later turned out to be!), than with the due process of law and the possible wrongful conviction of the innocent. In a now infamous judgment within the miscarriages of justice World, Denning upheld an appeal by West Midlands Police against a civil action by the Birmingham Six for the following reasons, which can be conceptualised as epitomising a Durkheimian perspective:

> 'Just consider the course of events if this action is allowed to proceed to trial…If the six men win, it will mean that the police were guilty of perjury, that they were guilty of violence and threats, that the confessions were involuntary and were improperly admitted in evidence and that the convictions were erroneous. That would mean that the Home Secretary would either have to recommend they be pardoned or he would have to remit the case to the Court of Appeal. This is such an appalling vista that every sensible person in the land would say: It cannot be right that these actions should go any further' (Denning cited Mullin, 1986: 216).

Another remark by Denning about the Birmingham Six is equally indicative of a quasi-Durkheimian desire to protect the criminal justice system at all and any cost from the damage to the conscience collective that wrongful convictions might cause:

> 'We shouldn't have all these campaigns to get the Birmingham Six released if they'd been hanged. They'd have been forgotten and the whole community would have been satisfied' (Denning cited Dyer, 1999).

In May 1991, the Birmingham Six finally overturned their convictions on their third appeal in the CACD. Denning's worst fears were confirmed by the revelations of the causes of their miscarriages of justice, police torture, fabricated statements and allegedly corrupt forensic science evidence (see, Mullin, 1986; Callaghan and Mulready, 1993); Hill and Hunt, 1995). Combined with the cases of the Guildford Four (Conlon, 1990) and other successful appeals

and suspected cases of wrongful convictions in which Irish people had been convicted for Irish Republican Army (IRA) bombing campaigns (see, Woffinden, 1987; Maguire with Gallagher, 1994; Ward, 1993), it induced a widespread public crisis of confidence in the entire workings of the criminal justice system. It prompted the setting up of the Royal Commission on Criminal Justice (RCCJ)[2] to undertake the most extensive review of the criminal justice system ever undertaken in England and Wales (see, Royal Commission on Criminal Justice, 1993: 1).

The most significant reform from the RCCJ was the removal of the power to refer alleged miscarriages of justice back to the CACD by the Home Secretary and the establishment of the CCRC as it became apparent that successive Home Secretaries were covering up the corruption and malpractice by agents of the criminal justice system by failing to refer potential miscarriages of justice back to the CACD for political, as opposed to legal, reasons (see, Naughton, 2009b: 1).

However, the CCRC is not the panacea for miscarriages of justice that was hoped for as it is structured in a way that means it can (see Innocence Network UK, 2011), and does,[3] fail victims of miscarriages of justice in ways which were not intended or envisaged by the RCCJ when it was established. The nub of the problem is that the CCRC must abide by s.13 of the 1995 Criminal Appeal Act 1995 (Criminal Appeal Act, 1995) and s.23 of the Criminal Appeal Act 1968 (Criminal Appeal Act, 1968).

Firstly, s.13 of the Criminal Appeal Act 1995 dictates that the CCRC can only refer cases to the CACD[4] where it feels there is a 'real possibility' that the conviction will be overturned. Then, in deciding whether the 'real possibility' test has been met, the CCRC must also consider s.23 of the Criminal Appeal Act 1968, which requires that evidence admissible in the Court of Appeal must be 'fresh', understood generally as evidence or argument that was not or could not have been available at the time of the original trial.

In consequence, CCRC reviews are for the most part mere desktop considerations of whether such 'fresh' evidence may now exist that was not or could not be available at the time of the original trial or previous failed appeal that has a good chance of overturning the conviction (Newby, 2009). Such an approach sees the CCRC reject alleged victims of miscarriages of justice if it is not felt that they have or could have 'fresh' evidence that will fulfil the 'real possibility' test. This means that CCRC reviews are not aimed at finding the truth of claims of innocence by alleged victims of miscarriages of justice which can, and do, overlook and positively exclude, lines of inquiry that may prove an applicant's claim of innocence if it is not felt that such investigations would discover material that would meet the 'fresh' evidence and/or 'real possibility' criteria.

The restrictive approach to applications is reflected in the CCRC referral statistics. Between 1999 when the CCRC was set up and the end of 2015-16, the overall proportion of cases referred to the appeal courts was 3.43%. Recent annual referral rates have, however, been much lower. In the three years to 2018-19 they stood at 0.77%, 1.24% and 0.9% respectively. In 2019-20 this rose to 1.95% (APPG Miscarriages of Justice, 2021: 12-13).

[2] Announced on the day that the convictions of the Birmingham Six were overturned in the CACD.

[3] For example, the case of Dwaine George, refused by the CCRC but, subsequently, referred to, and overturned by, the CACD following work by Cardiff Innocence Project and Innocence Network UK (INUK) (see BBC News, 2014).

[4] This analysis is concerned only with CCRC referrals to the CACD following conviction in the Crown Court, but the CCRC also deals with alleged miscarriages of justice in magistrates' courts (see Kerrigan, 2009).

Such statistics are a stark insight into how the CCRC can fail innocent applicants. This is given further support in a dossier of cases that was created by Innocence Network UK (INUK) (Innocence Network UK, 2012). It detailed 44 cases that comprised mainly of prisoners serving life or long-term sentences for serious offences, ranging from gangland murders and armed robbery to rape and other sexual offences. All of them maintained that they were not involved in the offences despite having failed in their appeal and having been refused a referral by the CCRC on at least one occasion because they are not felt to satisfy the requirements for 'fresh' evidence and the 'real possibility' test. They asserted that they were wrongly convicted for reasons including fabricated confessions, eyewitness misidentification, police misconduct, flawed expert evidence, false allegations and false witness testimonies, perennial and well-established causes of the wrongful conviction of the innocent as evidenced by successful appeal cases.

The way that the 'real possibility test' works to subordinate the CCRC to the CACD and how innocent victims of miscarriages of justice can, therefore, fall through the gaps of CCRC reviews has been openly conceded in public meetings by CCRC staff speaking in a personal capacity.[5] The CCRC website also states, clearly, that it can only refer cases if there is fresh evidence and how this impacts on its ability to refer cases, which is a further acknowledgement that innocent applicants may not have their cases referred:

> 'To launch a fresh appeal, we need something important like strong new evidence or an argument that makes the case look different now. Since this can be very hard to find many cases cannot be referred for appeal' (Criminal Cases Review Commission, 2021).

And, former CCRC Commissioners once they have left the CCRC have been scathing of the impact of the 'real possibility test' on how the CCRC decides which applications to review, how it reviews them, and how this can result in the applications of genuine victims of miscarriages of justice being rejected.[6]

Despite this, however, much effort has been exerted by CCRC defenders who betray a quasi-Durkheimian approach in their attempts repel critiques of the limitations and/or outright failings of the CCRC in assisting potentially innocent victims of miscarriages of justice to have their cases referred who may be languishing in prison. This includes academic voices (for instance, Quirk, 2007; McCartney et al, 2008; Roberts, 2018: 266-267), successive CCRC Chairs such as Richard Foster (see Justice Committee, 2014; McGuiness, 2016: 3) and Helen Pitcher (see Robins, 2021) and other State agents such as the then Parliamentary Under-Secretary of State for Justice, Edward Argar MP, who responded to critiques of the CCRC's real possibility test in a parliamentary debate in July 2019 in the following unequivocal terms:

> 'I very much support the work of the CCRC…..We [The Government] do not feel that it would be appropriate to alter the [real possibility] test simply to demonstrate the independence of the CCRC…. the organisation is well placed to deliver its important work investigating where people are wrongly convicted or where convictions are unsafe' (Argar cited House of Commons, 2019).

[5] As long ago as at the Inaugural Innocence Projects Colloquium, University of Bristol, 3 September 2004, which was attended by the Principal Legal Advisor, the Public Relations Officer and four Case Review Managers (CRMs) from the CCRC.

[6] As acknowledged by former CCRC Commissioners Laurie Elks and David Jessel (see Naughton and Tan, 2013; also Jessel cited House of Commons, 2014: paragraph 12).

Marx

In direct opposition to the Durkheimian perspective, Karl Marx's social theory urged analyses that seek to puncture the ideological 'false consciousness' that pervades modern Western capitalist societies, and which underpins the belief that societal institutions, such as the criminal justice system, operate in the interests of the general public. From a Marxist perspective, crime is not normal but, rather, acts which are criminalised by the powerful in society to protect their own interests (Taylor, Walton and Young, 1973). Marxist analyses, therefore, endeavour to highlight the economic power relations at play in the processes of the criminal justice system that target the working class and leave the crimes of the economically powerful relatively unchallenged or certainly downplayed (Bongor, 1916; Pearce, 1976; Slapper and Tombs, 1999). The criminal justice system is further implicated as functioning against the interests of the working class in Marx's thesis on surplus value, which holds that if remunerative occupations are useful, acts socially constructed as crime is also useful as it gives rise to the police, the court and even the professor who teaches criminal law and future criminal lawyers. All of whom, therefore, have a profound stake in maintaining the existing arrangements and power relations (see, Bottomore, 1991: 117).

Indeed, from a Marxist perspective, crime control is a lucrative 'industry' that solves two major problems that confront modern capitalist societies: unequal access to paid work and the uneven distribution of wealth. It provides profit and work while producing social control of those who would otherwise cause trouble (Christie, 1993: 11**).** As crime is so often considered in isolation from other social harms, such as wrongful convictions, it also gives legitimacy to the further expansion of the crime control industry. As Hillyard and Tombs (2004: 29) noted:

> 'In the UK, the amount committed to law and order has increased faster than any other area of public expenditure and, as a result, more and more peoples' livelihoods are dependent on crime and its control.'

The Marxist perspective thus argues that 'modern social orders are being increasingly characterised by an unacknowledged but open war between young males, mainly from poor and deprived backgrounds, and an army of professionals in the crime control industry' (Hillyard and Tombs, 2004: 29; see, also, Box, 1983**,** Christie, 1993, Reiman and Leighton, 2020).

The routine nature of miscarriages of justice from a Marxist perspective, then, can be broadly conceived as revealing how far the criminal justice system deviates from genuine (lay) public interests when the police and prosecution are shown to have wrongly convicted the 'usual suspects', predominantly young working class males who are disproportionately from ethnic minority backgrounds (see Box, 1983: 2; also, Walmsley et al, 1992; Pantazis, 1998**)** and when the system for correcting miscarriages of justice is shown to be failing to overturn the convictions of such victims who may be innocent (Naughton, 2013; 162-186). They are seen as signalling State abuses of power and, indeed, call into question the continued legitimacy of the existing criminal justice system (Naughton, 2014; also Stratton, 2015).

More specifically, from a Marxist perspective extra-judicial initiatives such as the RCCJ that recommended the establishment of the CCRC are generally seen as representative of 'damage limitation exercises' that enable to State to continue to retain power and its 'control' of the criminal justice system (see, for instance, McConville and Bridges, 1994: 22-23; also Hillyard, 1994: 74). Celia Wells (1994: 53-54) expressed this perspective of the RCCJ as follows:

> 'It is unarguable that the criminal justice system is a taken for granted part of the apparatus of the state, however defined…[it is] subject to government manipulation in support of its claim to authority.'

In this context, the establishment of the CCRC from a Marxist perspective is viewed as a cosmetic reform that fails to get to the heart of the need for fundamental changes to the underlying structures and the operations of the criminal justice process. For instance, McConville and Bridges (1994) edited a book on the failures of the RCCJ from a broadly Marxist perspective in which the 28 contributors were said to share a view that it was a 'betrayal' in terms of the part that it failed to play in achieving meaningful reforms (see, McConville and Bridges, 1994: xv).

More recently, Robert Schehr (2005: 1296) applied a Marxist perspective derived from the work of Bob Jessop (1990) to argue that the CCRC is a 'state strategic selection mechanism', serving as a meliorating institution that appeared during a time of a legitimacy crisis in the criminal justice system to fend off instability. For Schehr (2005: 1297-1298), the social control function of state strategic selection mechanisms is manifest in contemporary society as 'adaptive responses' to apparent crises.

From this perspective, the CCRC is a product of the public crisis of confidence in the criminal justice system that was exposed in successful appeals such as those of the Guildford Four and the Birmingham Six (and other cases) that represents but another structural device available to meta-organisations responsible for the administration of crime and punishment.

Moreover, from this perspective, it is little wonder that the CCRC has failed as the final solution to the continuing problems faced by victims of miscarriages of justice who are unable to provide the so called 'fresh' evidence to the CCRC that is required for it to be able to refer convictions back to the CACD. A Marxist view would not see this an accidental, nor unintentional. Just as the collective response by the authors of *Criminal Justice in Crisis* both feared and predicted, the Marxist perspective would argue that the CCRC was never meant to fix the problem of miscarriages of justice in a system governed by capitalist power relations where they are the inevitable consequence of crime control and, thus, mere collateral damage.

Foucault

The Durkheimian and Marxist versions of miscarriages of justice appear to operate as polar opposites, yet despite their surface differences both approaches are equally open to critique in terms of their respective conceptualisations of criminal justice system power relations from a perspective derived from the social thought of Michel Foucault. From a Foucauldian perspective, Durkheim fails to acknowledge that criminal law does not always represent shared morals and norms and he does not explain how crimes are created or how the moral consensus in the conscience collective is achieved and/or sustained, although it is acknowledged that this critique is also one that is made from a Marxist perspective, notably Garmsci's thesis on hegemony. Likewise, Marxist analyses present a rather nihilistic conspiratorial account of State domination over the population, which fails to see any tangible value in engaging with the processes of law reform at all, as all reforms are viewed negatively and as simply serving as further additions to State power. Moreover, in terms of initiatives such as the RCCJ and the setting up of the CCRC, a Foucauldian perspective would see Durkheimian and Marxist accounts as also corresponding in seeing them as a pointless waste of time, albeit for quite different reasons: the Durkhiemian view is that they cause unnecessary trouble for a benign

State that must be trusted as it has the best interests of the (conscience) collective at heart; alternatively, the Marxist perspective sees them as mere sops that allow the State to retain its social control via the criminal justice system.

Contrary to the kinds of analysis that can be conceived from a general reading of Durkheimian or Marxist theory, Foucault provided a critical perspective that can be dovetailed with the Marxist perspective to further juxtapose the Durkheimian perspective, although it requires rethinking the structures of power and the ways that it is exercised. Indeed, whilst Marxist analyses focus on 'why' questions of power relations in capitalist societies to highlight that economic thinking underpins exercises of power, Foucault's questions revolved around 'how' such exercises of power are accepted as legitimate by the population at large and what can be done to resist apparent abuses of State power.

Crucially, for Foucault (1991), the State is important in modern Western capitalist societies, but only insofar as it is an effect of government or what he termed governmentality. Governmentality for Foucault is a practical pursuit that problematises the population, seeking to know the needs and aspirations of the population so that it may be governed or managed in an appropriate, and pastoral, way. The overall aim of government/governmentality in Foucault's analysis is not unquestioning trust and obedience to the State (Durkheim) versus State domination (Marx) but, rather, the enhancement of the general welfare of the population/the governed in terms of heath and wealth, with the strength of the modern State compared with other States being reflected in the prosperity and overall wellbeing of the nation. This challenges models of power which posit a State 'sovereign' with absolute power over 'subjects', either benevolently (Durkheimian) or in terms of a will to domination (Marxist).

Moreover, for Foucault (1979) a defining feature of exercises of power in modern Western societies is the centrality of discourses, bodies of knowledge, and their counter-discursive opposition, which inform governing agencies on the appropriate way of dealing with the population. It is discourses that shape and direct governmental interventions or exercises of power. This is not to say that the economy is not important or even the most important consideration in exercises of governmental power in a capitalist society. Rather, it is to present power as an interrelationship between the 'holders' of power and the population, government and the governed, with the latter providing the public mandate required for governmental exercises of power to be accepted as legitimate (Foucault, 1991: 100).

Indeed, contrary to Marxist analyses, Foucault's thesis on resistance to power sees it as not simply a reaction to a form of the pre-existing power embodied by the Sovereign. Rather, it is an intrinsic part of his definition of power. That is to say, for Foucault, power and resistance imply one another and co-exist in struggles between power and resistance. Moreover, resistance, for Foucault, is never external to power. Forms of power are continually engendered or incited by virtue of the potential counter-powers or states of resistance, which co-exist with them. As he said: 'where there is power there is resistance' (Foucault, 1979: 95).

Vital to Foucault's conception of resistance is the concept of 'force' or 'power relations'. In the context of the present discussion, 'power' within the sphere of the criminal justice system can be conceived as the assortment of force relations existing within the socio-legal body. Power's conditions of possibility actually consist of this shifting substrate of force relations: the struggles, confrontations, contradictions, inequalities, transformations and integrations of these force relations. This sees individuals as 'positioned' within any struggle only as a consequence of the existence of a struggle for power. Consequently, both existing forms of

power and resistance to them involve the creation of 'tactics' and the co-ordination of these various tactics into coherent strategies by government and the governed. The political value of Foucault's thesis on power is that a strategic action must be countered by an opposing action; a set of 'tactics' must be consciously 'invented' in opposition to the setting in place of another; a different procedural 'art' of criminal justice system, for example, is what will oppose the existing one: 'One is always "inside" power, there is no "escaping" it' (Foucault, 1979: 95).

Moreover from a Foucauldian perspective, resistance is more effective when it is directed at a technique or specific exercises of power rather than at 'power' in general. It is techniques of power which allow for exercises of power and the production of forms of knowledge. Resistance consists of not accepting these techniques. Perhaps most significantly, a Foucauldian perspective would argue that oppressive forces of domination do not hold the monopoly in the capacity to invent and deploy tactics. If resistance is to be effective, it requires the acknowledgement that tactics are being employed in a struggle, and the active interrogation of those tactics. For Foucault, it is in the scrutiny of tactics of power that power is rendered intelligible, which allow for the analysis of power down to its most minute details. Such analyses of power can reveal the historical strategies and sets of 'tactics' designed to mobilise these techniques to political advantage (Foucault, 1979: 95-96).

Perhaps most crucially, a Foucauldian perspective to power and resistance offers hope to those seeking to challenge existing forms of power to effect transformative reforms. Indeed, contrary to sovereign exercises of power, as epitomised in pre-modern Feudal societies, for Foucauldian governmental exercises of power to be legitimate, government cannot simply impose changes to social systems in society or exercise power over citizens arbitrarily. Rather, for exercises of governmental power to be legitimate they must follow a certain process, in which it is crucial that the population/governed participate in the process by informing government of aspects of social life that impact detrimentally upon public wellbeing. It is through such engagement that government knows, that is obtains the forms of discourse and counter discourse about societal problems in need of governmental intervention.

If we apply these kind of ideas to the establishment of the RCCJ, a Foucauldian approach would likely view it as a governmental technique into an apparently problematic aspect of the criminal justice system that was highlighted by the apparent miscarriages of justice of the Guildford Four, the Birmingham Six, and so on. It would be seen as representing a governmental tactic within which the power struggle between dominant forms of criminal justice system discourse and its counter-discursive resistance could take place. That is to say, the RCCJ provided an arena for the engagement between forms of discourse and counter discourse on the apparent problem with the criminal appeals system that were impeding highly visible miscarriages of justice from being rectified.

As this relates to the setting up of the CCRC, a Foucauldian perspective would conceive it as a governmental strategy of power that 'successfully' resolved of the public crisis of confidence that was caused by the miscarriages of justice cases of the Guildford Four, the Birmingham Six, and so on. It would be seen as an example of the ongoing governmentality of the criminal justice system. The processes of governmentality are described as 'on-going' as there is a continual and always unfinished contest between dominant discourses and counter discourses in struggles for power and resistance to power. Finally, from a Foucauldian perspective, it is fundamental in the processes of governmentality that are being discussed here that that miscarriage of justice activists subject the criminal justice system to continual critical scrutiny. They must, firstly, unearth cases of miscarriages of justice and, then, bring them to public

attention as a precursor to further governmental engagements and contestations between existing forms of dominant discourse and their counter discursive opposition calling for transformations of the criminal justice system (c.f. Foucault, 1980; for an extensive discussion of this application of Foucault's thoughts to miscarriages of justice see, Naughton, 2007: 26-35).

Conclusion

This article has sought to show how key sociological and criminological theories can be used as analytical tools to help to situate and provide insights and understanding of the social and legal realities of the criminal justice system that relate to miscarriages of justice. I think that it is fair to say that the application of a Durkheimian, Marxist or Foucauldian theoretical analysis in isolation would not allow for the depth or richness of analysis that can be gained in a critical interrogation that utilises a wider range of available, even conflicting, social theories. For instance, although the theoretical orientation in the foregoing analysis stands intellectually against the Durkheimian perspective, Durkheimian social theory is, nonetheless, useful in this critical analysis as a foil that provides theoretical insights and understanding into the apparent resistance to forms of counter discourse on miscarriages of justice and attempts to overturn them by criminal justice system power.

Likewise, although Marxist analyses can be critiqued from a Foucauldian perspective in terms of the concept of power relations in contemporary Western societies, they aptly illuminate the influence and detrimental impacts of the existing criminal justice system in which, as Reiman and Leighton (2020) so succinctly put it, 'the rich get richer and the poor get prison'. Marxist analyses also further explain the general reluctance of lawyers, criminal justice system agencies and even academics to embrace critiques of the criminal justice system from an economic perspective. Put simply, they can be conceived as economic beneficiaries of the existing arrangements, so it is unsurprising that they would want to resist or undermine attempts to reveal flaws with the existing criminal justice system and/or calls for change.

As such, taken together, the Marxist and Foucauldian perspectives can work together to provide a more holistic critical analysis than an analysis of either perspective in isolation could provide: whilst the Marxist perspective highlights the lived material realities of the criminal justice system that favour the economically better-offs and which can leave the economically powerless vulnerable to wrongful convictions, the Foucauldian perspective on power and resistance can be conceived as providing something of a blueprint for a progressive engagement with the flaws of the criminal justice system that seeks to unearth miscarriages of justice to present as counter discursive evidence of how the criminal justice system is targeted at the powerless, whether measured in economic or discursive terms, to bring about reforms aimed at their prevention.

From this standpoint, a synthesis of a Marxist-Foucauldian inspired social theory can provide illuminating insights into the behaviours of individual agents or entire agencies of the criminal justice system. Knowledge *is* power, and the thinking here is that the better the critical knowledge or counter discourse that is produced on what is wrong with the system in terms of miscarriages of justice that can be attained, the better informed will be the analysis and, hence, any strategies of resistance on how those problems might be responded to and ultimately fixed.

More specifically, the central focus of this article has been on the limits of the CCRC in being able to guarantee that innocent victims of miscarriages of justice can and will overturn their wrongful convictions. That is to say, how the CCRC is unable to fulfil the task that the RCCJ recommended and which CCRC representatives and its defenders continue to say that it does fulfil.

There is an age-old adage that says: 'If the facts don't fit the theory, change the theory.' The problem with the existing dominant discourses on the CCRC from the perspective of this adage is that they work along quasi-Durkheimian lines. They accept without question that the CCRC was, indeed, established to assist innocent victims of miscarriages of justice to overturn their convictions when the evidence (facts) show that it wasn't.

On the contrary, the facts support the alternative theory that the CCRC is an integral part of the criminal justice system, rather than independent from it. Further, that the CCRC functions not to assist innocent victims to overturn their wrongful convictions but, rather, that it acts as a gatekeeper of the criminal appeals system, serving to hide and bury all manner of egregious wrongs, injustices and harms that are caused to innocent victims of wrongful convictions and their loved ones by the criminal justice system. This finding alone demonstrates the value of theoretical analyses that seek to explain why organisations like the CCRC operate in the way that they do.

Moreover, looking at the evidence/facts of the context within which the RCCJ was established and within which it recommended the setting up of the CCRC, the inability of the Court of Appeal to overturn miscarriages of justice given to innocent victims that was identified at the time is a problem that is merely mirrored by the CCRC in its 'real possibility' test. As such, the inability of the criminal justice system to guarantee that innocent victims of miscarriages of justice can and will be able to overturn their convictions is a problem that has not be resolved by the CCRC and one which still exists.

Another value of the foregoing theoretical analysis is that helps to explain why meaningful reforms to ensure that innocent victims can overturn their miscarriages of justice have not been forthcoming, i.e. because the criminal justice system and the CCRC operate along quasi-Durkheimian lines to prevent public knowledge of miscarriages of justice for fear that they diminish trust and confidence in the criminal justice system and detract from the social solidarity that is obtained by the conviction of alleged criminal offenders. This highlights how victims of miscarriages of justice can be treated as mere collateral damage in a criminal justice system that seeks Durkheimian forms of social solidarity from criminal convictions and fails to provide the mechanisms necessary to overturn wrongful convictions when they occur.

But, this article also provides hope to fuel continued efforts to transform the existing post-appeal arrangements under the CCRC in the shape of Foucauldian inspired theoretical insights into the workings of the power relations that govern the interplay and exchanges between the dominant discourses that centre on miscarriages of justice and their counter discursive opposition.

To be sure, and as was discussed above, in a Foucauldian sense the CCRC is better seen as a tactic or technique of criminal justice system power that was created, not as the final solution to the wrongful conviction of innocent victims, but, rather, to silence the public crisis of confidence that was caused by the widespread public awareness of cases of the Guildford Four, the Birmingham Six, and so on. Also from the perspective of a Foucauldian reading of power

and resistance and the ongoing fight for justice for innocent victims of miscarriages of justice, the governmental tactic that is the CCRC is now seen plainly for what it is; an attempt to prevent miscarriages from coming to public attention that might cause harm to the need for public trust and confidence in the criminal justice system.

In response, anti-miscarriage of justice activists should take heart that all is not lost with the setting up of the CCRC as the fight is ongoing. As such, forms of counter discursive resistance like the analyses presented in this article can act to encourage and inspire the refusal to accept the failings of the CCRC in dealing with applicants who claim to be innocence. It is unjust and a clear and apparent abuse of criminal justice system power to reject applications from alleged innocent victims of miscarriages of justice on the basis of legal technicalities and the need for so called 'fresh' evidence that was not available at the time of the original trial. It is well documented in successful appeal cases and in the existing research that lawyers can and do fail their clients, that juries can make mistakes and that innocent victims can be wrongly convicted (see Brandon and Davies, 1973; Walker and Starmer, 1986; Walker, 2001; JUSTICE, 1989: Naughton, 2007; 2013). Forms of counter discourse need to be invented that can highlight these continuing realities of the existing criminal justice system and how the real possibility test of the CCRC needs to be urgently repealed in the interests of justice. This would uncouple the CCRC from the Court of Appeal (Criminal Division) so that it is free to conduct truly independent and impartial investigations into claims of innocence by alleged victims of miscarriages of justice in the interests of truth and justice. In these investigations, any evidence not presented to the jury at trial should be argued to be considered as fresh or new, as it should be as it has not been heard by a jury that made a decision based on incomplete evidence, and if it undermines the reliability of the evidence that led to the conviction or validates a claim of innocence then the conviction must be quashed by the CCRC. This, also, requires the CCRC to also have its own authority to overturn wrongful convictions and not have to send cases that it finds are wrongful convictions backwards to a court of appeal which previously refused to overturn the alleged wrongful conviction.

Moreover, if it is not possible to reform the CCRC in these ways, those against the existing arrangements of the CCRC could create counter discourses that call for the replacement of the CCRC with a new body with these functions that is fit for the purpose of assisting the innocent to overturn their convictions. It is simply unjust to have a criminal justice system in which innocent victims can be, and are, wrongly convicted and imprisoned and do nothing to rectify the failures of the CCRC in dealing with applicants claiming factual innocence. It is not acceptable for the CCRC and its defenders to argue that the CCRC is merely working within its governing statutes and there is nothing that can be done about it.

Finally, when thinking about alleged miscarriages of justice, it must always be remembered that when innocent victims are wrongly convicted that the guilty perpetrators of those crimes remain at 'wrongful liberty' with the potential and reality (see Baumgartner et al, 2018) to commit further crimes. This adds an important public protection and moral dimension to the work of forms of anti-miscarriage of justice counter discourse that defenders of the existing post-appeal system of the CCRC also fail to acknowledge.

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