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Does the NOMS Risk Assessment Bubble Need to Burst for Prisoners Who May be Innocent to Make Progress?

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Abstract: This article considers, critically, a new course for prison and probation staff who work with indeterminate sentenced prisoners (ISPs) that has been devised by the National Offender Management Service (NOMS), which allows, for the first time, the possibility that some prisoners maintaining innocence may be innocent. However, whilst on its face this looks like a significant step, a closer analysis shows that the rationale and operations of the NOMS system of risk assessment for prisoners maintaining innocence remains trapped in a bubble which deters meaningful assistance to prisoners who may be innocent. As such, prisoners maintaining innocence continue to be faced with the 'parole deal', a situation whereby they claim that they must choose to admit their guilt for crimes that they say that they did not commit in order to make progress through the prison system and obtain their release.

Keywords: indeterminate sentenced prisoners (ISPs); public protection; parole; prisoners maintaining innocence

The spectre of innocent life sentenced prisoners has always been a sore subject for the prison service, national probation service and the Parole Board, alike. Indeed, there exists a sustained discourse that has derided how those charged with the welfare and possible[1] release of life sentenced prisoners have stood firm in responses to concerns raised about alleged innocent victims of wrongful imprisonment, repeatedly insisting that they – prison, probation and parole – are required to work from the premise that the courts are correct and that all prisoners are guilty of the crimes for which they have been convicted (see, for instance, Parole Board 2009; Woffinden 2000; Hill 2001; Wilson 2001; Samuels 2003; Naughton 2004, 2005a). The resulting blanket policy of regarding all prisoners maintaining innocence as guilty offenders or 'deniers', negating any possibility that a prisoner maintaining innocence may, in fact, be innocent, has only further entrenched the stand-off between the prison, probation and parole

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regimes and what might loosely be termed the 'wrongful conviction of the innocent community'.

More recently, however, practical attempts by the Innocence Network UK (INUK), the umbrella organisation for member innocence projects in UK universities,[2] to allocate eligible cases to its member innocence projects for further investigation has unearthed varied and complex reasons why prisoners maintain innocence. In brief, a typology of claims of innocence has been developed as follows: ignorance of criminal law (they do not *know* that they have committed a criminal offence); disagreement with criminal law (they do not *believe* that their behaviour is, or should be, regarded as criminal); tactical equivocation of the nature of the offence (they think they have a chance of *appeal*); stigma avoidance (they want to protect themselves or others from loss of face and *dignity*); because they are factually/actually innocent of the crime for which they have been convicted (Naughton 2007a, 2008).

Against this background, this article will, first, provide an overview of the Parole Board's stance on the issue of prisoners maintaining innocence and how it straddles between two conflicting requirements of having to assume that all prisoners are guilty whilst not discriminating against those maintaining innocence. Second, it critically considers a new course for prison and probation staff who work with indeterminate sentenced prisoners (ISPs) that has been devised by the National Offender Management Service (NOMS)[3] and which incorporates ideas from the typology of claims of innocence, potentially allowing the possibility, for the first time, that some prisoners maintaining innocence may be innocent. It is argued that whilst this looks like a significant step, the rationale and operation of the NOMS risk assessment system for prisoners maintaining innocence remains trapped in a bubble of risk assessment which deters meaningful assistance to prisoners who may be innocent. As such, prisoners maintaining innocence continue to be faced with the 'parole deal', a situation whereby they claim that they must choose to admit their guilt for crimes that they say that they did not commit in order to make progress through the prison system and obtain their release (Naughton 2005b).

The 'Parole Deal'

When Stephen Downing overturned his conviction for the murder of Wendy Sewell, after spending 27 years in prison maintaining his innocence, compelling evidence was provided in support of long-standing claims that life sentenced prisoners maintaining innocence are discriminated against by the prison service and by decisions taken by the Parole Board. In particular, it was reported in the media at the time that had Downing acknowledged guilt in prison, confronted his offending behaviour and, thus, demonstrated a reduced risk of reoffending, he would, more than likely, have served around twelve years. It was also reported that during his wrongful 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 words of the Home Office – IDOM, 'in denial of murder' (Hale 2002). The possibility that he had no offending behaviour to confront and that he presented no risk of reoffending as he may have been innocent of the crime is not one that was even considered by the various agencies which together comprise the post-conviction system because, as stated, they are 'not allowed to go behind the conviction, nor the decisions of the courts' (see, for example, Parole Board 2005; also McCarthy 2005).

Other high-profile successful appeals quickly followed, such as Robert Brown's (see O'Neill 2002; Hill 2002) and Paul Blackburn's (see Naylor 2004) quashed convictions by the Court of Appeal (Criminal Division) in November 2002 and May 2005, respectively. Both had served 25 years in prison for crimes that they had also always maintained that they did not commit. Like Downing, Brown and Blackburn were estimated to have served over double the time in prison that they would have been likely to serve had they acknowledged their guilt and confronted their offending behaviour while they were in prison to show their remorse and a reduced risk of reoffending. Like Downing, Brown and Blackburn, too, were regarded by the various post-conviction agencies charged with the management and treatment of life sentenced prisoners – prison, probation, psychology and parole staff – as 'in denial' of their crimes.

These cases further highlighted, and served to strengthen, concern about a significant barrier for life sentenced prisoners maintaining their innocence: they are, generally,[4] required to co-operate with their sentence plans and undertake offence-related coursework as a means of progressing through the various stages of imprisonment to possible release. The term the 'parole deal', then, can be conceptualised as a situation that confronts prisoners maintaining innocence as follows: tackle your offending behaviour, even if you have no offending behaviour to deal with, and you may make progress through the prison maze and be recommended for release by the Parole Board. The other option is to remain in prison protesting innocence, sometimes over a decade past tariff like Downing, Brown and Blackburn, with the faint hope[5] of overturning your conviction in the appeal courts.

The Parole Board's Position

> The Parole Board must by law, accept that you [the prisoner] are guilty . . . but it does not necessarily mean you won't get parole . . . In fact if the Parole Board refuses parole only because you say you are innocent, you can challenge that decision and make them look at your case again. (Parole Board 2009)

Although the 'parole deal' should not be restricted to the way that the Parole Board treats prisoners maintaining innocence and should, more appropriately, include all aspects of the post-conviction system that work on the basis that prisoners are guilty of the crimes for which they are convicted (Naughton 2005a), as it is the Parole Board that 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, it was in reaction to the pressure of Downing's successful appeal that the Parole Board responded by appointing its first ever public relations officer to fend off negative publicity of its role in such matters. The Parole Board argued that claims of a 'parole deal' were not true and, that it is a 'myth' to say that prisoners maintaining innocence must admit to crimes for which they have been convicted in order to get parole (Parole Board 2004; Naughton 2004). To be sure, the Parole Board pointed out that legal precedent means 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 (OBPs) which focus on the crime committed) (as determined in Parole Board 2004; *R* v. *Secretary of State for the Home Department ex parte Hepworth, Fenton-Palmer and Baldonzy* ([1998] COD 146, HC); *R* v. *Parole Board ex parte Winfield* ([1997] EWHC Admin 324)).

On the other hand, the Parole Board simultaneously asserted that although it is required *not* 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 (as determined in Parole Board 2004; *R* v. *The Secretary for the Home Department and the Parole Board ex parte Owen John Oyston* ([1999] EWHC Admin 750)).

The rationale for the working practice of the Parole Board as it tries to find a way to traverse these two apparently conflicting positions was underscored 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 ... The Board's remit extends only to the assessment of risk, and the bottom line is always the safety of the public' (Parole Board 2004).

More recently, the difficulty for the Parole Board in treating all prisoners as guilty whilst not discriminating against those maintaining innocence of their convictions was summed up by Parole Board Member, Judge Anthony Thornton (2008), in his report on a Parole Board sponsored conference on the obstacles to progression faced by prisoners maintaining innocence:

> A prisoner maintaining innocence should not be disadvantaged in any risk assessment process because of that stance, even if it has precluded participation in relevant offending behaviour programmes. However, the Parole Board when assessing risk may not go behind relevant facts associated with a conviction even when these are not admitted by the prisoner. A lawful verdict of guilty must be respected by the Board and no account can be taken of pleas of innocence. Thus, in many cases of maintained innocence, a risk assessment inevitably takes account of a prisoner's lack of appropriate admissions and of any consequent absence of relevant risk reduction work. (Thornton 2008, p.1)

The Parole Board, then, works from the premise that convictions are correct; that 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. (McCarthy 2005, pp.1–2)

Having said this, the Parole Board is still able to comply with its statutory duty 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. Instead, it is, generally, able to justify not recommending progression or release to prisoners maintaining innocence who will not undertake offence-related work on the grounds that 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 (Naughton 2008, pp.33–4; McCarthy 2005, p.9). Notwithstanding the official legal position, then, this leaves prisoners maintaining innocence caught in a bleak catch-22 position: they must deal with offending behaviour that they may not have in their attempts to make progress through the prison system and/or be recommended for release by the Parole Board; alternatively, they must languish in prison maintaining innocence, often many years past tariff in the hope that they might overturn their convictions in the appeal courts.

Managing Indeterminate Sentences and Risk

> Just because a prisoner denies his/her guilt, this is not a bar to release. There is no rule or policy preventing progress or release, stating an ISP cannot progress if they deny their guilt. (National Offender Management Service 2008, p.1)

The foregoing quotation, derived from a new training course for prison and probation staff that was being rolled out by NOMS from Autumn 2008, reiterates the legal position on the treatment of prisoners maintaining innocence. 'Managing Indeterminate Sentences and Risk' (MISaR), will be delivered to some 30,000 prison and probation staff jointly for the first time[6] to provide a more joined-up training package for all staff who deal with ISPs. Drawing directly from, and directing staff to, an article (Naughton 2008) on the INUK typology of the reasons why prisoners maintain innocence, it promises something of a new era for identifying and managing prisoners maintaining innocence, giving hope that the challenges that such prisoners face in making progress and achieving release will (finally) be recognised and redressed. The relevant part of MISaR is Learning Outcome 2, 'Identify how to manage prisoners who deny their guilt', the very title of which provides the first indication that the module is

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still grounded in an underpinning discourse that sees prisoners who maintain innocence as guilty of the offences for which they were convicted and, so, 'deniers'.

Nonetheless, Learning Outcome 2 does contain innovations, which at least appear to represent a step outside the existing bubble that sees all prisoners maintaining innocence as 'in denial', instructing staff, for the first time, to embrace at least the possibility of innocent prisoners in the following terms:

> There are many reasons an offender may deny all or part of their offence – they may not be able to accept what they have done, they may be trying to protect others, they may not want some one dear to them to know the truth, they may not see what they did as an offence, they may actually be innocent. (National Offender Management Service 2008, p.1)[7]

Moreover, and also with reference to the INUK approach to claims of innocence, Learning Outcome 2 directs an engaged approach to expose the reasons for innocence claims and the possibility that some prisoners may be innocent as follows:

> Staff should interview a prisoner who denies part or all of his/her offence to establish the basis upon which they hold their views. (National Offender Management Service 2008, p.1)

In practical terms, staff are instructed to inform prisoners maintaining innocence who cannot be classified as guilty that:

> Other processes exist for the ISP [indeterminate sentenced prisoner] to challenge the safety of the conviction i.e. Appeal, Criminal Cases Review Commission (CCRC), etc. and staff must advise the prisoner to take legal advice and follow these courses of legal appeal ... the Court and the independent Criminal Cases Review Commission ... review alleged miscarriages of justice in England, Wales and Northern Ireland. Prisoners should be advised to contact the Commission where they continue to maintain their innocence. (National Offender Management Service 2008, pp.1–2)

The inclusion of an official recognition in the NOMS training course that a prisoner maintaining innocence may be innocent, and providing prisoners maintaining innocence who cannot be easily identified as falling into the various categories of non-innocence in the typology with advice on the appeals system and how they might challenge their alleged wrongful convictions, are ground-breaking steps. It truly looks like joined-up thinking that considers not only the delivery of justice, but, effectively, links the prison and probation systems with the limits of the pre-trial and trial system through which innocent people can be wrongly convicted, as well as the appeal system and the Criminal Cases Review Commission (CCRC),[8] which exist to overturn wrongful convictions.

However, on closer inspection, the action thus far taken still tends to work from the premise that prisoners maintaining innocence are guilty, with the INUK typology mainly being utilised to extend the existing discourse of 'denial' with additional categories of non-innocence or guilt.

Indeed, the terminology of the relevant sub-headings of MISaR Learning Outcome 2 are also instructive of the rigidity of the thinking on prisoners maintaining innocence underpinning the course, which also pitch prisoners maintaining innocence as guilty 'deniers' in the following terms: 'Denial of guilt (or protesters of innocence)',[9] 'Consideration by the Parole Board in denial of guilt cases' and 'Management of ''deniers'' in prison', leaving little doubt about the basis of the new training programme, which is inextricably linked with the discourse of the existing regime and the structural cause of the 'parole deal'. Indeed, although prison and probation staff are told that it is possible that a prisoner may maintain innocence because they are innocent, they are instructed to:

> . . . advise the prisoner of the possible consequences of not engaging in addressing identified risks, [that is, addressing offending behaviour]. Release is dependent on the Parole Board being satisfied any areas of concern have been *appropriately dealt with* and it is safe to release the prisoner. (National Offender Management Service 2008, p.1, italics added)

As will be shown, 'appropriately dealt with' means, in practice, an admission of guilt by the prisoners and compliance with specified OBPs. To further illustrate the extent to which the new NOMS training programme for prison and parole staff dealing with ISPs remains grounded within the existing bubble, failing to engage meaningfully with prisoners who may be innocent, the remainder of the article will critically evaluate the key themes of 'risk assessment' and 'the management of deniers' as outlined in the section of the MISaR training manual on prisoners who deny guilt.

Risk Assessment

> The primary responsibility of the Prison Service in this area is to assess and seek to minimise the risk a prisoner might pose to the public if released. Where appropriate, this can be done through offending behaviour programmes but this may not always be possible with ISP who deny their guilt . . . *The problem posed by denial is that it may be harder to form a proper assessment of the factors contributing to their offending and so there may be less certainty about the level of their risk and the extent to which it has been reduced during their sentence*. This is particularly the case as far as offending behaviour programmes are concerned. (National Offender Management Service 2008, pp.2–3, italics added)

This opening paragraph on the framework on risk assessment for determining whether prisoners pose a risk to public protection or whether they are safe to release from prison works counter to the previous acknowledgement by MISaR that there are various reasons why prisoners say they are innocent, including the possibility that they are innocent. It also confirms that there is no real change to the existing system that places prisoners maintaining innocence within a risk assessment process that, generally,[10] requires the satisfactory completion of OBPs that form the prisoner's sentence planning as the main way to obtain progression or release.

Perhaps the most contentious OBPs for prisoners maintaining innocence are programmes such as the Sex Offender Treatment Programme (SOTP) and the Controlling Anger and Learning to Manage It (CALM), which depend on prisoners being willing to give a full and frank account of their offences, either during the initial assessment stage or during the programme itself, and so is not normally available to prisoners who maintain innocence for the offences of which they are convicted. The MISaR training programme itself acknowledges the difficulties that this represents:

> This can make it more difficult to judge whether an individual's level of risk has diminished. There is also the problem that many deniers refuse to undertake any offending behaviour work whether it involves discussing the index offence or not. (National Offender Management Service 2008, p.3)

However, MISaR suggests that:

> ... the cognitive skills programmes like Enhanced Thinking Skills (ETS) and programmes to address drug and alcohol problems *do not* require offenders to talk about their offences; so a prisoner who denies his/her guilt but is willing to take part in this work should be able to without difficulty ... [Moreover] ... With the Cognitive Self Change Programme (CSCP), it is within the Treatment Manager's discretion as to whether a denier should take part, based on their discussions with the individual. Enhanced Thinking Skills (ETS) courses *do not* require participants to talk about their offences at any point so there is no barrier to deniers taking part. (National Offender Management Service 2008, pp.3–4, italics added)

The main problem with this is that undertaking courses that do not require an acknowledgement of guilt may not help lifers/ISPs to progress or obtain release as they do not address the index offence for which they were convicted and, hence, do not present as strong evidence in Parole Board decisions (see, for instance, McCarthy 2005). Moreover, the assessment of the impact of attendance on OBPs is measured through the use of psychometric tests, which are conducted before and after the courses (National Offender Management Service 2008, p.3). This, inevitably, puts the prisoner maintaining innocence who refuses to undertake specified OBPs as a way of demonstrating a reduced risk of reoffending, at an immediate disadvantage, as they will not be eligible for the tests.

To overcome this, MISaR posits that:

> Although denial makes it harder to conduct a risk assessment, it should nevertheless still be possible to make one. This can be done, for example, by using *police reports about the offence* in combination with *social history information, the prisoner's performance in interview and their behaviour during sentence*. By taking all this information into account, it should be possible to form some reasonable assessment of the factors underlying the prisoner's risk. Once the factors, which underlie the ISP's offending, have been provisionally identified, it should be possible to judge how far these factors continue to be expressed in their current behaviour. On this basis, an assessment of whether the prisoner's risk is increasing or decreasing can be made. (National Offender Management Service 2008, p.3, italics added)

The main limitation with this method of risk assessment for prisoners who will not comply with their sentence plans is that it will be based on a range of biased, thus, inherently unreliable indicators, that are not 'fit for purpose': the 'police reports about the offence' will have been gathered in the police investigation and will posit the prisoner as the criminal responsible for the crime, taking no account of the possibility of police error or impropriety; the 'social history information' may contain information of previous (spent) convictions, for which the prisoner should not be re-punished; and, it takes no account of the possibility that prisoners may misbehave in prison interviews and during their sentences precisely because of the frustrations and anxieties caused by wrongful conviction and imprisonment. For instance, a report[11] on Robert Brown (see, O'Neill 2002) by a prison medical officer in 1984 when he had served seven years of the 25 years he would serve before his conviction was quashed stated:

> His uncooperative and anti-authority behaviour throughout the 7 years of imprisonment (with a minimum of 15 years) is in keeping with that of a wrongly convicted man.

As such, by working entirely within a framework that sees all prisoners as guilty offenders and those that maintain innocence as 'deniers', the possibility of innocent prisoners is denied and ISPs who may be innocent who refuse to attend index offence related OBPs are not only given no real hope in the new MISaR training course of making progress through their sentences and/or being released, they can be irreparably harmed in the process (see, Naughton 2007b, ch. 8). Indeed, the MISaR section on risk assessment concludes with the instruction that: 'the assessment of the prisoner's current level of risk *must* be the pre-eminent factor in determining whether s/he is ready to progress or be released' (National Offender Management Service 2008, p.3, italics in original).

Yet, until new ways of determining the absence of risk in prisoners who may be factually innocent of the crimes for which they are imprisoned, the innocent will remain languishing in prison indefinitely, calling not only the penal system into question but also the legitimacy of the entire criminal justice system of which the penal agencies form an integral part (see Naughton 2006). The harm caused to victims of wrongful imprisonment is only exacerbated by a system that, even under the new MISaR training programme, steadfastly refuses to take seriously the possibility of innocence: giving information about the appeals system and the CCRC to prisoners maintaining innocence who cannot be fitted into a category of non-innocence of the typology is a new development, but more (pro)active steps are needed that actually *do* something about their plight rather than leaving them in the same impasse in which they currently find themselves.

The Management of 'Deniers' in Prison

The training on the management of 'deniers' starts off with the following:

> It is not at all uncommon for offenders, and especially sex offenders, at some point to deny the offences for which they have been convicted. It is also true a number of

these individuals subsequently admit the offence. (National Offender Management Service 2008, p.4)

These two propositions are empirical assertions that require statistical validation: how common is it for guilty offenders to maintain innocence and then acknowledge their guilt? And, what are the reasons that encourage or induce prisoners maintaining innocence to change their stance and admit their guilt? It is likely that there are many reasons why prisoners maintaining innocence change their claim to one of guilt: it could, arguably, be because they have exhausted the appeals system and accept that their appeal hopes are no longer viable so they admit to crimes that they did commit; but, it is also possible that some prisoners maintaining innocence admit guilt even when they are innocent because they are complying with the requirements of the 'parole deal' in an attempt to make progress through the various stages of imprisonment and/or achieve their release.

More specifically, the MISaR training programme states that:

Approaches to addressing the offending behaviour of deniers vary because offending behaviour programmes differ in the extent to which they are able to treat those who refuse to admit their guilt. Although the SOTP requires participants to discuss the offence for which they were convicted or the sexual elements of their offence, and is therefore not available to those who completely deny their offence, it can be undertaken by those who admit partial guilt. For example, those who concede that an incident took place but attempt to minimise their culpability. (National Offender Management Service 2008, p.4)

A problem with the foregoing is that it would bring all those convicted of rape or other sexual offences who claim that the sexual act was consensual within the SOTP nexus, taking no account whatever of the phenomenon of false allegations of sexual abuse/assault,[12] nor successful appeals such as those of Roy Burnett who spent 15 years of wrongful imprisonment for a rape that the Court of Appeal said 'almost certainly never happened' (Editorial 2000), or Roger Beardmore who spent three years in prison (of a nine year sentence) for the paedophile rape of a young girl who later admitted that she had lied to get her mother's attention (Peek 2001).

More disconcertingly, from the simple standpoint that prisons should be for people convicted for actual criminal offences, MISaR embodies an underlying discourse of 'risk' which sees as self-evident the fact that all prisoners, guilty or innocent of the crimes for which they were convicted, are in need of 'correction' before it is safe for them to ever be released:

Inevitably with many deniers, however, the emphasis has to be on working on the offending behaviour identified in any pre-convictions and or other/identified problem behaviour, such as alcohol . . . anger, relationships, poor social skills, etc. For instance, although participants on the Controlling Anger and Learning to Manage It (CALM) programme are not expected to talk about their offending during the programme sessions, they *must* do so during the assessment process. If they are not prepared to admit to their index offence, there could be another offence to which they are prepared to acknowledge responsibility. (National Offender Management Service 2008, p.4, italics in original)

But, these things are not criminal offences to be 'corrected' by a prison service that is already bursting at the seams: 26% of adults (aged 16–64 years) have an alcohol use disorder, equivalent to approximately 8.2 million people in England (Institute of Alcohol Studies 2007); it is a normal human emotion and lawfully legitimate in certain circumstances to express anger, hence laws of provocation; in 2007, 128,534 marriages ended in divorce (Office for National Statistics 2008), making 'relationship problems' a routine aspect of everyday life; and, the imprisonment of potentially innocent victims cannot be justified on the basis that it will help them address their poor 'social skills' and, therefore, their risk of committing crime if they are released, as they should not be in prison in the first place if they are not guilty of the crimes for which they were convicted.

Moreover, to encourage prisoners who may be innocent ('deniers') to admit to committing offences other than the index offences for which they were convicted to make progress and achieve their release not only makes a mockery of the method for assessing risk reduction, it gives licence to prisoners to undertake risk assessment courses for reasons that are not genuine, which calls into question both the value of the courses in the first place and their possible effectiveness.[13]

Following on from this, in an almost clairvoyant mode, MISaR sees a key part of the task of dealing with ISPs as the need 'to explore issues of motivation and the propensity of the ISP to pose a risk to the public, and commit serious crime, in [the] future' (National Offender Management Service 2008, p.4). This, again, avoids the critical question about whether prisoners maintaining innocence should be in prison in the first place.

However, MISaR states that:

> It is equally important staff responsible for prisoners who deny their guilt do not lead them to believe their denial will *automatically* prevent their progress and ultimate release ... [and that] The real question should not be what offending behaviour work has been undertaken but what is the current level of risk. (NOMS 2008, p.4, italics added)

This seems like a cruel twist to give hope to prisoners that they can stay true to their claim of innocence without fear of discrimination, when the reality is that the only real way of progressing is by compliance.

The penultimate paragraph of the MISaR course on how to deal with prisoners who deny their guilt equally betrays a total lack of any empathy at all with the situation in which innocent prisoners find themselves:

> The Prison Service accepts the general presumption that [to work on the basis that] the conviction was correct does not meet the case of the person who is genuinely innocent but who has exhausted all avenues of appeal without success. As indicated above, [however] the key issue affecting an ISP's progress is whether or not the risk s/he poses to the public is acceptably low. (National Offender Management Service 2008, p.5)

This perverse logic seems to miss the point that we live in a society with a core principle at the heart of the criminal justice system that people are

supposed to be convicted and punished for the crimes that they commit. Despite this, the MISaR training course, effectively, instructs prison and probation staff to care not for any potentially innocent prisoners that they may encounter, but, rather, see all prisoners as in need of complete correction of any 'risky' habits or personality traits so that they may be safe to release.

Firmly aligning the Parole Board with the rationale of the NOMS course for prison and probation staff dealing with lifers, the MISaR training course concludes by stating that:

> The Parole Board is aware of the approach; denial of guilt is not an automatic bar to release, taken by the Prison Service. The Board does not ignore the possibility the prisoner may be innocent, but its consideration has to proceed on the presumption of guilt. The Board's first duty, however, is to assess the risk a prisoner may pose to the public if he is released on life/IPP licence. For that reason it is *unlawful* for the Board to refuse to consider the question of release solely on the grounds the prisoner continues to deny guilt. (National Offender Management Service 2008, p.5, italics in original)

This confirms that the 'parole deal' still prevails: as shown above, prisoners maintaining innocence are not denied progression and release on the simple grounds that they are maintaining innocence but, rather, they fail to make progress and achieve release because they do not provide the evidence necessary for the Parole Board to make reliable judgments about whether or not they have reduced their risk of reoffending and so the harm that they pose to public protection. The possibility that a prisoner may be innocent is not given any serious weight at all as the prison, probation and parole systems operate within a bubble that is not allowed to go behind the decisions of the court and works on the basis that all prisoners are guilty of the offences for which they are convicted.

Conclusion

The new MISaR training course is novel in that it instructs prison and probation staff to provide prisoners maintaining innocence with information about the appeals system and how they might challenge their convictions in the courts. The pressure for NOMS to seek and incorporate new ideas on how to deal with prisoners maintaining innocence is because the present arrangements are unsustainable: the problem with prisoners maintaining innocence will only 'intensify with the exponential growth in the number of IPP [imprisonment for public protection], high-risk, determinate and recalled prisoners needing risk assessment coupled with the acute shortage of appropriate OBPs and prison psychologists working on an individual basis with such prisoners' (Thornton 2008, p.2). Indeed, not only is the general prison population currently at an all time high, it is estimated that the number of ISPs will rise from 10,911 in March 2008 (HM Prison Service 2008a) to 18,000 by 2012,[14] whereas the lifer system was designed with just over 4,000 prisoners in mind (Ministry of Justice 2007, p.6).

Yet, there is no evidence of a genuine attempt to separate prisoners maintaining innocence who may be innocent from those who are not. Instead, the thinking behind the new training regime remains rooted in a worldview that can only really see prisoners as guilty offenders who need to show that they have reduced their risk of reoffending in line with the existing theories and practices on 'risk assessment' and 'public protection' before they can be released. This indicates that the mounting problem of prisoners maintaining innocence is likely to escalate still further. It, also, renders the MISaR course at odds with the underpinning objective of the criminal justice system, which is:

> . . . to deliver justice for all, by convicting and punishing the guilty and helping them to stop offending, *while protecting the innocent*. (Criminal Justice System 2008, italics added)

Contrary to this, the bubble within which NOMS is operating applies only to one side of this equation, taking no active steps at all to work in any practical way with the appeals system or the CCRC to actually progress and/or release and/or assist in overturning the wrongful convictions of prisoners who may be innocent. To be sure, NOMS is highly selective in its use of the INUK typology of claims of innocence in the MISaR course, utilising only the categories of non-innocence (guilt) that provide legitimacy to the theory of 'denial'. This is not problematic *per se*, for to help prisoners maintaining innocence to understand their legal culpability can make a meaningful contribution to reducing the risk that they pose to public protection if, and when, they are released. For example, by engaging with prisoners maintaining innocence to unearth the ignorance of applicants to the INUK that sexual relations with girls aged under 16 years in the UK constitutes a criminal offence or the applicant who believed that because his ex-girlfriend had once given consent to sex he had a permanent consent and, thus, could not be guilty of rape (Naughton 2008), can, potentially, assist them to address the causes of their offending behaviour, truly reducing the possibility of such behaviour in the future. Thus, the INUK typology of claims of innocence can really contribute to addressing the root causes of offending behaviour, as opposed to the present system which seems to be more about managing offenders who will leave prison no wiser than when they entered prison than about why they were convicted and imprisoned in the first place.

Perhaps most crucially, however, NOMS fails to fully comprehend the importance of placing innocence at the centre of penal policy, not only in the interests of the innocent victims of wrongful imprisonment, their families, and, even society as a whole (Naughton 2007b, ch. 8), but also in terms of the reality that when the innocent are wrongly convicted and imprisoned the public remains at risk from the guilty offenders who escaped justice.

This suggests that the exercise could be more about identifying prisoners maintaining innocence who are not innocent to increase compliance with the prison regime and meet performance indicators, than it is about a real concern for prisoners maintaining innocence who

may not have committed the offences for which they were convicted. But, unless and until more is done for prisoners who may be innocent, possibly with specialist investigators and a fast track to the appeal courts and/or the CCRC, the inclusion of the theoretical possibility of innocent prisoners and the giving of legal advice to prisoners who may be innocent are rather futile gestures that will not assist them in their plight, calling into question the legitimacy and, therefore, the viability of the new MISaR course before the ink on the paper is dry.

It may be concluded that the only real hope that innocent prisoners have is for the NOMS risk assessment bubble to burst from the pressures that will be brought to bear from an increasing population of ISP/lifer prisoners maintaining innocence who will not comply with an unyielding regime that is itself in denial about the reality that criminal courts can, and do, sometimes get it wrong and is averse to taking proactive steps to work with other parts of the criminal justice system to do something about it.[15]

Notes

1 Because there is no guarantee that indeterminate sentenced prisoners (ISPs) will ever be released in England and Wales if they fail to comply with the prison and parole regimes and demonstrate a satisfactory reduced risk of reoffending.
2 For details, see Innocence Network UK (INUK) (2008).
3 I am grateful to Tony MacGregor, principal officer, NOMS, for providing the information on this new training course, which is not available in the public domain, and for the spirit with which he is open to discuss its rationale.
4 The exception to this general rule being Susan May who was released on the day of her tariff despite maintaining innocence throughout her sentence and not undertaking any accredited offending behaviour programmes (OBPs). In the absence of any other examples of a lifer/ISP who maintained innocence at trial and throughout the whole of their sentence and refused to undertake any index offence-related OBPs at all, however, I tend to see the case of Susan May as the exception that proves, rather than disproves, the general rule that life sentenced prisoners maintaining innocence are generally required to comply with their sentence plans if they are to make progress through the prison system and achieve their release. For details of the case see Susan May is Innocent (2008).
5 For instance, the Criminal Cases Review Commission (CCRC), the body charged with investigating alleged miscarriages of justice and referring them back to the appeal courts if it is believed that they have a 'real possibility' of not being upheld, refers only approximately 4% of the thousand or so applications that it receives each year (see Criminal Cases Review Commission 2008b).
6 Although prison staff will receive four days of training, whilst probation staff will receive two days, the first and last days of the training for prison staff.
7 Please note that the page numbers for the section from the MISaR training course dealing with prisoners who deny guilt will not correspond with the page numbers as they are cited in the complete MISaR course. Rather, for convenience, I have simply numbered the pages as they appear in the word document sent to me by Tony MacGregor, principal officer, NOMS.
8 For information, see Criminal Cases Review Commission (CCRC) (2008a).
9 Although the inclusion of 'protesters of innocence' to describe 'deniers' is an innovation.
10 As mentioned above, the exception to this general rule being the case of Susan May.
11 I am grateful to Eamonn O'Neill, University of Strathclyde, for supplying a copy of the report.

12 See, for instance, the websites of the organisations Falsely Accused Carers and Teachers (FACT) (2008); False Allegations Support Organisation (FASO) (2008).
13 A look at the reoffending rates is instructive of the general failure of the risk assessment system (HM Prison Service 2008b).
14 Thanks to Tony MacGregor, principal officer, NOMS, for providing this estimated statistic.
15 *Acknowledgements*: Thanks to Gabe Tan and the anonymous assessors for feedback on a previous draft.

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