

2014

# Under Pressure: The Hazards of Maintaining Innocence after Conviction

Daniel S. Medwed

*Northeastern University*, [d.medwed@neu.edu](mailto:d.medwed@neu.edu)

Follow this and additional works at: [http://lsr.nellco.org/nusl\\_faculty](http://lsr.nellco.org/nusl_faculty)



Part of the [Law Commons](#)

---

## Recommended Citation

Medwed, Daniel S., "Under Pressure: The Hazards of Maintaining Innocence after Conviction" (2014). *School of Law Faculty Publications*. Paper 46.

[http://lsr.nellco.org/nusl\\_faculty/46](http://lsr.nellco.org/nusl_faculty/46)

This Book Chapter is brought to you for free and open access by the Northeastern University School of Law at NELCO Legal Scholarship Repository. It has been accepted for inclusion in School of Law Faculty Publications by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact [tracy.thompson@nellco.org](mailto:tracy.thompson@nellco.org).

NORTHEASTERN UNIVERSITY  
SCHOOL OF LAW

*NORTHEASTERN PUBLIC LAW AND THEORY FACULTY RESEARCH  
PAPERS SERIES NO. 199-2014*

**UNDER PRESSURE: THE HAZARDS OF  
MAINTAINING INNOCENCE AFTER  
CONVICTION**

*Chapter in Ros Burnett, ed., Vilified: Wrongful Allegations of Sexual and Child Abuse, Oxford University Press, forthcoming*

Daniel S. Medwed  
*Northeastern University – School of Law*

*Under Pressure: The Hazards of Maintaining Innocence after Conviction*

Daniel S. Medwed<sup>1</sup>

**Introduction**

Innocent people convicted of child abuse or sexual offenses face a classic “Catch-22” situation that has ramifications on their prospects for parole and for exoneration in court. If prisoners continue to maintain their innocence while imprisoned, then corrections officials may interpret this behaviour as demonstrating a key trait of sex offenders—“denial”—and make them ineligible for treatment programs that are a prerequisite for parole in many jurisdictions. Even if they are technically eligible to apply for parole, inmates who claim innocence before parole boards harm their chances for release based on the belief that those unable to admit guilt are likely to re-offend; they are perceived as lacking in remorse and failing to address their offending behaviour (Medwed, Daniel S., 2008, “The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings,” *Iowa Law Review*, Vol. 93, p. 491 [hereinafter Medwed, “Innocent Prisoner’s Dilemma”]). Prisoners who pursue their innocence through post-conviction litigation also face an uphill climb. This is attributable in part to cognitive biases that affect how prosecutors treat innocence claims in the aftermath of conviction and all too often lead them to discount their potential legitimacy (Medwed, Daniel S., 2012, “Prosecution Complex: America’s Race to Convict and Its Impact on the Innocent,” New York University Press, pp. 123-132 [hereinafter Medwed, “Prosecution Complex”]). Considering the hazards that inmates encounter in maintaining their innocence in parole and post-conviction litigation settings, there is reason to think that many of them are not in denial, but rather the victims of profound miscarriages of justice. This Chapter will explore this conundrum in these two settings before concluding with some thoughts on reform.

**Parole Release Decision-Making and the Innocent Prisoner’s Dilemma**

As a threshold matter, prisoners convicted of sex offenses often must participate in “Sex Offender Treatment Programs” in order even to be eligible for release on parole. A fundamental

---

<sup>1</sup> Professor of Law, Northeastern University School of Law, Boston, Massachusetts, U.S.A.

requirement of such programs is that inmates must accept responsibility for their behaviour by “admitting guilt.” American courts have upheld this practice, finding that it neither inherently coerces prisoners nor violates their constitutional rights (Brar, Leah G. et al., “Mandatory Admission of Guilt in Sex Offender Programs,” September 2012, *Journal of the American Academy of Psychiatry and the Law*, Vol. 40:3, pp. 433-435; *Newman v. Beard*, U.S. Court of Appeals for the Third Circuit, 2010, *Federal Reporter 3<sup>rd</sup>*, Vol. 617, pp. 775). This naturally poses an obstacle for innocent people convicted of sex crimes.

For example, in the “San Antonio Four” case from Texas, a group of women were accused of sexually assaulting two girls in their care and steadfastly refused to accept plea deals before trial that would have spared them incarceration. Convicted of aggravated sexual assault of a child, the four received stiff sentences: fifteen-year prison terms for three of them, and thirty-seven and a half for the purported ringleader. The case against them rested on the inconsistent testimony of the two girls and the faulty expert opinion statements of a doctor. The case crumbled years later, in 2013, after a court acknowledged the glaring errors in the expert’s testimony. A sad footnote to this saga is that only one of them had been paroled prior to these events; the remaining three had bypassed the chance for release by refusing to participate in a Sex Offender Treatment Program. As of 2014, all four are free, awaiting an opportunity to formally prove their innocence (Chammah, Maurice, “The Mystery of the San Antonio Four,” *Texas Observer*, Jan. 7, 2014; Rodriguez McRobbie, Linda, “How Junk Science and Anti-Lesbian Prejudice Got Four Women Sent to Prison for More Than a Decade,” *Slate*, Dec. 4, 2013).

In situations where innocent prisoners convicted of sex crimes are permitted to seek parole, they still must tread carefully in light of the premium that parole boards place on admissions of guilt. Parole boards consider a wide range of variables in their release decisions (Cromwell, Jr., Paul F. et al., 2d ed. 1985, “Probation and Parole in the Criminal Justice System,” p. 199 [hereinafter Cromwell, “Probation and Parole”]; Palacios, Victoria J., 1994, “Go and Sin No More: Rationality and Parole Release Decisions by Parole Boards,” *South Carolina Law Review*, Vol. 45, pp. 567, 579). Among those variables, “evidence of rehabilitation”—as perceived by parole commissioners during the live hearing part of the release process—has historically played an instrumental role in the release decision (Medwed, “Innocent Prisoner’s Dilemma,” p. 512). Most notably, the parole hearing provides an opportunity for a face-to-face

meeting between the prisoner and parole officials, allowing the latter “to search for such intuitive signs of rehabilitation as repentance, willingness to accept responsibility, and self-understanding” (Cromwell, “Probation and Parole,” p. 200). Purely from a risk management perspective, parole boards value an admission of guilt as reassurance that the inmate is aware of his past indiscretions and perhaps unlikely to reoffend.

This search for signs of rehabilitation has links to (1) modern psychology and (2) Judeo-Christian theology. In the eyes of many psychologists, a “sick” prisoner can only be “cured” if he accepts and openly acknowledges his involvement in criminal activity. And a person can only do this, or so many think, if he is not “in denial”—a concept that relates to Sigmund Freud’s groundbreaking psychological research in the area of disavowal and repression. The psychological discourse about denial emphasizes that a person can only experience a positive mental and spiritual transformation after coming to terms with past misdeeds (Medwed, “Innocent Prisoner’s Dilemma, pp. 533-534). Similarly, Judeo-Christian theology treats the admission of sinful conduct and apology for such conduct as integral in atoning for sins. Under ancient Jewish law, rehabilitation and atonement were the pillars of punishment theory. The parole process’s dependence on remorse and responsibility also mirrors the Christian Sacrament of Penance: “contrition, confession, the act of penance, and absolution” (Celichowski, John, 2001, “Bringing Penance Back to the Penitentiary: Using the Sacrament of Reconciliation as a Model for Restoring Rehabilitation as a Priority in the Criminal Justice System,” *Catholic Lawyer*, pp. 239, 249; Cohen, Jonathan R., 2005, “The Culture of Legal Denial,” *Nebraska Law Review*, Vol. 84, pp. 247; Medwed, “Innocent Prisoner’s Dilemma,” pp. 532-533).

Perhaps it is no surprise that parole boards, influenced by the rehabilitative origins of parole along with prevailing psychological beliefs and theological traditions, want to hear inmates admit guilt. That is, to gain release from the *penitent-iary* inmates must essentially display evidence of their repentance (Schimmel, Solomon, 2002, “Wounds Not Healed by Time: The Power of Repentance and Forgiveness,” Oxford University Press, p. 182). Quantitative and qualitative data confirm (1) that parole boards attach tremendous importance to inmate statements that take responsibility for the crime underlying their conviction and (2) that the refusal to admit guilt diminishes the likelihood of parole (Medwed, “Innocent Prisoner’s Dilemma,” pp. 514-515). Specifically, statistics from the United Kingdom in one year studied, 2003, indicated that 51% of parole applications were granted overall, but that only 24% of

applicants who maintained their innocence received parole (Naughton, Michael, “Why the Failure of the Prison Service and the Parole Board to Acknowledge Wrongful Imprisonment is Untenable,” *Howard Journal of Criminal Justice*, pp. 1, 2).

The true value of acceptance of responsibility in measuring an inmate’s worthiness for release may be minimal, especially in the case of those whose denial is related to innocence. A 2002 study of 144 inmates convicted of sex offenses in England revealed that, while offenders perceived to be “in denial” by the parole board (about one-third of the sample) were much more likely to be rated “high risk” than those who accepted responsibility, only one “high-risk denier” was subsequently reconvicted of a sex crime, as compared with seventeen of the ninety-seven “non-deniers” (Hood, Roger et al., 2002, “Sex Offenders Emerging from Long-Term Imprisonment: A Study of Their Long-Term Reconviction Rates and of Parole Board Members’ Judgments of Their Risk,” *British Journal of Criminology*, Vol. 42, pp. 371, 387 n. 5; Shute, Stephen, “Does Parole Work? The Empirical Evidence from England and Wales,” *Ohio State Journal of Criminal Law*, Vol. 2, pp. 315, 324). How many of those “high-risk” deniers were actually innocent?

To be clear, some convicted sex offenders who claim innocence at parole hearings almost certainly are in denial, sometimes in the face of irrefutable evidence of guilt. Social scientists have observed that people typically make choices that maximize their “positive self-image.” Individuals are often reluctant to acquire or divulge information that counters the affirmative view they hold of themselves. As a consequence, guilty prisoners may be hesitant to admit guilt for fear of damaging their vision of themselves as “good.” Inmates may also have practical reasons for refusing to acknowledge guilt, for instance, sex offenders who worry that admitting culpability could imperil them within the prison (Medwed, “Innocent Prisoner’s Dilemma,” p. 539; Sigler, Mary, 2006, “Just Deserts, Prison Rape, and the Pleasing Fiction of Guideline Sentencing,” *Arizona State Law Journal*, Vol. 38, pp. 561, 567).

But it is dangerous to underestimate the strong possibility that assertions of innocence at parole hearings reflect the truth. Even more dangerous is the chance that an innocent prisoner’s resolve may flag over the years—that the desperation to improve the chances for earlier release may eventually prove hard to resist. Consider the internal dialogue that an innocent prisoner must experience before facing the parole board. Should he continue to maintain innocence and hinder his parole prospects? Should he falsely accept responsibility to boost his odds for release?

Even if the admission of guilt prompts the parole board to release him, the confession now belongs in the inmate's parole file, which may be accessible to police and prosecutors. If the defendant were to pursue his innocence claim through post-conviction litigation, prosecutors may rely on the inculpatory statement in devising their response. And what about the inmate who vacillates, claiming innocence in one appearance before the board and guilt in another? Or who admits to a lesser crime (say, indecency) but protests the greater offense (rape)? Such is the "Innocent Prisoner's Dilemma" when encountering the parole board (Medwed, "Innocent Prisoner's Dilemma," pp. 539-541).

### **Litigating Post-Conviction Innocence Claims**

The parole process is not the only mechanism through which an innocent prisoner may seek her freedom. The court systems in Great Britain and the United States provide an array of post-conviction options for proving innocence. These options, though, are littered with procedural, substantive and strategic barriers.

Newspaper headlines notwithstanding, most criminal cases lack biological evidence suitable for DNA testing. This large category of "non-DNA" cases includes many cases involving child or intimate partner abuse where there were delays in reporting the allegations to law enforcement and, accordingly, no opportunity to retrieve potentially incriminating biological evidence. In such cases, as in the San Antonio Four saga, it is usually the purported victim's statements coupled perhaps with some expert opinion testimony about physical and/or psychological trauma that comprise the evidence against the accused. Most prisoners therefore must resort to subjective, non-DNA evidence to prove their innocence. That evidence often consists of statements by new witnesses, the discovery of information that casts doubt on the honesty of key prosecution witnesses, or recantations by trial participants. Finding this evidence is challenging; persuading courts to take it seriously is just as burdensome (Medwed, "Prosecution Complex," pp. 125-126).

After the conviction of a defendant, it becomes increasingly difficult to prompt courts to explore the accuracy of that outcome. In the United States, defendants may file a motion for a new trial in the aftermath of a conviction. Although these motions typically allow for the presentation of new evidence, they have strict time restrictions. Chances are remote that a

defendant can assemble enough newly discovered evidence to prove his innocence before the time runs out on a new trial motion. Defendants also invariably challenge their conviction in a procedure called the “direct appeal,” but the issues that courts review at this stage are relatively narrow. For the most part, appellate courts only consider issues and evidence previously presented to the trial judge, not anything new, during the direct appeal (Medwed, “Prosecution Complex,” pp. 125-126). The appellate procedure in Great Britain, while quite different, contains its own roadblocks.<sup>2</sup>

Limitations on direct appeals and new trial motions put many defendants at the mercy of a jurisdiction’s post-conviction procedures, such as writs of habeas corpus or error coram nobis, or their statutory analogues. These are not direct attacks on the judgment but rather indirect or “collateral” challenges where petitioners may introduce evidence never heard before. Even though every jurisdiction in the United States permits the presentation of newly discovered evidence through some sort of collateral procedure, legislators and judges are notoriously skeptical of these claims. The post-conviction process reflects this skepticism through rigid statutes of limitations, onerous burdens of proof for defendants, and deferential standards of review for judicial decisions denying petitions (Medwed, “Prosecution Complex,” p. 125).

It may be particularly hard to prove innocence based on recantation evidence where the primary accuser has repudiated his trial testimony and now asserts that the defendant did not commit the underlying offense (Medwed, Daniel S., 2005, “Up the River without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts,” *Arizona Law Review*, Vol. 47, p. 655, 658 n. 13). Many innocence claims in sex abuse cases depend on this form of evidence, but courts tend to be hostile toward it—and understandably so. If the witness swore under oath that the defendant perpetrated the crime, how can we believe the witness now when he “swears” that the former testimony was untrue? As the Mississippi Supreme Court once proclaimed, “[n]o form of proof is so unreliable as recanting testimony” (*Yarborough v. State*, 1987, Mississippi Supreme Court, *Southern Reporter* 2<sup>nd</sup>, Vol. 514, pp. 1215, 1220).

---

<sup>2</sup> In Great Britain, there is no direct appeal as of right. Instead, the intermediate appellate court, the court of appeal, has the power to grant permission to appeal. The standard for reversal on appeal is that the court must find the conviction “unsafe.” If the court of appeal agrees to hear a case, then defendants may present new evidence in the interest of justice, but the court is notoriously wary of entertaining this evidence (Griffin, Lissa, 2001, “The Correction of Wrongful Convictions: A Comparative Perspective,” *American University International Law Review*, Vol. 16, pp. 1241, 1267-1270).

It should go without saying that occasionally recantation evidence is meritorious. Take the case of Brian Banks, a prominent California high school athlete who was accused of raping an acquaintance on campus. Facing a sentence of 41 years to life imprisonment, Banks pled guilty in 2002. Moreover, the accuser sued the school district and ultimately procured a \$1.5 million settlement. Years later, while Banks was on parole as a registered sex offender, his accuser contacted him via Facebook, met with him, and admitted that she had fabricated her account. With this admission caught on tape, Banks’s legal team sought his exoneration in court. The judge who had presided over the original plea overturned the conviction in 2012 (“Blindsided: The Exoneration of Brian Banks,” 60 Minutes Television Program, March 24, 2013, available at <http://www.cbsnews.com/news/blindsided-the-exoneration-of-brian-banks/>; Hiserman, Mike, “Rape Conviction of Brian Banks is Overturned,” Los Angeles Times, May 24, 2012).

Given judicial aversion to recantation evidence in general and the procedural obstacles embedded in the post-conviction process, a key factor in a defendant’s ability to make any progress with a post-conviction innocence claim often lies in the prosecution’s reaction. Prosecutorial resistance can stop a case in its tracks or at least make the process much more arduous for the defendant. To be fair, many prosecutors react admirably to innocence claims. Some even take proactive measures to correct wrongful convictions. But prosecutors do not always exhibit an open mind in the post-conviction arena when faced with evidence of innocence; on the contrary, many prosecutors fight these claims with vigor. One common situation is where prosecutors, confronted with a potential wrongful conviction, hatch revised theories of the case that bear little resemblance to the stance at trial to support the continued incarceration of a defendant (Medwed, “Prosecution Complex,” p. 125).

Why do some prosecutors respond this way? Numerous explanations come to mind, among them, resource constraints, belief in the finality of verdicts, the absence of firm ethical rules, and political considerations. Let’s now turn to the most significant and mysterious source of prosecutorial opposition: cognitive bias (Medwed, “Prosecution Complex,” p. 127-129).

The scholarship on cognitive bias offers many findings that apply to the conduct of post-conviction prosecutors. The “confirmation bias” refers to the propensity of people to value information that reinforces, rather than rejects, their initial hypotheses. This bias flourishes in the post-conviction context. The factfinder, usually a jury, has validated the prosecutor’s theory of

the case through a guilty verdict. That theory is further validated when a court affirms the conviction on direct appeal. At this point an offshoot of the confirmation bias (known as the status quo bias) surfaces. Once external actors have corroborated a decision, it requires extensive contrary data to push the stakeholders in that decision (including prosecutors) away from that point of reference. As information emerges, these stakeholders may process it selectively by overvaluing data in favor of the status quo and discounting findings that defy it. In other words, the presumption of guilt grows “stickier” for prosecutors after conviction (Medwed, “Prosecution Complex,” p. 127).

The status quo bias affects many prosecutors who handle post-conviction innocence claims. Where post-conviction petitions are distributed to the *same* prosecutor who tried the case, the impact of the status quo bias is pronounced. Humans are particularly reluctant to second-guess their own choices. The status quo bias lingers even when innocence claims are allocated to prosecutors with no explicit link to the original trial. Studies indicate that people within an organization may respect the decisions of their peers because of the power of “conformity effects,” a wish to act in line with a colleague. The pressure to conform can spur post-conviction litigators to defer to their predecessors or look at the new evidence with a dubious eye (Medwed, “Prosecution Complex,” pp. 127-128).

One’s aversion to cognitive dissonance—the disturbing realization that one’s actions do not reflect one’s self-image—also comes into play. Convicting an innocent person undermines an ethical prosecutor’s belief that charges should only be made against the guilty and that his office would not do otherwise. To avoid cognitive dissonance, prosecutors may latch onto the original theory of guilt as a way to reconcile their beliefs with their actions. This partially explains why prosecutors can seem indifferent to wrongful convictions; they just cannot confront the possibility that they or their office helped in generating one. The cognitive burden is too heavy to bear (Medwed, “Prosecution Complex,” p. 128).

### **On the Horns of the Innocent Prisoner's Dilemma: An Example**

The following case exemplifies the hazards for defendants claiming innocence during the parole and post-conviction processes:

Bruce Dallas Goodman was convicted in Utah for the rape and murder of a young woman with whom he had been romantically involved. The crime occurred in a rural part of the state near a highway exit. The only physical evidence that could identify the perpetrator was a cigarette butt located nearby that was later found to have been smoked by a type “A” secretor. It also appears as though she had engaged in sex with a type “A” secretor. A type “A” secretor is someone with type “A” blood who secretes “A” antigens into body fluids; testimony at Goodman’s trial suggested that thirty-two percent of the population falls into this category. At the time, more accurate methods of testing biological evidence, such as DNA testing, were in their infancy (Medwed, “Innocent Prisoner’s Dilemma,” p. 523).

The other evidence against Goodman, like the blood evidence, was largely circumstantial. He was last observed with the victim miles away from the crime scene and roughly five hours before the discovery of Williams’s body. On direct appeal, the Utah Supreme Court conceded that “[w]ithout question this was a close case” but affirmed Goodman’s conviction. Justice Stewart’s dissent proclaimed that “[t]he evidence in this case falls far short of proving that the defendant committed the crime charged” (Medwed, “Innocent Prisoner’s Dilemma, p. 524; *State v. Goodman*, 1988, Utah Supreme Court, Pacific Reporter 2<sup>nd</sup>, Vol. 763, pp. 786, 788-790).

Goodman had always claimed innocence and continued to do so after his conviction and loss on appeal. Yet, in 2000, Goodman “admitted” his culpability at a hearing before the Utah Board of Pardons and Parole in the hope of gaining favor. His comments failed to have the desired effect—the Board denied him parole (Medwed, “Innocent Prisoner’s Dilemma,” pp. 524-525).

Goodman’s wish for freedom came to pass four years later through the work of the Rocky Mountain Innocence Center (“RMIC”), a Salt Lake City group that investigates and litigates post-conviction claims of innocence. RMIC sought to subject the biological evidence from the Williams murder to DNA testing. After RMIC obtained the evidence and sent it for testing, the results proved that none of the material belonged to Goodman. Rather, the DNA evidence proved that *two other* people had left these samples (Medwed, “Innocent Prisoner’s Dilemma,” p. 525).

RMIC then analyzed how to present this new discovery in court. One option involved filing a motion under Utah’s post-conviction DNA statute. Under that remedy, a judge may dismiss the charges “with prejudice” if the defendant proves actual innocence and prosecutors

would be barred from retrying him. RMIC alternatively considered the state habeas corpus remedy, which allows courts to overturn convictions when presented with newly discovered evidence that undermines confidence in the verdict, but permits a retrial. I had recently joined RMIC's Board of Directors and engaged in the discussions. We decided to contact the prosecutors and gauge their feelings (Medwed, "Innocent Prisoner's Dilemma," pp. 525-526).

The prosecution's stance all along had been that Goodman had killed Williams by himself, and the DNA findings destroyed that theory of the case. Even so, prosecutors involved with the litigation did not conclude that Goodman was innocent. A new prosecution theory evolved to justify the conviction: that Goodman was one of several perpetrators who took part in the Williams murder and that the absence of his biological evidence from the crime scene did not prove his innocence. This theory emerged despite the lack of evidence that Goodman had acted in concert with others, let alone that he was even present at the crime scene. (Medwed, "Innocent Prisoner's Dilemma," p. 524, 526).

In their conversations with us, the prosecutors cited Goodman's admission of guilt at his parole hearing as one reason for their reluctance to deem him innocent. We explained the pressures that prisoners face in applying for release, particularly when they know proclamations of innocence damage their parole outlook. But the prosecution would not stray from its belief that Goodman was entangled in the crime and indicated it would oppose a filing under the DNA statute. So we compromised. The prosecutors stipulated to vacate the conviction under the habeas corpus procedure and not pursue a retrial (Medwed, "Innocent Prisoner's Dilemma," pp. 527-528).

Goodman was released in 2004, but not formally exonerated: a casualty I ascribe to the one-two punch of a flawed parole process and prosecutorial intransigence to post-conviction innocence claims. Without the imprimatur of a court-ordered exoneration, the consequences of Goodman's wrongful murder conviction will dog him, presenting barriers in his search for state compensation or any form of employment. And the Goodman story is, in many respects, a happy one; he was released. What about the scores of innocent prisoners convicted of sexual abuse whose cases lack DNA evidence—and whose plaintive cries of innocence fall on the deaf ears of parole officials and prosecutors?

### **Thoughts on Possible Reforms**

Having outlined the hazards that convicted sex offenders may face in claiming innocence during the parole and post-conviction processes, I will now use my remaining pages to ponder some potential remedies designed to make it easier for the truly innocent to obtain freedom.

### *Parole*

Presupposing that the current norm in which prisoners are penalized for claiming innocence at parole hearings rests on a flimsy policy and ethical foundation, the question is what can be done to ameliorate this flaw? As an initial point, parole boards could be educated about the Innocent Prisoner’s Dilemma and exhorted to discount the overarching importance of inmate statements regarding guilt or innocence as factors in their release decisions (Medwed, “Innocent Prisoner’s Dilemma,” pp. 543-546). I have urged parole boards to adopt this approach in a handful of cases. This strategy has occasionally appeared to help.

Beyond encouraging parole boards to discount the significance of inmate statements about guilt or innocence, another possible reform might involve banning prosecutors from formally using such statements in subsequent post-conviction proceedings. This could advance a number of desirable goals. For one thing, it might remove any disincentive for prisoners to convey empathy for the victim for fear that the statement would be interpreted as an admission of guilt and deployed against him in later litigation. Second, innocent prisoners would no longer pay a direct price in the post-conviction setting for admitting guilt before parole officials solely in the hopes that it might generate a positive outcome. Third, in light of the pressure to “admit” guilt to appease parole officials, these statements may lack credibility and have little value as evidence at a post-conviction proceeding (Medwed, “Innocent Prisoner’s Dilemma,” p. 542).<sup>3</sup>

Instead of ignoring inmate statements on the topic of guilt or innocence, or limiting the ensuing impact of such statements, parole boards could take an entirely different approach and view them as issues worthy of scrutiny. Parole boards could be told—and empowered—to engage in more thorough factual investigations about innocence claims, provided that such inquiries are limited to the issue of suitability for release on parole and not a formal

---

<sup>3</sup> To be fair, curtailing the subsequent use of these statements at post-conviction proceedings could further incentivize inmates to lie: an innocent prisoner could “admit” guilt at a parole hearing with few if any direct costs and thereby increase the odds of a parole grant. This might, in turn, further erode the integrity of the parole hearing. Medwed, “Innocent Prisoner’s Dilemma,” pp. 542-543).

determination of guilt or innocence. To aid parole boards in this endeavour, three ideas rise to the fore: (1) altering the structure of parole release hearings where innocence is at issue to permit inmates a greater opportunity to clarify the basis of their claim,<sup>4</sup> (2) augmenting the resources of parole boards to conduct investigations, and (3) advising parole boards to refer innocence claims to organizations better positioned to evaluate them (Medwed, “Innocent Prisoner’s Dilemma,” pp. 546-555). In no way would this proposal usurp the court’s function in adjudicating legal questions of guilt or innocence (Medwed, “Innocent Prisoner’s Dilemma,” p. 546).

Courts appear to be gradually recognizing the problems wrought by this dilemma. Three American appellate courts have cited my research in this area (In re Personal Restraint of Dyer, Washington Supreme Court, 2008, Pacific Reporter 3<sup>rd</sup>, Vol. 189, pp. 759 (in dissent); Newman v. Beard, U.S. Court of Appeals for the Third Circuit, 2010, Federal Reporter 3<sup>rd</sup>, Vol. 617, pp. 775, 786; Steele v. State, Idaho Court of Appeals, 2012, Pacific Reporter 3<sup>rd</sup>, Vol. 291, pp. 466, 473). Yet without greater recognition of this problem, and the implementation of concrete reforms to rectify it, the Innocent Prisoner’s Dilemma will linger—to the detriment of the innocent and the integrity of our system of justice.

### *Post-Conviction Litigation*

The cognitive biases of prosecutors can profoundly affect their response to post-conviction innocence claims in sex abuse cases and, as a result, influence the outcome of the litigation. My chief recommendation is to implement structural reforms within prosecutors’ offices to create distance between the original decision maker and the post-conviction reviewer of the claim to allow for a new look at an old choice—or at least permit the possibility of such a look.

For prosecutors, one reform might entail asking them to establish internal divisions to investigate post-conviction innocence claims. Prosecutors’ offices are nicely situated to investigate post-conviction innocence claims. First, prosecutors have access to case files. This is an advantage in analyzing an innocence claim revolving around an assertion that the main

---

<sup>4</sup> Specifically, I would propose modifying the format of parole hearings to allow prisoners to provide advance notice about their desire to claim innocence; with such notice, parole boards could adjust their hearing schedule to allow more time for these inmates to make their presentations, and to permit expanded rights to make their arguments by calling witnesses and even drawing on the assistance of counsel (Medwed, “Innocent Prisoner’s Dilemma,” pp. 548-549).

prosecution witness lied and it turns out that the witness has testified in other matters. Second, prosecutors can tap into a group of veteran investigators (the police) who have a powerful information network of their own.

Prosecutors in these units would soon become specialists in post-conviction innocence claims, making them better evaluators of a claim's merit than generalist lawyers from other divisions. Moreover, organizational separation between the trial bureau and the attorneys in charge of reviewing post-conviction petitions could minimize the impact of the status quo bias. Consolidating responsibility for post-conviction innocence claims might also nurture productive relationships between individual attorneys in the unit and lawyers affiliated with innocence projects. Stronger relationships of this nature could yield increased cooperation in presenting innocence claims to the courts. This could spawn greater openness from judges in reviewing claims in which the defense and the prosecution appear united.

There are downsides to my proposed reforms. The power of conformity effects would persist; post-conviction prosecutors might hesitate to second-guess the trial decisions of a co-equal in the office. Lawyers might abhor assignments to the innocence unit, envisioning the group as akin to a police Internal Affairs Bureau that rats out their colleagues. Attorneys in an innocence unit could have a hard time gathering information or fear professional repercussions. Political considerations also augur against these entities. Prosecutors might worry about voters viewing an innocence unit as a sign of “weakness” and hold it against them on Election Day. And resource constraints, to be sure, may make the enterprise impractical, especially in smaller offices.

Still, on balance, promoting the growth of innocence units at prosecutors' offices would lead to more exonerations of wrongfully convicted prisoners, including purported sex offenders, and more consistent treatment of inmate petitions within each jurisdiction. This is a good thing in my view and in the eyes of many increasingly sceptical observers of the Anglo-American criminal justice system.

## **Conclusion**

Convicted sex offenders are among the most reviled members of society. They are branded as “predators” and “deviants,” particularly those accused of preying upon children.

Although many convicted sex offenders no doubt deserve such disdain, what about the strong possibility that some do not—that some are actually innocent?

For that unknown, but potentially sizable, segment of the population the avenues available to correct this error after conviction are fraught with problems. Parole boards rely heavily on “admissions of guilt” as a precondition for release, and during post-conviction litigation, prosecutors often resist innocence claims with all their might, making prisoners’ chances for success exceedingly slim. This Chapter has sought to describe some of the failings of those procedures and to offer some modest reforms, changes aimed at allowing those wrongfully deemed “the Worst of the Worst” the best opportunity for justice.

### **Reference List**

“Blindsided: The Exoneration of Brian Banks,” 60 Minutes Television Program, March 24, 2013, available at <http://www.cbsnews.com/news/blindsided-the-exoneration-of-brian-banks/>.

Leah G. Brar et al., “Mandatory Admission of Guilt in Sex Offender Programs,” September 2012, *Journal of the American Academy of Psychiatry and the Law*, Vol. 40:3.

Celichowski, John, 2001, “Bringing Penance Back to the Penitentiary: Using the Sacrament of Reconciliation as a Model for Restoring Rehabilitation as a Priority in the Criminal Justice System,” *Catholic Lawyer*, p. 239.

Chammah, Maurice, “The Mystery of the San Antonio Four,” *Texas Observer*, Jan. 7, 2014

Cohen, Jonathan R., 2005, “The Culture of Legal Denial,” *Nebraska Law Review*, Vol. 84, p. 247.

Cromwell, Jr., Paul F. et al., 2d ed. 1985, “Probation and Parole in the Criminal Justice System.”

Griffin, Lissa, 2001, “The Correction of Wrongful Convictions: A Comparative Perspective,” *American University International Law Review*, Vol. 16, pp. 1241.

Hiserman, Mike, “Rape Conviction of Brian Banks is Overturned,” *Los Angeles Times*, May 24, 2012.

Hood, Roger et al., 2002, “Sex Offenders Emerging from Long-Term Imprisonment: A Study of Their Long-Term Reconviction Rates and of Parole Board Members’ Judgments of Their Risk,” *British Journal of Criminology*, Vol. 42, p. 371.

*In re Personal Restraint of Dyer*, Washington Supreme Court, 2008, *Pacific Reporter 3<sup>rd</sup>*, Vol. 189, pp. 759 (in dissent).

Medwed, Daniel S., 2008, “The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings,” *Iowa Law Review*, Vol. 93, p. 491.

Medwed, Daniel S., 2012, “Prosecution Complex: America’s Race to Convict and Its Impact on the Innocent,” New York University Press.

Medwed, Daniel S., 2005, “Up the River without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts,” *Arizona Law Review*, Vol. 47, p. 655.

Naughton, Michael, “Why the Failure of the Prison Service and the Parole Board to Acknowledge Wrongful Imprisonment is Untenable,” *Howard Journal of Criminal Justice*, p. 1.

*Newman v. Beard*, U.S. Court of Appeals for the Third Circuit, 2010, *Federal Reporter 3<sup>rd</sup>*, Vol. 617, pp. 775, 786.

Palacios, Victoria J., “Go and Sin No More: Rationality and Parole Release Decisions by Parole Boards,” *South Carolina Law Review*, Vol. 45, p. 567.

Rodriguez McRobbie, Linda, “How Junk Science and Anti-Lesbian Prejudice Got Fur Women Sent to Prison for More Than a Decade,” *Slate*, Dec. 4, 2013.

Schimmel, Solomon, 2002, “Wounds Not Healed by Time: The Power of Repentance and Forgiveness,” Oxford University Press.

Shute, Stephen, “Does Parole Work? The Empirical Evidence from England and Wales,” *Ohio State Journal of Criminal Law*, Vol. 2, p. 315.

Sigler, Mary, 2006, “Just Deserts, Prison Rape, and the Pleasing Fiction of Guideline Sentencing,” *Arizona State Law Journal*, Vol. 38, p. 561.

*State v. Goodman*, 1988, Utah Supreme Court, *Pacific Reporter 2<sup>nd</sup>*, Vol. 763, pp. 786

*Steele v. State*, Idaho Court of Appeals, 2012, *Pacific Reporter 3<sup>rd</sup>*, Vol. 291, p. 466.

*Yarborough v. State*, Mississippi Supreme Court, 1987, *Southern Reporter 2<sup>nd</sup>*, Vol. 514, p. 1215.