This paper will examine how a miscarriage of justice may be avoided in English law with a specific focus on a potential bias existing within the intricate aspects of the appellate process. The proposition will explore the implications of adopting a consistent statutory provision outlining whether an unfair trial ultimately renders any resulting subsequent conviction unsafe. This invokes many controversial questions; potentially compromising the most intrinsic components of the English appellate process. Following the Criminal Appeal Act 1995 (CAA), statute failed to give clear guidance on an entrenched question of legal morality; can a conviction be considered 'unsafe' where a defendant is proven guilty beyond a reasonable doubt at trial, however, that trial was tainted by a material irregularity?

To provide an insightful and comprehensive analysis addressing any potential resolution, it must first be examined what may truly be considered 'unsafe' for the purposes of implicating the wider justice system. However, statute can never strictly define what may be considered 'safe' in English law, or risk tainting judicial independence, shown through the CAA intentionally omitting any definition.[1] This shows the complex and broad particulars facing this issue, with Professor Smith interpreting '*safe'* as, '*the most heavily pregnant word in the history of legislation*'.[2] Acknowledging this, the jurisprudence behind the Human Right to a fair trial will be examined in depth to determine the legal significance of any reform and the reality of any application affecting judicial independence. Ultimately, this remains an area of weakness and concern within the justice system as an unresolvable issue. The application of either approach would present a miscarriage of justice to defendants, victims, and the state; showing the existence of a lacuna which can never be filled, with any reform providing merely a statutory tool to be used arbitrarily at a judge's discretion. Thus, ultimately determining the lesser of two evils.

Firstly, the historical and legal context surrounding this issue must be examined, considering jurisprudence and the judicial approach prior to the ambiguous CAA. An immortal image surrounding the perception of justice is Lady Justice, who stands blind so as to judge all equally, and holding a set of scales for fair consideration. This presents a lingering anthropomorphism showing justice in its essence must be seen to be applied equally with fairness. This principle is so deeply entrenched within the English rule of law that Bingham

[1] J. R. Spencer, "When is a conviction "unsafe"" (1998) Arch. News, 5, 5-8
[2] ibid

considered it the *'core of the existing principle of the rule of law: that all persons […] should be bound by [law][…] publicly administered in the courts.'*[3] Bingham further considered the impossible moral position a judge may face when prioritising '*procedural-justice*' over '*outcome-justice'*, understanding the temptation to '*lock up all those who [offend] […] and throw away the key*', however, the need for proving guilt in a '*safe and satisfactory'* manner is undeniable and essential.[4]

This further requires a deeper analysis to see its importance. Fundamentally, in order for a society to have an effective justice system, there must be public faith in this system, and this can only be achieved through transparency. This was famously affirmed in *R v Sussex Justices, ex parte McCarthy,*[5] with Justices clarifying, '*It is not merely important but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'*.[6] This is universally reaffirmed with the European Commission of Human Rights referencing *Sussex Justices*.

Trechsel further suggests procedural justice irrefutably must be done, but perhaps even more importantly must be perceived to be done, stating, '*justice can and must be seen to be done* […] *One of the fundamental guarantees of a fair hearing is that it be public'*.[7] He further clarifies justice being witnessed is the most essential duty of the justice system, stating the disservice of '*invisible justice*'.[8] Furthermore, he examines the principle of *in dubio pro* reo; there must be a presumption of innocence with any acquittal, as the acquittal of a defendant considered guilty would diminish faith in the judiciary.[9] These implications pose a potential resolution to a miscarriage of justice with the interpretation the public must witness justice, and the releasing of a defendant judges believe to be guilty would tarnish this perception of justice. On the other hand, this may be interpreted to suggest the public must first witness justice in its fair procedure. Where a guilty verdict was reached only due to an unsatisfactory trial, upholding this conviction would in itself tarnish a perception of justice. This presents the

[3] Tom Bingham, *The Rule of Law*, (2nd edition, Penguin Books 2011)
[4] ibid
[5] [1924] 1 KB 256 (KB)
[6] Ibid (Lord Hewart CJ)
[7] Stefan Trechsel, "Why must trials be fair" (1997) 31 Isr L Rev 94
[8] ibid
[9] ibid

institutional complication with exhibiting justice and reinforces the suggestion this miscarriage is unresolvable in any ultimate capacity.

Secondly, the relevant nature and purpose of the appellate process must be analysed for any comprehensive understanding of factors influencing reform. The need for a consistent and independent judicial process protected from abuse has been universally accepted throughout the backdrop of all times and cultures. Examining comparative law, the most significant constructional components in history include protectionist measures against abuse of process and an unfair trial, including the Magna Carta 1215, the US Constitution, European Convention of Human Rights, and the Geneva Conventions. This universal application shows fundamentally in any society with a fair judicial system, the right to a fair trial and protection from any abuse of process is essential.

Examining the strict purpose of the English appellate courts, a required ground of appeal must be in the form of a question of law rather than a question of fact. To determine fact above a magistrate level is considered an ancient power granted only to a jury as the '*lawful judgement of his peers*',[10] and consequentially, an appellate judge can only consider errors in law when providing a judgement, disregarding any dispute in fact. Lord Hobhouse reaffirms this ancient right in *R v Pendleton*[11] dictating, '*the assessment of the truth […] is a matter for the jury*'.[12] This is so firmly entrenched within English law that through the legal positivism school of jurisprudence, the appellate courts are required to exclusively resolve errors in law. Considering a miscarriage of justice, this would suggest the courts should follow an approach where the verdict resulting from a trial with any material irregularity should be considered unsafe. Furthermore, from a pragmatist standpoint which disregards jurisprudence, the most efficient and only true method in finding guilt beyond a reasonable doubt within fact can only be at Crown Court level, as the most valid interpretation of evidence and witnesses can come only from those jurors who experience it, as reinforced by the Runciman Royal Commission.[13]

Additionally, considering the aims of the judicial process, there is a clear necessity to uphold justice to as high a standard as possible. The procedure rules outline consistently and clearly

[10] Magna Carta 1215, Art 39
[11] [2002] 1 WLR 72, [2001] UKHL 66
[12] Ibid [45] (Lord Hobhouse)
[13] Runciman Royal Commission on Criminal Justice (1993) (Report, Cmnd 2263, London: HMSO)

the overriding objective of the courts is to ensure cases are '*dealt with justly'*.[14] In view of this, there is an inevitable flaw within every society that it is not a realisable objective to achieve absolute justice in every case. Regarding the outcome of proceedings, however, Rose LJ[15] provided the sentiment that Justices acting as '*custodians of their own processes',*[16] can ensure the consistent and exclusive application of appellate laws and procedure. The significance of a fair and consistent judicial process has been the first priority of appellate judges throughout the history of English law, adopting the Confucian approach; *'it is not the attaining of a goal which is decisive, but the road taken'*.[17] This creates controversy through a potential miscarriage in the courts applying this approach and quashing all convictions with questionable legal proceedings, despite the acquittal of a guilty defendant. As an anti-pragmatic principle in such instances, it ensures the protection of a defendant's right to a fair trial, however, risks causing the injustice to victims of their perpetrator being acquitted, while enfranchising all defendants with their legal rights.

Having analysed the legal and historical context behind appellate processes, recent judicial application and legal challenges have presented a build-up in the ambiguity and inconsistencies within the current law; this facilitates and permits miscarriages of justice. In establishing a timeline of legal amendments and controversies within this area, in order to gain a comprehensive insight into the development of this miscarriage, the first relevant authority is the Criminal Appeal Act 1968. Section 2 of the statute considered all relevant schools of jurisprudence and the purpose of the appellate court, and decisively restricted judicial independence in requiring any conviction to be quashed provided there was a '*material irregularity'*, causing the resulting verdict '*unsafe or unsatisfactory*'. This particularly deliberate wording creates an onerous duty upon the courts, the inclusion of '*unsatisfactory'* creating the wider ramification. Lord Morris outlined his interpretation of '*unsatisfactory'* in *DPP v Shannon*,[18] in which he provided the insight, '*the result produced by such [procedural] inconsistency is "unsatisfactory" cannot be disputed but it is the unsatisfactory character of the guilty verdict [..] [which is the] result of the trial as a whole*'.[19] This sentiment was famously

[14] Crim PR 1.1 (1)
[15] *R v Mullen (Nicholas Robert)* [2000] QB 520 (QB)
[16] Trechsel (n 7)
[17] Spencer (n 1)
[18] [1974] 59 Cr App R 250 (HL)
[19] Ibid (Viscount Dilhorne)

echoed in the most significant miscarriage of justice in living memory, *R v McIlkenny*,[20] or the Birmingham 6, where the supposedly guilty defendants who suffered as victims of procedural abuse and unfair trials had their sentences quashed, with the explicit omission of Justices describing the defendants as innocent in any way. This establishes within the law that under the CAA 1968, any procedural error resulting in a verdict must undisputedly be unsatisfactory, regardless of legal morality.

Additionally, in broadening the independence of the judiciary, Parliament attempted to create a degree of balance in extending the tools for remedies available at the discretion of a judge. Section 7 of the CAA 1968 embedded within the judicial toolkit the power to order an appellant be re-tried when the interests of justice require. However, there continues to exist a stigma within the legal system against retrials, with objections made on the grounds of preserving the integrity of the criminal justice system. In recent years, *R v Maxwell*[21] attempted to remove this stigma through acknowledging the public interest in prosecuting those charged with '*serious crimes'* outweighs the ground of objection.[22] This tool, despite its availability as a token which offers judicial independence, is rarely utilised and wholly failed to provide any sufficient remedy for the miscarriage presented in overturning the convictions of those believed to be guilty who faced an abuse of process.

A dramatic U-turn in this matter of public policy came with the assent of the CAA 1995, which restored a high degree of judicial independence and discretion. This Act was intended to simplify the appellate process, and to an extent, was overly ambitious in doing so, intentionally omitting key aspects from the 1968 Act as to allow judges to be considered independent and free from over-restriction.[23] The most relevant amendment reduced the scope of s.2, stating an appeal should be allowed where a conviction is merely '*unsafe'* rather than '*unsafe and unsatisfactory*'. This omission of unsatisfactory removed the statutory requirement to quash a conviction due to an unfair trial, which redefined the role of a judge in an appellate court as the degree of their discretion and independence broadened substantially. In addition, the statute intentionally omitted any definition of '*safe',* leaving its definition to develop in common law, further reinforcing judicial independence. The

[20] (1991) 93 Cr App R 287 (CA)
[21] [2010] UKSC 48, [2011] 1 WLR 1837
[22] Ibid [54] (Dyson JSC)
[23] Runciman (n 13)

definition with positive commentary arose in *R v Madhi*,[24] with '*unsafe'* defined through the insightfully simple statement, '*a conviction is unsafe if there is a possibility that the defendant was convicted of an offence of which he was in fact innocent*'.[25] This definition itself remains intentionally vague so as to provide guidance while continuing this period of judicial independence through interpretation. The inclusion of the word *'possibility'* emphasises this, as a judge may always find a subtle possibility of error where they seek one. This seemingly provided judges with the discretion to quash any conviction where there is a doubt of guilt, and to uphold any in which the defendant is believed to be guilty, despite the abuse of process.

An apparent lack of consistency was first shown in the cases of *R v Graham*[26] and *R v Martin,*[27] senior Justices gave conflicting interpretations of their roles. Lord Bingham CJ in *Graham* stated, '*if the court is satisfied, despite any misdirection of law or an irregularity in the conduct of the trial or any fresh evidence, that the conviction is safe, the court will dismiss the appeal*'.[28] Contrastingly Lord Hope in *Martin* provided a wholly separate interpretation deviating from Bingham's stating, '*I do not think it can be doubted that the appeal court […] have the power to declare a conviction to be unsafe […] if they find that course of proceedings […] has been such to threaten […] the rule of law*'.[29] This shows the ambiguity in judicial attitudes at the time, with consistent indecision as whether to prioritise the conviction of the guilty, or the integrity of procedure, and presents a clear backdrop for miscarriages of justice to occur.

These conflicting approaches would ultimately lead to a clash of interpretations in the leading two cases referenced in modern courts. In the first of which, *R v Chalkley,*[30] Auld LJ suggested the amendment to the CAA was in fact intended to limit the court's power to quash convictions, imposing a duty upon the courts to uphold any conviction where a defendant is perceived by judges to be factually guilty.[31] This approach embraced a sense of legal morality and branched away from the conventional approach of prioritising the right to a fair trial, and

[24] [1993] Crim LR 793 (CA)
[25] ibid
[26] [1997] 1 Cr App R 302 (CA)
[27] [1998] 1 Cr App R 347 (HL)
[28] *Graham* (n 26)
[29] *Martin* (n 27)
[30] (1998) 2 Cr App R 79 (CA)
[31] ibid

seemingly challenged other schools of ancient jurisprudence. Subsequently, this case received mixed commentary, with academics considering Auld LJ of having employed an, '*over restrictive interpretation of the word "unsafe"*',[32] preventing any defendant's guilty verdict from being quashed where they appear guilty, despite all other factors. However, in ensuring the guilty remain convicted, this approach creates conflict with the essential understanding justice '*should manifestly and undoubtedly be seen to be done'.*[33] The disregard of abuse of process may certainly be considered a miscarriage of justice, whereas maintaining the convictions of all considered factually guilty upholds this ethos, further reinforcing the unresolvable nature of this miscarriage.

The second case, ruled in the wake of *Chalkley*, was *R v Mullen.*[34] Rose LJ acknowledges the existing '*ambiguity of "unsafe"*' and judicial confusion in considering the CAA.[35] In order to remedy this, Rose LJ broadened the interpretation of '*unsafe*' so as to encompass procedural abuse under the term, stating, '*certainty of guilt cannot displace the essential features of this kind of abuse of process'*,[36] returning to the general approach taken prior to the CAA, supposedly '*dispel[ling] the doubts created by Chalkley*'.[37] Despite being seen as a step backwards, unlike *Chalkley,* this case has received positive judicial commentary, with the indecisiveness coming to a supposed terminus in *R v Tougher,*[38] with Lord Woolf acknowledging, '*Chalkley could not be regarded as the final word on the subject*',[39] and suggesting where the courts are considering which approach to reaffirm, *Mullen* should be favoured.

This seemingly would have created a consistency under the *Mullen* approach, not necessarily resolving all potential miscarriages of justice, but rather limiting potential abuse and deprivation of rights. Ultimately, it failed to do so. In considering the attempted reform, the significance of the judicial reaction cannot be understated. With *Mullen* reaffirmed and the assent of the Human Rights Act 1998 (HRA) guaranteeing a right to a fair trial under Art. 6,

[32] Henry Blaxford, What's in a word? The meaning of "unsafe" (1999) Arch. News, 2, 4-7
[33] *Sussex Justices* (n 5)
[34] *Mullen* (n 15)
[35] Ibid [540] (Rose LJ)
[36] Ibid [534] (Rose LJ)
[37] Blaxford (n 32)
[38] [2001] 1 Cr App R 33 (CA)
[39] Ibid [26] (Lord Woolf)

the courts must constitutionally be bound to adopt this approach, compromising judicial independence. In reality, the appellate courts continue to apply *Chalkley*, being cited as recently as 2019.[40] Insight into the reason for this may be found from Lord Bingham in his understanding of a separate issue, the statutory definition of the rule of law. When clarifying why the Constitutional Reform Act 2005 could never have defined the rule of law, Bingham acknowledges any attempt would have compromised the judiciary's independence so substantially that judges would have interpreted the legislation at their own discretion.[41] Despite the severe constitutional implications, this shows a gridlock on any reform in this area which cannot be broken.

To conclude, the unresolvable nature of this lacuna is deeply rooted within the fabric of the legal system. When examining every stage of this exhaustive discussion, there appears to be a hesitation to limit the authority of the judiciary in any context. Regardless of whether Justices are to be seen as exhibiting judicial stubbornness, or fiercely protecting their ancient rights, it is clear they will ultimately remain the '*custodians of their own processes'* as Treschel aptly described them,[42] with a clear priority of ensuring justice is seen to be done at all costs, even if doing so compromises the integrity of the legal system. How efficiently this was managed however is evidently a wider question, with an alternating approach on this matter. This inconsistency maximises the potential miscarriages of justice, with those facing an abuse of process deprived of their Art. 6 Human Right, those victims facing their perpetrators freed due to procedural errors, and the state facing constitutional challenges from the judiciary.

When considering whether there can be any true resolution in the issue of acquitting the factually guilty, the most significant miscarriage referenced, the Birmingham 6 case, is the perfect example of an unresolvable miscarriage, with justices begrudgingly releasing the defendants believing it to be the lesser of two evils. Examining legal attitudes, statute has attempted to create a consistent approach with the CAA and HRA, however, this has been unconstitutionally rejected or interpreted out of legal existence in cases such as this. The word '*safe*' has founded a volatile common law definition in *Madhi*, [43] which was so broad as to maintain absolute judicial discretion. The judicial community has maintained a favour for

[40] *R v Williamson (Stephen)* [2019] EWCA 2289 (CA)
[41] Bingham (n 3)
[42] Trechsel (n 7)
[43] *Madhi* (n 24)

Mullen approach, and this does appear more consistent with English jurisprudence, showing many consider this to be the lesser of two evils, however, this is not universally accepted and still creates an inevitable miscarriage of justice, showing the bitter unresolvable nature of this issue beyond applying case law in a case by case basis, albeit arbitrarily with the court's seemingly limitless discretion.

Table of Cases:

DPP v Shannon (David Charles) [1974] 59 Cr. App. R. 250 (HL)

R v Chalkley (Tony Michael) (1998) 2 Cr. App. R. 79 (CA)

R v Graham (Hemamali Krishna) [1997] 1 Cr. App. R. 302 (CA)

R v Madhi [1993] Crim. L.R. 793 (CA)

R v Martin (Alan) [1998] 1 Cr. App. R. 347 (HL)

R v Maxwell (Paul) [2010] UKSC 48, [2011] 1 W.L.R. 1837

R v McIlkenny (Richard) (1991) 93 Cr. App. R. 287 (CA)

R v Mullen (Nicholas Robert) [2000] Q.B. 520 (QB)

R v Pendleton (Donald) [2001] UKHL 66, [2002] 1 W.L.R. 72

R v Sussex Justices, ex parte McCarthy [1924] 1 K.B. 256 (KB)

R v Tougher (Kenneth) [2001] 1 Cr. App. R. 33 (CA)

R v Williamson (Stephen) [2019] EWCA Crim 2289 (CA)

Table of Legislation:

Constitutional Reform Act 2005

Criminal Appeals Act 1968

Criminal Appeals Act 1995

Human Rights Act 1998

Magna Carta 1215

Books:

Bingham T, *The Rule of Law* (Penguin Books 2011)

Ellison G, *Constitutional Law and Civil Liberties 4LA501/5LA501 Administrative Law and Human Rights 4LA500/5LA500* (1st edn, Routledge 2018)

Journals:

Blaxland H, “What’s in a word? The meaning of “unsafe”” (1999) Arch. News, 5, 5-8

Davidson L, “Quashing convictions for pre-trial abuse of process: breaching public international law and human rights” (1999) C.L.J. 58(3), 466-468

Runciman Royal Commission on Criminal Justice (1993) (Report, Cmnd 2263, London: HMSO)
Spencer, J.R., “When is a conviction “unsafe”?” (1998) Arch. News 5, 5-8

Taylor N, Ormerod D, “Mind the gaps: safety, fairness and moral legitimacy (2004) Crim. L. R. Apr. 266-283

Trechsel S, “Why must Trials be Fair” (1997) 31 Isr L Rev 94