Miscarriages of Justice: Limits to Reparation

The harmful consequences of miscarriages of justice and the pressures on prisoners maintaining innocence to admit their guilt

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How big is the 'iceberg'? a zemiological approach to quantifying miscarriages of justice

Michael Naughton

Introduction

Previous critical researches into miscarriages of justice in England and Wales' Criminal Justice System (CJS) have not generally addressed the question of the likely scale of the miscarriage phenomenon in any systematic way. Rather, they have generally been directed towards individual *exceptional* miscarriage cases, brought about through extra-judicial procedures, that have exemplified particular 'errors' or 'fallibility' in the CJS's legislative framework. Despite this, many critical analyses of miscarriages have routinely speculated upon the possible scale of England and Wales' miscarriage phenomenon by asserting that the exceptional miscarriage being 'exposed' is the 'tip' of some much greater 'iceberg'. But, just how big the iceberg might be has hardly received any critical attention at all.

In this context, this essay draws from zemiology the holistic study of the social, psychological, physical and financial harmful consequences of social phenomena. It argues that by focussing upon exceptional cases, those cases of criminal conviction that are routinely quashed by the Court of Appeal (Criminal Division) (CACD), or more mundanely quashed by the Crown Court from the magistrates' court have received no attention at all. As a result, the likely scale of England and Wales' miscarriage phenomenon that can be inferred from the official statistics, the size of the official iceberg, has been overlooked. In consequence, an extensive range of harmful consequences that also accompany *routine* and *mundane* miscarriages have also been neglected. In conclusion, it is noted that there are a number of legitimate structural rules, procedures and practices that can cause miscarriages that might never be acknowledged in the official statistics of successful appeal against criminal conviction. When these are also considered, the true number of miscarriages of justice may be higher than portrayed in the official statistics, as may the harmful consequences.

To this end, the essay is structured into three parts. Firstly, England and Wales' appellate structure is briefly outlined. Secondly, the Lord Chancellors Department's (LCD) official statistics of successful appeals against criminal conviction are analysed and three categories of miscarriage discerned the *exceptional*, the *routine* and the *mundane*. Finally, the third part discusses the zemiological approach to social phenomenon and the significance of incorporating even the most apparently routine and mundane of quashed criminal convictions within the critical miscarriage rubric.

The appellate structure

Within England and Wales' CJS there are a number of appellate opportunities available to those who receive criminal convictions. In order of ascending judicial superiority:

- the Crown Court deals mainly with appeals by persons convicted in magistrates' courts against their conviction or sentence or both;
- the Court of Appeal (Criminal Division) (CACD) hears appeals in criminal matters from the Crown Court;
- an appeal can be made to the House of Lords where it has been certified by the CACD that a point of law of general public importance was involved in a decision;
- the Attorney General has the power to refer what are thought to be unduly lenient sentences for offences triable on indictment to the Court of Appeal;
- the Criminal Cases Review Commission (CCRC) can refer cases that have already been through the appeals system and have not succeeded for any reason back to the appropriate appeal court' (Chapman and Niven, 2000, pp. 42-43); and,
- when all domestic appellate attempts have been exhausted, criminal appeal cases can also be taken to the European Court of Human Rights at Strasbourg (see European Court of Human Rights website: http://www.echr.coe.int/).

In terms of official miscarriage statistics, the LCD collects statistics from each of these appeal courts in terms of applications for leave to appeal and their success. Taken together, these statistics would provide a picture of the scale of England and Wales' miscarriage iceberg that can be inferred from the official statistics.

Exceptional miscarriages

Although the LCD publishes official statistics of *all* the criminal convictions that are successfully quashed upon appeal in the various appeal courts, current official definitions, public perceptions and critical miscarriage discourse have been almost entirely focussed upon the cases of *Stephen Downing* (see Vasagar, 2000; Vasagar, 2000b; Vasagar and Ward, 2001); *Derek Bentley* (see Campbell, 1998; Birnberg, 1998; Oliver, 2002); *Mahmood Mattan* (see Lee, 1998; Wilson, 2001), *John Kamara* (see Quinn, 1999; Carter and Bowers, 2000; Gillan, 2001), the *M25 Three* (see Hardy, 2000; Bird, 2000; Times Law Report, 2000), the *Cardiff Three* (see Carroll, 1998; Lewis, 1999); and so on. All of these were exceptional cases of successful appeal against criminal conviction that were referred back to the CACD by the CCRC having previously failed through routine appeal procedures.

Table 1 represents the number of criminal convictions that were quashed by the CACD as a result of being referred back to the CACD by the CCRC since it started handling casework in March 1997. In the year 1998, for example, there were 7 cases that were successfully quashed in the CACD after referral by the CCRC. This compares with a total of 341,000 criminal convictions from the Crown and magistrates courts in the same year, 1998 (Home Office, 2000). Thus, depicting only the minutest of icecubes.

Table 1: Criminal Cases Review Commission: Successful quashed convictions after referral back to CACD*

Year	1997**	1998	1999	2000	2001***	Total	Average per year
Number of quashed convictions	0	7	10	10	9	36	7

Source: Criminal Cases Review Commission, 2001. * The methodology upon which this analysis is based differs from the CCRC's own analysis in that it only includes those criminal convictions that were successfully quashed after referral back to the CACD that involved no further action. That is, this analysis does not include

those 'quashed' convictions that were included by the CCRC that resulted in an altered charge or sentence. Nor does it include those 'quashed' convictions that the CACD referred for retrial. ** Figures for the year 1997 are from 31 March when the CCRC started handling casework. *** Figures for the year 2001 are up to and including to October.

This is not to suggest that the trend to focus upon exceptional cases is entirely misguided. To be sure, accompanying this trend is an important 'tradition of CJS reform' (Naughton, 2001, pp. 50-52) whereby the Government has introduced corrective legislation in an attempt to resolve the public crises of confidence that were induced by the high profile that these cases attain. For example, the Court of Appeal (Criminal Division) (CACD) has its roots in the Government's legislative response to the public pressures that were exerted by the *Beck* case, which exemplified the urgent need for a court of criminal appeal (Report of the Committee of Inquiry into the Beck Case, 1904; Pattenden, 1996); capital punishment was abolished in the Government's legislative response to the public crisis of confidence in criminal justice that was engendered by the cases of *Bentley*, *Evans-Christie* and *Ellis*, which together exemplified the question of the justness and/or appropriateness of the continuance of capital punishment (see Block & Hostettler, 1997; Christoph, 1962); the Police and Criminal Evidence Act (1984) (PACE) (see Fisher, 1977; Police and Criminal Evidence Act, 1985) which imposed guidelines on police conduct were a consequence of the pressures brought about by the *Confait Affair* which exemplified the consequences of procedural disregard (see Price & Caplan 1976; Price, 1985); and, the establishment of the Criminal Cases Review Commission (CCRC) was a direct consequence of the cases of the *Guildford Four* and the *Birmingham Six* which exemplified the need for an independent body for the investigation of suspected or alleged miscarriages once existing domestic appeal processes had been exhausted (Royal Commission on Criminal Justice, 1993).

In this context, analyses of exceptional miscarriages are important as they often exemplify problems in the CJS's legislative framework in need of corrective reform. But, they represent only a minute part of England and Wales' miscarriage phenomenon. And, they, therefore, capture only a minute part of the harmful consequences that miscarriages of justice engender.

Routine miscarriages

A major limitation of concentrating on exceptional miscarriage cases that are brought to light via the extra-judicial procedures of the CCRC, is that all manner of *routine* miscarriages have been neglected. For, in addition to the *exceptional* miscarriages there are also all those criminal convictions that are obtained in the Crown Court that are routinely successful in appeal to the CACD on a daily basis. Indeed, if 'miscarriages' are also considered to be those criminal convictions that are routinely quashed upon appeal by the CACD, then they can, perhaps, be said to be far more widespread than is commonly first thought. Table 2 shows that in the decade 1989-1999, for example, the CACD abated a yearly average of 770 criminal convictions over 8,470 in total.

Click HERE for Table 2: Court of Appeal (Criminal Division): Successful appeals against criminal conviction 1989-99 (inclusive)

Source: Lord Chancellor's Department (1999) *Judicial Statistics Annual Report* London: HMSO Cm 4786; Lord Chancellor's Department (1998) *Judicial Statistics Annual Report* London: HMSO Cm 4371.

To put this figure into context, as well as to give some indication of the split between the *routine* and *exceptional* miscarriages contained in the official miscarriage statistics, it is worth comparing the CCRC's reported case statistics in a little more detail. If the 36 cases that were successfully quashed upon being referred back to the CACD by the CCRC since 1997 are compared against all the official CACD statistics, then in the year 1997 alone, 832 appeals against criminal conviction were successful in being quashed through routine appeal procedures. But, by incorporating routine miscarriages within critical analyses, the official scale of England and Wales' miscarriage phenomenon increases from an annual average of 7 cases to an annual average of around 770 cases, and the miscarriage iceberg as it is conventionally perceived and understood is increased a hundred fold.

Mundane miscarriages

In addition to successful appeals in the CACD from the CCRC and the Crown Court, criminal convictions obtained in the magistrates' court can be appealed in the Crown Court. When the criminal convictions from the magistrates' court that are quashed upon appeal to the

Crown Court are also taken into account conceptions of England and Wales' official miscarriage phenomenon are even further extended.

For example, Table 3 shows an annual average of 3,546 quashed convictions at the Crown Court for criminal convictions that were given by the magistrates' courts between 1998-2000 (inclusive). If this average is added to the CACD annual average then an official picture of England and Wales' miscarriage phenomenon, the official miscarriage iceberg, is multiplied to an annual average of 4,316 cases.

Table 3: Crown Court: Successful appeals against criminal conviction in the magistrates' court 1998-2000 (inclusive)

Year	1998	1999	2000	Total	Average
	3,980	3,575	3,090	10,645	3,546

Source: Lord Chancellor's Department (2000) *Judicial Statistics Annual Report* London: HMSO Cm 5223; Lord Chancellor's Department (1999) *Judicial Statistics Annual Report* London: HMSO Cm 4786; Lord Chancellor's Department (1998) *Judicial Statistics Annual Report* London: HMSO Cm 4371.

Zemiology

But, are these routine and mundane successful appeals against criminal convictions really miscarriages? Or, are they, as advocates and defenders of the system contend, a manifestation of the safeguards that are contained within the CJS, functioning in the interests of the protection of the criminal suspect population (see, for example, Pattenden, 1996, pp. 57-58). Of course, in a sense the criminal convictions that are routinely quashed by the CACD and mundanely quashed by the Crown Court *are* a sign of 'the carriage of justice' and that people who are wrongly convicted in England and Wales *do* have rights of legal redress. But, safeguards are supposed to exist only for use in extreme circumstances and only then are they supposed to be used in the last resort. By concentrating the critical miscarriage agenda only upon exceptional cases, the safeguard argument is sustained. But, by widening the critical miscarriage gaze to incorporate *routine* and *mundane* miscarriages any notion of the right to appeal as a last resort appellate safeguard collapses. By so doing, safeguards can themselves be conceived as merely routine and

mundane legal procedures that do not stand up to critical scrutiny (c.f. McBarnet, 1981, pp. 11-25).

Another angle on miscarriages that comprehensively calls into question the notion of safeguards and points towards the critical necessity of including *routine* and *mundane* miscarriages within the rubric of England and Wales' miscarriage iceberg is the zemiological perspective. In essence, zemiology takes a more holistic approach to the study of the consequential harm(s) of socio-legal phenomena - social, psychological, physical and financial - that have profound impacts and effects. It is then well placed to determine whether the law is in need of review and/or re-constitution (Gordon et al, 1999; Hillyard and Tombs, 2001).

Elsewhere, these ideas have been applied and the harmful social, psychological physical and financial consequences of miscarriages of England and Wales' CJS have been briefly outlined, and the financial consequences of the likely penal costs of containing the wrongfully convicted more fully developed (Naughton, 2001, pp. 56-61). What have previously received less attention are the crucial zemiological questions of the potential scale of England and Wales' miscarriage phenomenon and the forms of harm that both accompany, and are associated with, routine and mundane successful appeals against criminal conviction. Indeed, from a zemiological perspective the distinction between exceptional, routine and/or mundane miscarriages is not so straightforward. Even the most apparently routine and mundane wrongful criminal convictions also involve an extensive range of zemiological harms, and not always to a lesser degree.

For example, in June 1998, 58 motorists won a joint action against Greater Manchester Police after being wrongly convicted of drink-driving offences. It transpired that a kit that was being used to determine blood alcohol levels contained a fault that actually introduced alcohol into the suspect's sample and gave a positive reading even if the suspect had not been drinking. The zemiological costs attached to this case were as substantial as in many exceptional cases. Some of those concerned served prison sentences, some lost their businesses, several suffered mental breakdowns, and some even tried to take their own lives (see Ford, 1998).

Conclusion

This article has noted the general generic trend of critical researches to focus upon exceptional miscarriage cases that are produced through extra-judicial procedures and the accompanying tradition of CJS reform. Without doubt, this trend and tradition are important and have been significant in effecting many progressive changes to the CJS, such as those described. However, the trend to focus on exceptional successful appeals against criminal conviction serves to reduce perceptions of the true scale of England and Wales' miscarriage phenomenon, and it diverts critical attention from the forms of harm that accompany those cases of criminal conviction that are routinely quashed by the CACD, or more mundanely quashed by the Crown Court from the magistrates' court. As a result, both the likely scale of England and Wales' miscarriage phenomenon that can be inferred from the official statistics, the size of the official iceberg, as well as an extensive range of harmful consequences that also accompany *routine* and *mundane* miscarriages have been overlooked.

It must also be acknowledged that the legislative events that brought about the establishment of the CACD, the abolition of capital punishment, the introduction of PACE (1984) and the creation of the CCRC were not about the correct legality of the challenges in the exceptional cases that preceded them. On the contrary, they were largely brought about because they were able to induce a public crisis of confidence in the CJS by demonstrating the harmful consequences to the individuals in these cases, as well as the future potential harm to other criminal suspects and convicts. This then prompted Government intervention to resolve the crisis by demonstrating, through the introduction of corrective legislation, that the potential harm to criminal suspects that might be innocent of their criminal charges and convictions had been reduced. In this context, a more thorough zemiological analysis of miscarriages, *routine* and *mundane* as well as *exceptional*, might bring about more profound and wide-ranging legislative changes to the CJS that might more appropriately address the potential causes of miscarriages and their accompanying harmful consequences. *Routine* and *mundane* miscarriage cases are of as much critical importance as *exceptional* miscarriages. Not only to the question of the likely size of England and Wales' miscarriage iceberg, but also to questions of the likely size of the accompanying zemiological icebergs of social harm, psychological harm, physical harm and financial harm. In short, if miscarriages continue to be conceived only in exceptional terms not only will they continue to only concern the tip the miscarriage iceberg, they will also only be able to

capture the tip of a range of social, psychological, physical and financial harms that miscarriages engender.

Finally, it must be noted that this essay has only considered the likely scale of England and Wales' miscarriage phenomenon in the entirely legalistic and retrospective confines of the official statistics. That is, a miscarriage has only been considered to have occurred when an appeal against criminal conviction has been successfully achieved. But there are a whole host of additional structural obstacles, barriers and disincentives that also need to be taken into critical consideration to gain a purchase on the full scale of England and Wales' miscarriage phenomenon. For example, there is the 'time loss rule'. Under this 'rule' when the criminally convicted apply for an appeal they are advised that if their appeal is ultimately unsuccessful it could result in substantial increases to their sentence. Research conducted by JUSTICE found that 'the effect is to transform a minor check on wholly groundless applications into a major barrier in some meritorious cases' (Justice, 1994, p. 7). Another example is the Criminal Procedure and Investigations Act (1996) (CPIA) which introduced a regime for advance disclosure that is at odds with the operational practices of police officers, the Crown Prosecution Service (CPS) and defence solicitors. As a consequence, 'errors', whether inadvertent or otherwise, may not be recognised and the result is a system that presents real risks of future miscarriages of England and Wales' CJS (see Taylor, 2001). There are also the potential miscarriages that result from charge, plea and sentence 'bargaining' that induce innocent people to plead guilty to criminal offences that they have not committed (see Baldwin and McConville, 1977).

In this context, the 4,316 miscarriage cases that make-up the annual average of official miscarriage statistics (the official statistics of successful appeals against criminal conviction) can themselves be conceived as just the tip of some even greater miscarriage and zemiological icebergs.

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Why the Failure of the Prison Service and the Parole Board to Acknowledge Wrongful Imprisonment is Untenable

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Abstract: This article analyses key documents that were produced in collaboration between the Prison Service and the Prison Reform Trust. It identifies an organisational inability on the part of the Prison Service and the Parole Board to acknowledge that the courts can return incorrect verdicts and that wrongful imprisonment can, and does occur. It argues that this renders the ways in which the Prison Service and the Parole Board deal with life prisoners who maintain that they are innocent of the crimes for which they were convicted untenable. To demonstrate this, the article distinguishes two broad categories of wrongful imprisonment. It concludes that those charged with a duty of care for, and the possible release of, those given custodial sentences by the courts must, therefore, be prepared to 'think the unthinkable' and make adequate provision for the innocent victims of wrongful imprisonment that are sure to come their way.

Two key sources of information given to life prisoners about the structure of their sentences and the procedures through which they might possibly achieve release from prison are the Prisoners Information Booklets *Life Sentenced Prisoners 'Lifers'* (Prison Reform Trust and HM Prison Service 1998) (to be referred to as *Lifers* in subsequent references in this article) and *Parole Information Booklet* (Prison Reform Trust and HM Prison Service 2002). 'Possible release' because there is no certainty that a life prisoner will be released if they do not satisfy the release procedures (Prison Reform Trust and HM Prison Service 1998, p.2). The format of the booklets is a deliberate 'user-friendly' attempt to inform prisoners through a 'frequently asked questions and answers' guide written from a prisoners' 'voice' that is answered from the institutional 'voice' of the Prison Service and Parole Board.

'Lifers'

Perhaps, the two most important questions and answers contained in *Lifers* to this discussion are as follows. Firstly, the prisoner asks:

> What do I have to do to prepare for release? (Prison Reform Trust and HM Prison Service 1998, p.8)

The answer from the Prison Service seems fairly straightforward and to give eminently practical advice about how to progress through the prison system:

> The first thing to do to prepare for your release is to work on any areas of concern which contributed to the offence or offences which you were convicted of (known as the 'index offence'). Prison staff will expect you to work with them to see what these areas are when they are preparing your life sentence plan. This may involve you taking part in offending behaviour programmes such as the Sex Offender Programme, or you may have to have drug or alcohol counselling. Working on the areas of concern should help to reduce the risk you present to the public. This is the most important factor taken into account when considering whether you are safe to be released or moved to an open prison. The way you behave in prison plays an important part in decisions about your progress. You need to try to show that you are likely to be able to steer clear of trouble on the outside. (Prison Reform Trust and HM Prison Service 1998, p.8)

It is at once apparent, however, that the answer from the Prison Service does not allow for the possibility that some life prisoners might be innocent of the crimes for which they were convicted. On the contrary, it assumes a particular *kind* of person as constituting the typical life prisoner. Such people are likely to need counselling for either sex offending, alcohol or drug problems; they need to be cured of these problems before they can be released from prison in order to protect the public; and, they need to be able to demonstrate the ability to stay out of trouble.

Perhaps, even more significantly, the prisoner then explicitly asks:

> What if I say I am innocent? (Prison Reform Trust and HM Prison Service 1998, p.9)

The answer from the Prison Service is unequivocal:

> Prison staff must accept the verdict of the court, even if you say that you did not commit the offence for which you are in prison. They need to be sure that areas of concern and offending behaviour are identified and that you work on them. Whether or not you are eventually released will depend on an assessment of the risk you might be in the future, rather than whether or not you have accepted the court's verdict. (Prison Reform Trust and HM Prison Service 1998, p.9)

There is a curious contradiction about this answer. By including the question in a frequently asked questions booklet that advises lifers about the terms and conditions of their sentences and release plans, the Prison Service is implicitly signalling that a significant number of life prisoners would be likely to ask such a question. The answer, however, betrays the organisational inability of the Prison Service to even consider that some life prisoners may be innocent. Instead, they completely side-step the question and merely reaffirm the Prison Service's official position – it does not matter what life prisoners may say, or whether or not they accept the verdict of the court, they are regarded as guilty of the offences for which they were convicted.

It is within this context that the recommendations of the Parole Board about whether or not life prisoners should be released need to be considered. On this matter, *Lifers* describes the organisational remit and

purpose of the Parole Board. It outlines the differential procedures for the different types of 'lifer'. It spells out the time between reviews and the time taken by the Parole Board in reaching its decisions. But, most significantly, it emphasises the importance of the role of prison staff in preparing the dossiers that are considered by the Parole Board when making their decisions (Prison Reform Trust and HM Prison Service 1998, pp.12–15). This serves to undermine the official organisational independence of the Parole Board in terms of its formal relations with the Home Secretary and the Prison Service. Informally, there is little doubt that the parole process is entirely dependent upon the forms of discourse that are constructed by prison staff about whether or not all prisoners, including lifers, should progress through the stages of their sentences in their recommendations.

Parole Information Booklet

The extent to which the Parole Board embodies the policy of the Prison Service is confirmed in the following question and answer exchange from the *Parole Information Booklet*. First the prisoner maintaining innocence enquires:

> What happens if I maintain my innocence? Can I still get parole?' (Prison Reform Trust and HM Prison Service 2002, p.8)

The answer from the Parole Board corresponds almost exactly with the Prison Service's policy:

> You do not have to admit your guilt prior to making an application for parole, nor is denial of guilt an automatic bar to release on parole licence. It is not the role of the Parole Board to decide on issues of guilt or innocence, and your case will be considered on the basis that you were rightly convicted. The Board will consider the likelihood of you reoffending by taking into account the nature of your offence, any previous convictions, your attitude and response to prison, reports from the prison and probation service and your own representations. (Prison Reform Trust and HM Prison Service 2002, p.8)

This emphasises the problem that is commonly referred to as the 'parole deal', which is very much akin to a 'plea bargain' for it attempts to make innocent prisoners acknowledge guilt for crimes that they did not, in fact, commit. For Peter Hill (2001), significantly, both offer the same essential 'deal' in an attempt to obtain judicial finality in cases: 'We say you are guilty. Admit it and you get something in return'. The rationale behind the parole deal is connected to a range of 'cognitive skills', 'thinking skills', 'reasoning and rehabilitation' and various other 'offending behaviour' programmes and courses that have come to dominate regimes within prisons in England and Wales over the last decade. These courses are almost universally based on the work of psychologists in the correctional service of Canada and work from the premise that as offenders 'think' differently to law-abiding citizens, once their 'cognitive distortions' are corrected then they can be released with a reduced risk of reoffending (Wilson 2001). The effect is that whilst the Prison Service officially acknowledges that it is unlawful to refuse

to recommend release solely on the ground that a prisoner continues to deny guilt, it tends to work under the simultaneous assumption that denial of offending is a good indicator of a prisoner's continuing risk.

In a similar vein, David Wilson (2001), conceptualised the situation as one which political philosophers would describe as a *throffer* – the combination of an offer or promise of a reward if a course of action is pursued, with a threat or penalty if this course of action is refused. This plays out with the prisoner being offered an enormous range of incentives including more out-of-cell time, more visits and a speedy progress through the system, to follow the course of action desired by the prison regime – to go on an offending behaviour course to ensure that the prison's performance target is met. This is made to appear as an entirely rational and subjective choice, especially as it will be the basis for ensuring early release through parole. At the same time, if the prisoner does not go on a course and accept guilt for criminal offences that they did not commit, the threat of continued imprisonment remains, as the prisoner will be deemed too much of a 'risk' for release at all (Berlins 2002; Hill 2002a, 2002b; Woffinden 2000, 2001). An often cited example is the case of *Stephen Downing* whose conviction was quashed in January 2002 after he had spent 27 years of incarceration for an offence for which he might normally have served twelve years had he not been classified 'IDOM' – in denial of murder (see Editorial 2002). To emphasise the problem of the parole deal, it was reported when Stephen Downing's conviction was quashed by the Court of Appeal (Criminal Division) (CACD) that: 'All the prison officers knew Stephen was innocent. They were begging him to say he had done it [murdered Wendy Sewell] so they could release him' (Hill 2002c).

The Parole Board's Reply

In response to the publicity of Stephen Downing's successful appeal and the public's concern with the parole deal, the Parole Board (2004) responded that:

> There was a considerable misunderstanding about the position of those maintaining innocence in prison and how this affects their eligibility for parole.

In fact, they argued:

> A myth has grown up that unless a prisoner admits and expresses remorse for the crime that they have been sentenced for, they will not get parole. This is not true.

In support of their argument, the Parole Board lists five points that they say disprove the existence of the parole deal. Despite this, this section considers each of the Parole Board's points in turn and shows that they do not disprove the parole deal, they actually prove that prisoners who maintain their innocence are less likely to be recommended for parole. Moreover, it appears that life prisoners who maintain their innocence who refuse to go on offending behaviour programmes, on the grounds that they have no offending behaviour to confront, may be deemed too much of a risk to ever be recommended for release.

First, the Parole Board (2004) acknowledges that it would be unlawful to refuse parole solely on the grounds of denial of guilt or not being able to take part in offending behaviour programmes which focus on the crime committed. In the same breath, (same paragraph) however, they state that despite this:

> The Board is bound to 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.

This entirely undermines any notion that the Parole Board takes seriously the existence of innocent prisoners. It gives hope to prisoners maintaining innocence that they have an equal chance in law of achieving freedom with prisoners who were guilty of the offences for which they were convicted. It, then, demolishes that hope by insisting that they must take account not only of the offence for which they were wrongly convicted, but also their behaviour during their sentence.

Second, the Parole Board (2004) argues that:

> It is important to understand that the Board is not entitled to 'go behind' the conviction and 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.

I do not know of anyone who expects the Parole Board to overrule the decisions of the courts; that would be a truly bizarre situation. But, the way in which they hide behind their organisational remit and refuse to acknowledge the reality of innocent prisoners cannot be justified. As I will show in more detail below, the courts are not infallible. Wrongful imprisonment can, and does, occur, not only for crimes that innocent men and women did not, in fact, commit, but, also, for crimes that did not, even, occur. This fact has been proven in dozens of high-profile cases that have been overturned in the Court of Appeal.

Third, the Parole Board (2004) reports that:

> The figures for 2003 show that in 24% of cases where prisoners maintained their innocence, parole was granted. This compares with 51% of all applications granted. This shows, according to the Parole Board, that the belief that 'if you don't admit the crime, you don't get parole' is patently untrue.

The statistics presented do, indeed, show that *some* innocent prisoners achieve a parole licence. At the same time, however, they actually emphasise that prisoners who maintain their innocence are less likely to achieve parole against prisoners who are guilty or acknowledge their guilt on pragmatic grounds in the hope of achieving release. They have half as much chance. This does not dispel the 'parole deal' it proves it!

Moreover, the figures just cited by the Parole Board do not only relate to life prisoners, they, also, include all 'long-term prisoners' who receive a custodial sentence in excess of four years (Prison Reform Trust and HM Prison Service 2002, p.1). As such, they can very much be conceived as a 'red herring' to the charge of the parole deal, as there is no way of knowing

how many of the 24% were life prisoners who maintained their innocence and did not go on offending behaviour courses and, yet, were still recommended for release.

Fourth, the Parole Board (2004) employs a particularly perverse logic. They say that their:

> Core task of assessing the risk of future harm to the public is often made more difficult when dealing with those who deny guilt. This is because there may simply be less information to go on, particularly where the prisoner has not been able to undertake any relevant offending behaviour work. Detailed reports of a wide range of offending behaviour programmes are a key source of information for Board members in working out how a prisoner operates and copes with life and therefore what the risk to the public of a future offence might be.

This shifts the focus of why prisoners who maintain their innocence are less likely to be recommended for parole to the victims of wrongful imprisonment themselves. It blames them for *their* own failure to comply with the needs of the Board and undertake relevant offending behaviour courses and provide the detailed information to assist Board members in their deliberations. This brings the parole deal into clear view and puts life prisoners who maintain their innocence in an impossible catch-22 position. The only realistic way of achieving release is to acknowledge that they are guilty of the criminal offences for which they were wrongly convicted, murder, rape or sex abuse, and work with prison staff on that aspect of their behaviour, even if they have never behaved in such a way.

Finally, the Parole Board relies on further statistical evidence in the form of a breakdown of 50 release cases recommended by the Board. 'The fifty were all serving mandatory life sentences for murder. Of these, nine had maintained their innocence in whole or in part throughout their sentence' (Parole Board 2004).

Again, this reference to statistics only serves to further strengthen the concern that prisoners who maintain their innocence are at a disadvantage in terms of Parole Board decisions. This is because the survey cited decreases the statistical average from 24% of successful applicants to the Parole Board in 2003 who maintained their innocence to a maximum of 18% of the mandatory life prisoners surveyed. This figure is decreased still further when it is taken into account that an unknown of the 18% referred to did not maintain their innocence for the whole of their sentences, but only part of it. This leaves us none the wiser and raises the crucial question: How many of the nine mandatory lifers who the Parole Board recommended should be released *did* maintain their innocence for the whole of their sentences and did not attend offending behaviour programmes?

As a final insight into the mind-set of the Parole Board, it is interesting to note that the 'majority' of the mandatory lifers who were recommended for parole, whether or not they maintained their innocence, *had* 'also undertaken a variety of offending behaviour work such as anger management, assertiveness, thinking skills, all of which helped the Board' (Parole Board 2004).