

# Factual Innocence versus Legal Guilt

## The Need for a New Pair of Spectacles to view the Problem of Life-Sentenced Prisoners Maintaining Innocence

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**We tend to see the world through the spectacles that we happen to be wearing, which may be the spectacles that we are required to wear for the purposes of the jobs that we do, or the situations that we find ourselves in through no fault of our own, or maybe even for the positions that we take for ideological reasons. As this relates to the debate about life-sentenced prisoners maintaining innocence, victim support groups tend to work from the basis that those who allege that they are innocent are, in fact, innocent, because the flaws of the criminal justice system mean that they might be. Alternatively, however, the post-conviction system, prison, psychology, parole and probation services, work from the premise that all prisoners are guilty of the crimes that they were convicted of. The discursive currency used by the opposing sides in this tension has resulted in something of a stalemate: on the one hand, a situation that has become known as the ‘parole deal’ is claimed, whereby life-sentenced prisoners say that they are required to acknowledge their guilt for crimes that they say they did not, in fact, commit in order to make progress through the prison system and achieve their release;’ on the other, the post-conviction system labels prisoners maintaining innocence as ‘deniers’ who must be encouraged to acknowledge their guilt and address their offending behaviour as a necessary prerequisite for progression and possible release: possible release because there are no certainties that life-sentenced prisoners will ever be released if they do not satisfy the requirements of the Parole Board to demonstrate a reduced risk of re-offending.**

Against this background, this article argues that a new pair of spectacles is needed to unlock the current impasse. Although both sides of this conundrum do have a certain validity, both sides are, at root, untenable: whilst it is true to say that all prisoners maintaining innocence are *legally* guilty of the crimes

that they were convicted of in the sense that they were convicted in a court of law, and that it is likely that most prisoners maintaining innocence will also be *factually* guilty of committing the crimes that they were convicted of, it is equally possible that some prisoners maintaining innocence may be *factually* innocent, a problem that the post-conviction system has, hitherto, made no attempts at all to address. As I have come to see it, the crux of this tension resides in a fundamental failure by each side to understand what the other side means due to a lack of clarity about the precise meaning of the terms ‘innocence’ and ‘guilt’ in the engagement: whilst opponents of the alleged ‘parole deal’ think in terms of factual innocence and factual guilt, advocates of ‘denial’ think in terms of legal guilt and, possibly, legal innocence as a counterpart, although this fails to feature in the debate in any sense at all. Instead, a new way of understanding and responding more proactively to the claims of prisoners maintaining innocence is needed that can break through the deadlock, not only for prisoners maintaining innocence who may be innocent, but also for an overcrowded prison system in which there should be no place for the factually innocent.

The article is presented in four main parts. First, it discusses the key legal authorities that lend credence to the idea of a ‘parole deal’, which underpins the stance of the victim support and campaigning organisations. Second, as it is the Parole Board which, generally, makes the decisions about whether life-sentenced prisoners maintaining innocence will be allowed to progress through the stages of their sentence plans, it analyses the Parole Board’s response to the charge that it discriminates against prisoners maintaining innocence, also providing the case law that determines how it responds to claims of innocence by prisoners. Third, an analysis is undertaken that adjudicates the tension between factual innocence and legal guilt to clarify, further, the different approaches and underlying perspectives of the adversaries in the struggles around prisoners maintaining innocence. Finally, as a possible way out of the current impasse, the typology of

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1. The ‘parole deal’ as described here is not, strictly, limited to life-sentenced prisoners. It applies, also, to all prisoners serving four years or more who are also required to meet the requirements of the Parole Board to make progression and/or release.

prisoners maintaining innocence, created as part of my work with the Innocence Network UK to identify and filter eligible cases, is briefly outlined.

### The 'parole deal'

The term the 'parole deal' first entered public consciousness when Stephen Downing successfully appealed against his conviction for the murder of Wendy Sewell in January 2002. Downing had served 27 years in prison maintaining his innocence until he was able to overturn his conviction. At the time, it was widely reported in the media that if he had acknowledged guilt, confronted his offending behaviour and, thus, demonstrated a reduced risk of re-offending, he would, more than likely, have served around 12-15 years. It was, also, reported that during his imprisonment he was deprived of better jobs, training opportunities and parole consideration to put pressure on him to admit his guilt on the basis that he was — in the terminology of the Home Office — IDOM: 'in denial of murder'. The possibility that he had no offending behaviour to confront and that he presented no risk of re-offending as he was innocent of the crime was not even considered by the Parole Board because it is 'not allowed to go behind the conviction, nor the decisions of the courts'<sup>2</sup>.

Quick on the heels of Downing, other similar successful appeal cases followed, such as Robert Brown<sup>3</sup> and Paul Blackburn<sup>4</sup>, each of whom spent 25 years in prison maintaining their innocence, also longer than they would have done had they admitted their guilt and complied with their sentence plans, which ratcheted up the pressure on the Parole Board. These cases became emblematic of the alleged 'parole deal' and led to the emergence of Progressing Prisoners Maintaining Innocence (PPMI), a banner organisation made up of other grass roots victim support and campaigning

organisations, amid claims that such cases were the tip of a much greater 'parole deal' iceberg as some prisoners have been maintaining innocence for 40 years who may never fulfil the required criteria to overturn their convictions. It was noted that the history of miscarriages of justice demonstrates that no human system can be perfect and, therefore, logically speaking, at least *some* prisoners maintaining innocence may, in fact, *be* innocent<sup>5</sup>. It was argued that ways must be found to take this into account when reviewing prisoners maintaining innocence and appropriate ways of identifying and progressing innocent prisoners through their sentences need to be devised<sup>6</sup>

### The Parole Board's response

Although the 'parole deal' should not be restricted to the way that the Parole Board treats prisoners maintaining innocence (explained below), as it is the Parole Board that, generally, makes the decisions about whether prisoners maintaining innocence should progress through their sentence and/or be released, it has become the focus of the debate. Moreover, and perhaps most significantly, in reaction to the pressure of Downing's successful appeal, it was the Parole Board that responded by appointing its first ever public relations officer to fend off negative publicity of its role in such

matters. It argued that claims of a 'parole deal' were 'untrue', and, that it is a 'myth' to say that prisoners maintaining innocence must admit and express remorse for the crimes that they have been convicted of in order to get parole<sup>7</sup>. Indeed, the Parole Board stressed that legal precedent has established that it would be unlawful for it to refuse parole solely on the grounds of denial of guilt or anything that flows from that (such as not being able to take part in offending behaviour programmes which focus on the crime committed)<sup>8</sup>

On the other hand, the Parole Board simultaneously asserted that although it is required *not*

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2. Parole Board (2004) *Denial of Guilt and the Parole Board* available at <http://www.paroleboard.gov.uk> accessed 12 February 2004. An exception to this general rule is the case of Susan May. She was released on licence on her tariff date, 26 April 2005, despite maintaining innocence throughout the whole of her sentence and refusing to undertake any offence-related course work.
3. Hopkins, N. (2002) 'Man wrongly convicted of murder freed after 25 years' *The Guardian*, 14 November.
4. See Naylor, L. (2004) *Judge for yourself how many are innocent* London: Roots Books.
5. Naughton, M. (2005a) 'Why the Failure of the Prison Service and the Parole Board to Acknowledge Wrongful Imprisonment is Untenable' *Howard Journal of Criminal Justice* 44(1): 1-11.
6. Naughton, M. (2004) 'The parole deal is not a "myth"' *Inside Time: The National Monthly Newspaper for Prisoners* 59, May.
7. Parole Board (2004) see n2.
8. As determined in Parole Board (2004) se n2; *R -v- Secretary of State for Home Department ex parte Hepworth, Fenton-Palmer and Baldonzy and R -v- Parole Board ex parte Winfield* [1997] EWHC Admin 324.

to discriminate against prisoners maintaining innocence it is, equally, legally bound to assume the correctness of any conviction and take account not only of the offence, and the circumstances in which it was committed, but the circumstances and behaviour of the individual prisoner before and during the sentence<sup>9</sup>

The rationale for the working practice of the Parole Board as it tries to find a way to navigate these two seemingly conflicting positions was underlined as follows: 'It is important to understand that the Board is not entitled to 'go behind' the conviction. That means we cannot overrule the decision of a judge or jury. That is the job of the appeal courts and the Criminal Cases Review Commission [(CCRC) which reviews alleged miscarriages of justice and refers cases back to the appeal courts if it is thought that there is a 'real possibility' of the conviction being overturned]. The Board's remit extends only to the assessment of risk, and the bottom line is always the safety of the public'<sup>10</sup>.

Through the Parole Board's spectacles, then, it works from the premise that convictions are correct and prisoners are guilty and it would be contrary to its statutory remit to even consider that some prisoners may be innocent: '... we are a[n] organisation created by law, and operating under the law. The law says the [Parole] Board must treat all prisoners as guilty ... What the courts have said repeatedly is that the Board must ignore any representations by the prisoner that he (sic) is innocent. The Board must assume he (sic) is guilty'<sup>11</sup>.

Having said this, the Parole Board is still able to satisfy its statutory remit not to discriminate against prisoners maintaining innocence who will not comply with their sentence plans as it does not technically, nor officially, base its decisions not to recommend progression or release *solely* on the ground that a prisoner maintaining innocence will not acknowledge their guilt and undertake offence-related work. Rather, it is, generally, unable to recommend progression or release to prisoners maintaining innocence who refuse to undertake offence-related work because it does not have the necessary evidence in the form of successfully-

completed specified offence-related courses to show that the prisoner maintaining innocence has reduced his/her risk of reoffending<sup>12</sup>.

### Factual innocence versus legal guilt!

As may already be apparent from the foregoing, the conflict between those that see prisoners maintaining innocence as victims of a 'parole deal' and those that see them as 'deniers' stems from the different spectacles worn by the opposing sides based on where they are positioned in terms of either making challenges to the criminal justice system about alleged cases of wrongful conviction and/or imprisonment or working as part of the post-conviction system. To

illuminate what the opposing sides mean when they utter the key terms 'innocence' and 'guilt' it is, perhaps, instructive to consider a scenario between a fictitious life-sentenced prisoner maintaining innocence as s/he attempts to navigate her/his way through the maze of the post-conviction system that works from the premise that all prisoners are guilty.

When a life-sentenced prisoner maintaining innocence arrives at a prison s/he is informed that s/he will be expected to comply with a tailor-made sentence plan and

specified offending behaviour programmes, the successful completion of which provides the evidence by which the Parole Board will ultimately make decisions about whether to recommend progression and/or release. In response, the lifer maintaining innocence remains steadfast in asserting his/her innocence, meaning factual innocence of the crime(s) that s/he was convicted of. The response from the member of staff in the prison, whether it be a prison officer, a prison governor, or a member of staff from prison psychology or probation services, is equally unwavering in asserting that the prisoner will be considered to be guilty for the purposes of the various requirements of the prison regime<sup>13</sup>. From the spectacles of the prisoner maintaining innocence, what makes matters even worse is that s/he is also informed

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9. As determined in Parole Board (2004) see n2; *R v The Secretary for the Home Dept & the Parole Board ex parte Owen John Oyston [unreported]* (see *The Independent*, 15 October 1999).

10. Parole Board (2004) see n2.

11. McCarthy, J. (2005) 'How do I maintain innocence and get parole?' available at <http://home.vicnet.net.au/~safari/PublicDocs/ParoleBoardReport.pdf> accessed on 26 November 2007 p. 1-2.

12. McCarthy (2005) p.9 see n.11.

13. Naughton, M. (2005b) 'The parole deal does exist' *Inside Time: The National Monthly Newspaper for Prisoners* 77, November.

that a prerequisite of many offence-related programmes is that s/he gives a full and frank account of his/her crimes. A failure to do so will result in a delay in progression as compared with his/her guilty counterparts (or counterparts who accept their guilt), and, possibly, no progression at all if the life-sentenced prisoner refuses to undertake essential offending behaviour programme that are a requirement of his/her sentence planning.

Understandably, perhaps, this serves only to frustrate the life-sentenced prisoner maintaining innocence still further who may not be able to provide any kind of account of a crime that s/he says s/he did not do. Moreover, prisoners maintaining innocence know that they may still have an opportunity to overturn what they believe to be a wrongful conviction in the appeal courts, and may even be told by their appeal lawyers that they should not undertake any offence-related courses as it may look like they are admitting to the crimes that they were convicted of, which may harm their appeal hopes<sup>14</sup>. Under these circumstances, it is not difficult to comprehend why prisoners maintaining innocence often take offence at the allegation that they are guilty and refuse point blank to comply with any aspect of the prison and parole regimes that will not take seriously even the possibility that they might be innocent.

It is important to observe that because the prisoner maintaining innocence uses a currency of factual innocence and factual guilt, s/he hears the prison representative tell them that they are *factually* guilty, when, in reality, they are being told that they will be regarded as *legally* guilty for the purposes of prison procedures and, ultimately, Parole Board decisions which determine whether they are eligible for progression and/or release. These matters are only further obscured as staff in prisons either do not realise that they are making accusations to prisoners that are interpreted in terms of factual guilt or who choose not to make clear that they mean that prisoners maintaining innocence are regarded as legally guilty,

irrespective of whether they are factually innocent or factually guilty or whether they are mounting an appeal or an application to the CCRC.

Such encounters are played out each and every day in every prison in the country. They contribute to the statistical data disclosed in a PPMI meeting with senior representatives from the various agencies that together make up the post-conviction system, which revealed that there are currently many thousands of prisoners maintaining innocence that are not complying with the requirements of their sentence planning, progression and release schemes, and which the prison and parole systems do not know what to do with.<sup>15</sup> The scale of the problem of prisoners maintaining innocence was confirmed by a recent survey, which claimed that approximately 40 per cent of all male and female prisoners say that they are not guilty of the crime for which they were convicted<sup>16</sup>.

On this basis, the critique of the post-conviction system's position offered here is not on the grounds that it is unreasonable to regard prisoners maintaining innocence as legally guilty, for they all are. Rather, the post-conviction system collectively, as opposed to the Parole Board, specifically, is seen to be lacking in its apparent refusal to take any steps whatsoever to engage, on any practical level at all. This inattention to the extensive scale of the problem of prisoners

maintaining innocence not only forecloses any meaningful discussion on, or action in response to, the problem of prisoners maintaining innocence at all, but it is contributing to a mounting problem that raises critical questions about the entire criminal justice system of which the constituents of the post-conviction system — Prison Service, prison probation and prison psychology services, and the Parole Board — form integral parts<sup>17</sup>.

To label all prisoners maintaining innocence as 'deniers', denying the possibility that some prisoners maintaining innocence may well be innocent is contrary to any notion of justice, however defined. Most significantly, the key purposes of the criminal justice system, that is to 'protect the innocent' and 'raise

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14. Naughton (2005b) see n13.

15. The Meeting was conducted under 'Chatham House Rules', meaning that those present are free to use the information received. But neither the identity nor the affiliation of the speaker(s), nor that of any other participant may be revealed.

16. Inside Time (2006) 'Prisoner Survey 2006' *Inside Time: The National Monthly Newspaper for Prisoners* 85, July.

17. Naughton, (2006b) 'Parole Board – Discredited?' *Inside Time: The National Monthly Newspaper for Prisoners*, March.

confidence that the system is fair<sup>18</sup>, is not advanced by a policy of totally disregarding the plight of prisoners who may be innocent and find themselves in prison because of the failings of the criminal justice system (discussed below). Moreover, the criminal appeals system exists precisely because people can, and are, wrongfully convicted and imprisoned.

### A bifocal approach

In contrast to the rigid positions taken by the adversaries in the conflict between the advocates of the 'parole deal' and 'deniers', the Innocence Network UK (INUK) adopts what might be called a 'bifocal approach' to the problem of prisoners maintaining innocence in its attempts to distinguish potentially innocent victims from prisoners who maintain innocence when they are not. In particular, what is termed the 'typology of prisoners maintaining innocence' is employed as an objective screening process that separates prisoners (or alleged innocent victims of wrongful conviction who are no longer in prison or did not receive a custodial sentence) who are clearly *not* innocent from those that *may be* innocent. Devised as part of my work with the INUK in an attempt to provide reliable referrals to member innocence

projects for further investigation, the 'typology' is a practical demonstration that we (the INUK) do not just believe all who claim innocence are innocent. At the same time, however, the INUK accepts that the shortcomings of criminal trials, coupled with the limits of the criminal appeals system to guarantee that all innocent victims of wrongful conviction and imprisonment will be able to overturn their convictions (discussed below), means that it is *possible* that alleged innocent victims in prison may be innocent.

In essence, applicants to the INUK are sent a detailed questionnaire that asks for a full account of the basis of their claim of innocence and any part that the

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applicant may have played in the crime that they have been convicted of, among many other things such as the prosecution's case against them, their defence case, appeal history, parole status, and so on. From an analysis of the INUK questionnaires, a range of reasons and motivations for why convicted people say that they are innocent when they are not have thus far emerged. These range from prisoners that maintain innocence in the hope that they will overturn their cases on an *abuse of process* (to acknowledge guilt effectively prevents such a possibility) such as applicants who claim that they are innocent because of certain procedural irregularities alleged to have occurred during one or more stages of the criminal justice process, for instance, the arrest and/or interrogation, the police investigation, and/or during the trial that led to the conviction itself. It includes those who are *ignorant of criminal law* and do not know that their behaviour is criminal, such as the applicant convicted of a joint enterprise crime who believed that because he did not actually hit the person who died in a fight between two rival gangs that he was innocent of the murder for which he was jointly convicted. It includes those who know that their actions constitute a criminal offence but *disagree* that it should, such as the applicant who believed that because he

had video evidence that his former girlfriend had once consented to have sex with him he could never be guilty of rape; and, it includes cases where *innocence is maintained to protect loved ones* from the knowledge that they were lied to by the perpetrators of crime, such as the man who promised his mother that he would never commit another burglary and claimed that he had been 'fitted-up' by the police when he was reconvicted for a subsequent burglary. It was only when his mother had died that he admitted his guilt for his crimes.<sup>19</sup>

In addition to the foregoing categories or prisoners maintaining innocence who are not innocent, another

18. Criminal Justice System (2007) 'Aims and Objectives' available at [http://www.cjsonline.gov.uk/the\\_cjs/aims\\_and\\_objectives/index.html](http://www.cjsonline.gov.uk/the_cjs/aims_and_objectives/index.html) accessed on 26 November 2007.

19. This example was also provided in a 'Chatham House Rules' discussion between PPMI and senior representatives from the post-conviction system.

category relates to prisoners who may, in fact, be innocent. Criminal trials are not concerned with whether defendants are innocent or guilty in any straight-forward sense; they are highly technical affairs which attempt to determine if they are 'guilty' or 'not guilty' of criminal offences on the basis of the reliability of the evidence before the court. The many and varied flaws of the evidential processes in criminal trials are revealed in successful appeals against criminal conviction: police officers transgress procedures (e.g. Birmingham Six, Guildford Four, Cardiff Newsagent Three) and have even been shown to make deals with suspects for incriminating evidence to obtain criminal convictions (e.g. Bob Dudley and Reg Maynard); prosecutors can fail to disclose vital evidence (e.g. John Kamara, Judith Ward, M25 Three, Cardiff Three); forensic science expert witnesses exaggerate their findings or make mistakes (e.g. Sally Clark, Angela Cannings, Donna Anthony, Kevin Callan); people make false accusations (e.g. Mike Lawson, Basil Williams-Rigby, Anver Sheikh, Warren Blackwell); and defence lawyers can fail to adequately represent their clients (e.g. Andrew Adams)<sup>20</sup>.

It must be acknowledged that successful appeals are not evidence of innocence. Yet, the aforesaid examples demonstrate the diverse range of failings of the criminal justice system at the pre-trial and trial stages, to which innocent victims can fall prey, raising questions about the adequacy of the opportunities available to innocent victims of wrongful conviction to overturn those wrongful convictions when they occur.

The problem with the criminal appeals system, however, is that it, too, is highly technical as it attempts to determine not whether appellants are guilty or innocent, but whether convictions are 'safe' or 'unsafe' from the perspective of the prevailing rules of criminal appeals. As such, if and when innocent victims are wrongly convicted and imprisoned, they may not be able to overturn their convictions unless they are able to show a breach of process that led to the conviction. Fresh evidence is another possible way of overturning an alleged wrongful conviction by demonstrating the evidential unreliability of the conviction. Most crucially, however, evidence available at the time of the original trial may not count, even if it proves that the convicted person is innocent. Criminal appeals are not about

rectifying the wrongs of criminal trials and ensuring that the innocent overturn their convictions<sup>21</sup>.

## Conclusion

The reasons why prisoners maintain innocence are complex and varied: although all prisoners are legally guilty, and most will also be factually guilty, it is equally true that some prisoners who say that they are innocent are likely to be factually innocent. In devising and deploying the typology of prisoners maintaining innocence, the INUK keeps sight of the various categories of prisoners maintaining innocence who are not innocent *and* the limits of the criminal justice system that mean that innocent people can be wrongly convicted and may remain unable to overturn their convictions. It is an attempt to marry up the entirely legitimate concerns of those against the wrongful conviction and imprisonment of the innocent with the equally valid concerns of those that attempt to deal with

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so-called 'deniers' who will not confront their guilt whilst they are in prison and demonstrate a reduced risk of re-offending. The idea is to present the beginnings of a new way of thinking about the problem of prisoners maintaining innocence in the hope that new forms of action are devised and proactively deployed that might more appropriately deal with prisoners who say that they are innocent.

INUK's typology of prisoners maintaining innocence helps to clarify the different meanings of 'innocence' and 'guilt' between prisoners maintaining innocence and staff in prisons and the Parole Board, providing a new vocabulary so that the different positions are more clearly understood. As such, it could be utilised for educative purposes to assist prisoners maintaining innocence and prison and parole staff alike to understand the basis and validity of claims of innocence, even facilitating compliance with sentence plans and offence-related programmes by prisoners who realise why they are not innocent. Most crucially, it could be embraced by the post-conviction system to separate the various types of prisoners maintaining innocence as part of the wider remit of contributing to the underpinning goals of the criminal justice system — protecting the innocent and promoting confidence that the system is fair.

20. See for example Naughton, M. (2007) *Rethinking Miscarriages of Justice: Beyond the tip of the iceberg* Basingstoke: Palgrave Macmillan, Chapter 3

21. See also Naughton, M. (2006a) 'Innocence Projects', *ScoLAG: Scottish Legal Action Group*, 348.