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## Remorse in Parole Hearings: An Elusive Concept with Concrete Consequences

Nicole Bronnimann

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## Remorse in Parole Hearings: An Elusive Concept with Concrete Consequences

*Nicole Bronnimann*\*

### ABSTRACT

*Remorse is a profound and complicated emotion and it is one that is evaluated in a surprising number of legal contexts. One particularly high-stakes evaluation of remorse occurs in the context of discretionary parole, when a parole board is deciding whether to release an inmate back to the community. This Article explains the arguments justifying the evaluation of remorse in parole hearings, evaluates how remorse is directly and indirectly incorporated into a typical parole hearing, presents legal and psychological research about the effect that the presence or absence of remorse may have on parole commissioners' judgment of inmates' culpability and eligibility for release, and articulates the challenges that arise in assessing remorse. Finally, this Article makes recommendations for state parole boards that wish either to eliminate remorse as a consideration in parole hearings or assess it more consistently.*

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\* The views and opinions set forth herein are the personal view or opinions only of the author; they do not necessarily reflect views or opinions of the law firm with which she is associated. *In memoriam* Professor Joan Petersilia, who made tremendous contributions to the field of criminology in her scholarship and as an advisor to policymakers around the country and who deeply inspired her students.

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## I. INTRODUCTION: WHAT IS REMORSE?

When Timothy McVeigh was executed for his 1995 bombing of the Oklahoma federal building, many headlines shared a common theme: No remorse.<sup>1</sup>

Reporters described McVeigh as “stone-faced,”<sup>2</sup> and his written statement, a copy of a nineteenth century poem, conveyed defiance rather than regret.<sup>3</sup> Paul Howell, who lost his twenty-seven-year-old daughter Karan in the bombing, expressed disappointment: “I was hoping we could see something like ‘I’m sorry,’ but we didn’t get anything from the man.”<sup>4</sup>

In the eyes of the community, McVeigh committed two unforgivable offenses: The first was on April 19, 1995, when he killed 168 people. The second was June 12, 2001, when he missed his last opportunity to demonstrate remorse for his actions.

Remorse is evaluated from the beginning to the end of the criminal justice process. An offender’s remorse can persuade a prosecutor not to press charges. A judge may weigh remorse in her decision whether to transfer a juvenile to adult court,<sup>5</sup> how much bond to set,<sup>6</sup> or what kind of sentence to impose.<sup>7</sup> Capital jurors sometimes base their decision whether to vote for death on whether the defendant appears sorrowful.<sup>8</sup> Remorse may even affect

1. See, e.g., Sharon Cohen, *McVeigh Dies with No Remorse*, ARIZ. DAILY SUN (June 11, 2001), [http://azdailysun.com/mcveigh-dies-with-no-trace-of-remorse/article\\_986d66f9-1f3b-5798-9c3c-ee627a4b2387.html](http://azdailysun.com/mcveigh-dies-with-no-trace-of-remorse/article_986d66f9-1f3b-5798-9c3c-ee627a4b2387.html) [perma.cc/N5ES-M2N2]; Kevin Fagan, *McVeigh Shows No Remorse*, SF GATE (June 11, 2001), <http://www.sfgate.com/news/article/McVeigh-shows-no-remorse-2909973.php> [perma.cc/5B7B-NTL4].

2. Fagan, *supra* note 1. For additional language representative of how reporters described his remorselessness at execution, see Rick Bragg, *The McVeigh Execution: The Overview*, N.Y. TIMES (June 12, 2001), <http://www.nytimes.com/2001/06/12/us/the-mcveigh-execution-the-overview-mcveigh-dies-for-oklahoma-city-blast.html> [perma.cc/YXP2-SGHH] (describing how McVeigh “died unrepentant, without offering one word of regret” and how relatives of victims “searched his gaunt, hollow-eyed face in his final minutes for some kind of apology or answer . . .”).

3. Rick Bragg, *supra* note 2.

4. Fagan, *supra* note 1.

5. See Martha Grace Duncan, *So Young and So Untender: Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1471 (2002).

6. Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. REV. L. & SOC. CHANGE 133, 152–53 (2015).

7. See, e.g., Ronald S. Everett & Barbara C. Nienstedt, *Race, Remorse, and Sentence Reduction: Is Saying You’re Sorry Enough?*, 16 JUST. Q. 99, 99 (1999) (discussing the federal sentence reduction for “acceptance of responsibility”); Zhong, *supra* note 6, at 152.

8. See, e.g., Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1558 (1998).

the outcomes in civil matters such as fines for speeding violations,<sup>9</sup> school boards' decisions whether to expel students,<sup>10</sup> and bar admission committees' leniency in approving applications by would-be lawyers whose "character and fitness" investigations are unsatisfactory.<sup>11</sup>

Remorse *pervades* how we conceive of and deliver justice – and yet, what is it?

Remorse derives from the Latin *remord-ere*, "to bite again."<sup>12</sup> The etymology speaks to the experience of remorse; it is painful, it resurfaces, it gnaws. Dictionary definitions provide helpful synonyms but are too succinct to develop a thorough or nuanced understanding.<sup>13</sup> Recognizing the need for greater clarity, clinical psychologist Michael Proeve, along with legal scholar Steven Tudor, analyzed philosophical literature on remorse to come up with a descriptive breakdown of its principal characteristics.

According to Proeve and Tudor, a remorseful person displays most of the following characteristics in some combination:

- recognition that she has wronged and harmed another person
- recognition that she was responsible for her action, which was voluntary
- a sense that her life has changed in some way as a consequence of her action
- various feelings of internal pricking, vexation or turmoil

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9. See Martin Day & Michael Ross, *The Value of Remorse: How Drivers' Responses to Police Predict Fines for Speeding*, 35 LAW & HUM. BEHAV. 221, 224–31 (2011) (surveying American and Canadian drivers ticketed for speeding and finding that those who remembered expressing remorse received lower fines).

10. See, e.g., *Suspension and Expulsion Procedures*, WATERTOWN UNIFIED SCH. DIST., [http://www.watertown.k12.wi.us/cms\\_files/resources/53101%20Suspension%20and%20Expulsion%20Procedures.pdf](http://www.watertown.k12.wi.us/cms_files/resources/53101%20Suspension%20and%20Expulsion%20Procedures.pdf) [perma.cc/UVC8-RXRX] (noting that "the degree of responsibility and remorse the student feels regarding his/her offending conduct" will be considered).

11. Mitchell Simon et al., *Apologies and Fitness to Practice Law: A Practical Framework for Evaluating Remorse in the Bar Admission Process*, 2012 J. PROF. LAW. 37, 37–40.

12. *Remorse*, DICTIONARY.COM, <http://www.dictionary.com/browse/remorse> [perma.cc/P3RV-RUTM] (last visited Feb. 23, 2020).

13. See, e.g., *Remorse*, OXFORD ENGLISH DICTIONARY (3d ed. 2009), <https://www.oed.com/view/Entry/162286?rskey=oYs6za&result=1&isAdvanced=false#eid> [perma.cc/379P-JFMW] (defining remorse as "deep regret or guilt for doing something morally wrong; the fact or state of feeling sorrow for committing a sin; repentance, compunction").

- a desire to atone or to make reparation, for example by expressing remorse, apologizing, making restitution to the person harmed, undergoing penance, and/or behaving differently in the future
- a desire to be forgiven
- some form or forms of having acted upon the desires to atone, to make reparation, or to be forgiven.<sup>14</sup>

That definition has since been referenced or adopted by other researchers in this area.<sup>15</sup> However, even that list leaves questions relevant to parole hearings unanswered, or open at least to multiple reasonable interpretations. Among those that have been raised by scholars or commissioners are: Is genuine remorse present immediately or does it develop over time?<sup>16</sup> Is it possible to be remorseful and still seek a reduction of punishment or does it require humble submission to any judgment?<sup>17</sup> What is the proper balance in remorse between grief for one's lost opportunities, acknowledgement of one's wrongdoing, and empathy for the victim?<sup>18</sup> How is remorse different from shame?<sup>19</sup> What does genuine remorse look like?<sup>20</sup>

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14. MICHAEL PROEVE & STEVEN TUDOR, REMORSE: PSYCHOLOGICAL AND JURISPRUDENTIAL PERSPECTIVES 48 (2010).

15. See, e.g., Zhong, *supra* note 6, at 137.

16. See Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L. J. 131, 146–47 (2006).

17. PROEVE & TUDOR, *supra* note 14, at 133.

18. See *id.* at 36–49. While all three of these may be an aspect of remorse, the over-indulgence of one can indicate the underdevelopment of another. Too much focus on one's lost opportunities, for instance, could indicate a failure to appreciate victim impact. Detached empathy for the victim can indicate a failure to acknowledge one's wrongdoing. Jennifer Shaffer, the Executive Officer of the California Board of Parole Hearings, shared an anecdote of an inmate convicted of rape who said in a hearing that he wished he could “hug” his victim and make her feel better. Whatever empathy this may have expressed for her pain, the parole commissioners were disturbed by his failure to recognize how the victim would not want to be physically embraced by her rapist. Jennifer Shaffer, Executive Officer, California Board of Parole Hearings, Presentation to Class (Feb. 24, 2016).

19. Despite being “emotional neighbors” and sharing certain physical manifestations, psychological studies examining the experience of emotions find that shame is distinct from guilt emotions like remorse or regret. PROEVE & TUDOR, *supra* note 14, at 67–70. Unlike guilt-feelings, shame inspires withdrawal and feelings of rejection and inferiority. *Id.* Because these emotions inspire divergent behaviors, it is important to distinguish between them. *Id.* Multiple studies have shown that while guilt-proneness is positively correlated with empathy, shame-proneness is positively correlated with anxiety, depression, and externalizing blame and negatively correlated with empathy. *Id.*

20. See, e.g., Susan Bandes, *Remorse and Criminal Justice*, 8 EMOTION REV. 14, 17 (2016) (“Thus far, there is no evidence that facial expression, body language, or other physiological markers exist that can identify feelings of remorse.”).

The concept of remorse blurs as we interrogate it. Despite its importance throughout criminal justice proceedings, there is no legal consensus as to the definition or indicia of remorse.<sup>21</sup> The vagueness of the term invites legal decision-makers to import their own conceptions of this complex and varied emotion.

This Article, while drawing upon the scholarly research on remorse in various stages of criminal justice, focuses primarily on its use in the discretionary parole release decision. Discretionary parole is where a parole board has an opportunity to determine whether to conditionally release an individual from prison based on the board's assessment of the individual's characteristics and preparedness. At one point in American history, nearly three-quarters of all releases from prison occurred as a result of discretionary parole, and every state and the federal government operated a parole system.<sup>22</sup>

The 1970s saw a shift in thinking. Many jurisdictions began to move away from indeterminate sentences and parole release for "rehabilitated" offenders. The rehabilitative ideal of punishment lost popularity in the wake of studies showing that rehabilitative efforts appeared unsuccessful in reducing recidivism.<sup>23</sup> Critics also raised concerns that discretionary decisions were biased along racial, class, or other impermissible lines and argued that the psychological effects of not having an approximate release date were detrimental to prisoners' wellbeing.<sup>24</sup> By 2000, sixteen states had abolished discretionary parole for all offenders and another four had abolished parole for certain violent offenders.<sup>25</sup>

Discretionary parole, however, never disappeared and is again gaining attention as a potential tool in the decarceration agenda.<sup>26</sup> States facing prison overpopulation may see parole as a controlled release valve, as demonstrated most recently by the passage of Proposition 57 in California in 2016. That voter proposition, which was in part a response to a federal court order to reduce the prison population, amended the state constitution to allow parole

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21. *Id.* at 14.

22. JOAN PETERSILIA, WHEN PRISONERS COME HOME 58 (2003).

23. *Id.* at 63.

24. *Id.*

25. TIMOTHY A. HUGHES, DORIS JAMES WILSON & ALLEN J. BECK, TRENDS IN STATE PAROLE 1990–2000, BUREAU OF JUST. STATS. 1 (2001), <https://www.bjs.gov/content/pub/pdf/tsp00.pdf> [perma.cc/ND7H-3ND4].

26. For a thorough explanation of why discretionary parole is a particularly appealing option for states with overcrowded prisons, see Joan Petersilia & Jimmy Threatt, *Release from Prison*, THE ENCYCLOPEDIA OF CORRECTIONS 1, 5 (Kent Kerley ed., 2017), <http://onlinelibrary.wiley.com/doi/10.1002/9781118845387.wbeoc019/full> [perma.cc/JD4B-7GCY] ("In trying to downsize prison populations, it is easier to release eligible inmates through discretionary parole than it is to change sentencing laws or the behavior of other actors in the criminal justice system such as police, judges, or prosecutors. Additionally, as states decrease their prison populations, the least serious inmates are targeted for early release.").

consideration for nonviolent offenders.<sup>27</sup> Then-Governor Jerry Brown, who spearheaded the campaign for the proposition, had also long voiced regret for signing the determinate sentencing bill of 1977, which he believed reduced the incentive for inmates to use their time in prison productively.<sup>28</sup>

With renewed interest in discretionary parole, the criteria used in the parole decision should also come under review. The goal of such critical evaluation is not to derail efforts to return to a more discretionary system; rather, the goal is to continue a decades-long effort to professionalize the practice of paroling by determining which criteria are most relevant to parole's purposes and what the best practices are for applying those criteria. Part II of this Article explains the arguments justifying the use of remorse in parole hearings, Part III examines the ways in which the evaluation of remorse is incorporated into a typical parole hearing, Part IV discusses the effect that the perception of remorse has on human judgment, and Part V addresses the challenges that arise in assessing remorse and provides potential recommendations for how to either eliminate it from consideration or evaluate it more consistently.

## II. WHY IS REMORSE RELEVANT TO PAROLE DECISIONS?

Besides popular fascination with the emotion, remorse persists in the legal system in part because it aligns with almost all theories of punishment. Indeed, countries as disparate in their approaches to criminal justice as Sweden, the Netherlands, China, Japan, and the common law countries of Canada, England, Australia, and the United States incorporate evaluations of remorse into their legal systems.<sup>29</sup> There are at least four reasons for why that is so, as listed in Sections A-D below.

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27. See John Myers, *Gov. Brown to Seek November Ballot Initiative to Relax Mandatory Prison Sentences*, L.A. TIMES (Jan. 27, 2016), <http://www.latimes.com/politics/la-pol-sac-jerry-brown-sentencing-reform-ballot-20160127-story.html> [perma.cc/897M-D6LL]. The Supreme Court upheld the order in 2011, finding that California's prison overcrowding violated the Eighth Amendment's ban on "cruel and unusual punishment." *Brown v. Plata*, 563 U.S. 493, 545 (2011).

28. See Jenifer Warren, *Jerry Brown Calls Sentence Law a Failure*, L.A. TIMES (Feb. 28, 2003), <http://articles.latimes.com/2003/feb/28/local/me-prisoners28> [perma.cc/LR45-A686] (quoting Governor Brown describing prisons as "postgraduate schools of crime" because without the need to convince a parole board to grant early release, there are no incentives to self-improve and learn marketable skills).

29. Richard Weisman, *Regulating the Expression of Remorse and the Building of Moral Communities*, in *THE EXPRESSION OF EMOTION: PHILOSOPHICAL, PSYCHOLOGICAL, AND LEGAL PERSPECTIVES* 247, 248 (Catharine Abell & Joel Smith eds., 2016).

### A. Remorse May Decrease Recidivism

By far the most pressing and relevant concern for a parole board is an offender's likelihood to recidivate. In every state where parole exists, evaluating the risk posed by the offender's release is essential; high or unreasonable risk means certain denial.<sup>30</sup>

The perception that remorse correlates with decreased recidivism is widespread among judges and parole officers.<sup>31</sup> Moreover, a focus on recidivism aligns with the utilitarian theory of punishment – that it is a means to another end, commonly deterrence of future criminal conduct, incapacitation, or rehabilitation.<sup>32</sup> Because of the perception that an offender's remorse accomplishes some of the work needed to secure *any* of those ends, remorse may make some portion of a sentence unnecessary.<sup>33</sup> The pain of remorse acts as a deterrent of future criminal behavior. By inducing the acknowledgement of one's wrongdoing and the motivation to make amends, remorse makes it more likely that offenders will rehabilitate by taking the steps necessary to address the destructive behaviors and attitudes that led to their crime.<sup>34</sup> Finally, less incapacitation is necessary if remorse has successfully accomplished this work. As phrased succinctly by Judge Posner in *United States v. Beserra*,

A person who is conscious of having done wrong, and who feels genuine remorse for his wrong . . . is on the way to developing those internal checks that would keep many people from committing crimes even if the expected costs of criminal punishment were lower than they are.<sup>35</sup>

However, empirical support for the correlation between expressed remorse and reduced recidivism is equivocal. Until recently, there was little or no evidence attempting to prove or to disprove the linkage. A 1988 study examining offenders' post-probation behavior showed no statistically significant correlation between the expression of remorse and recidivism, and

30. See e.g., CAL. PENAL CODE § 3041 (2016) (instructing a board to release a parole candidate unless “consideration of public safety requires a more lengthy period of incarceration for this individual”); TEX. GOV'T CODE ANN. § 508.141 (2015) (instructing that panel may release a parole candidate only when the “parole panel believes that the inmate is able and willing to fulfill the obligations of a law-abiding citizen”).

31. RICHARD WEISMAN, SHOWING REMORSE: LAW AND THE SOCIAL CONTROL OF EMOTION 6–7 (2014).

32. *Id.* at 6.

33. See, e.g., PROEVE & TUDOR, *supra* note 14, at 120 (discussing how utilitarian principles operate upon “a general principle of parsimony, which requires that we try to achieve the desired goal of a sentence by means of the ‘cheapest rate’ possible and avoid imposing any punishment beyond that which is necessary to achieve that end.”)

34. *Id.*

35. *United States v. Beserra*, 967 F.2d 254, 256 (7th Cir. 1998).

only a slight correlation between remorse and co-operation with probation conditions.<sup>36</sup> Likewise, a 2000 study examining expressed remorse, among other factors, in psychiatric assessments of violent offenders in Canada showed no statistically significant relationship between remorse and recidivism.<sup>37</sup>

More recent research indicates that there is a modest but significant correlation. Two studies in the early 2000s examining the recidivism of young offenders who took part in restorative justice conferences<sup>38</sup> found that offenders who expressed remorse during their conferences were less likely to reoffend than those who had not.<sup>39</sup> A German study in 2008 assessed 1,243 young offenders in prisons through repeated interviews.<sup>40</sup> The interviews measured the frequency of guilt-feelings and shame-feelings by the offender from week to week and then compared these measures to the recidivism of the offenders once released.<sup>41</sup> The study found frequent experiences of guilt predicted decreased recidivism while frequent experiences of shame predicted increased recidivism.<sup>42</sup> More recently, a 2017 study found that remorse-prone adolescent offenders, assessed through responses to a series of questions, had fewer rearrests than those who were assessed to be remorse-resistant.<sup>43</sup> Finally, lack of remorse is one of twenty items used to assess psychopathy, a condition that is linked to increased recidivism.<sup>44</sup>

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36. See PROEVE & TUDOR, *supra* note 14, at 90–92 (summarizing this study by K.A. Romanowski and other studies relating to remorse and recidivism).

37. *Id.*

38. Restorative justice conferences are alternatives to traditional punishment. INT'L INST. FOR RESTORATIVE PRACTICES, DEFINING RESTORATIVE, <https://www.iirp.edu/defining-restorative/restorative-conference> [perma.cc/4XFJ-BWGZ]. They bring together youth offenders, victims, their respective families, a legal officer, and a facilitator to discuss the crime and its effects on participants. *Id.* All participants then come to consensus agreements how the offender can repair the harm. *Id.*

39. ALLISON MAXWELL & GABRIELLE MORRIS, RESTORATIVE JUSTICE FOR JUVENILES: CONFERENCING, MEDIATION, AND CIRCLES 267–84; Hennessey Hayes & Kathleen Daly, *Youth Justice Conferencing and Reoffending*, 20 JUST. Q. 725, 749–52 (2003).

40. Daniela Hosser et al., *Guilt and Shame as Predictors of Recidivism: A Longitudinal Study with Young Prisoners*, 35 CRIM. JUST. & BEHAV. 138 (2008).

41. *Id.*

42. *Id.* at 149.

43. See Ryan Charles Meldrum et al., *An Examination of the Criminological Consequences and Correlates of Remorselessness During Adolescence*, 16 YOUTH VIOLENCE & JUV. JUST. 279, 280 (2017).

44. See James F. Hemphill et al., *Psychopathy and Recidivism: A Review*, 3 LEGAL & CRIMINOLOGICAL PSYCHOL. 139, 160 (1998). Moreover, remorse is considered a particularly good indicator of psychopathy. See Daniel M. Bolt et al., *A Multi-Group Item Response Theory Analysis of the Psychopathy Checklist-Revised*, 16 PSYCHOL. ASSESSMENT 155, 164–65 (2004); David J. Cooke & Christine Michie, *An Item Response Theory Analysis of the Hare Psychopathy Checklist-Revised*, 9 PSYCHOL. ASSESSMENT 3, 7 (1997).

It is thus fair to say that there is at least some empirical support for the notion that expression of remorse correlates with reduced recidivism. But that relationship is far from well-established, and in the context of parole hearings, probably rests on “gut feelings” more than anything else.<sup>45</sup> Two explanations may account for the lack of empirical data supporting the intuition that a remorseful parolee is less likely to recidivate. The first is human error. Parole commissioners may fail to distinguish genuine from feigned remorse and release some remorseless offenders. As described in Part V, psychopaths may actually be more likely to be released than non-psychopaths because of their ability to charm and to persuade a parole board that they are rehabilitated. Data that relies on expressions of remorse – which could happen if such data relies on parolee statements of remorse or rationales from parole boards – may therefore include a number of non-remorseful individuals. Such data is subsequently less reliable in showing a connection between remorse and the likelihood of reoffending.

Second, even the genuine experience of remorse is no guarantee that a parolee will not reoffend. One parole commissioner shared that it was common for him to watch inmates express sincere remorse for a past criminal action and be released only to appear before the board a year later for a similar crime.<sup>46</sup> In his experience, most of these offenders struggled with addiction.<sup>47</sup> Clean and sober in prison, they would face pressures on the outside such as relationship dissolution and unemployment.<sup>48</sup> Relapse into drugs and economic stress would lead them to theft or robbery.<sup>49</sup> Another parole commissioner offered a similar perspective, after having observed an offender in a parole hearing swear ardently to stay clean if released. She remarked, “They always say that and they mean it too.”<sup>50</sup> The pressures of the outside and a tendency to return to unhealthy peer groups, she explained, frequently derailed inmates’ commitment to sobriety.<sup>51</sup> Thus, it may be true that remorse correlates with a lower-chance of recidivism, but the data fails to properly account for post-release conditions that drive a parolee to reoffend.

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45. See, e.g., Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 106 (2004) (“As of yet, psychology, psychiatry, sociology, and criminology have not empirically linked expressions of remorse and apology to a decreased need for specific deterrence of particular offenders.”).

46. Telephone Interview with Frederic G. Reamer, Professor in the School of Social Work, Rhode Island College and former State of Rhode Island Parole Board Commissioner (Feb. 15, 2017).

47. *Id.*

48. *Id.*

49. *Id.*

50. Interview with Ellen Kirschbaum, Executive Director of the Arizona Board of Executive Clemency, in Phoenix, Ariz. (Jan. 3, 2017).

51. *Id.*

### B. Remorse Makes Retribution Less Necessary

Retributive theory contends that “just deserts” is an end in itself. The punishment of a crime is valuable on its own aside from how that punishment rehabilitates offenders or deters other crimes. *Offense*-based retribution focuses on providing a punishment that “fits the crime” and that reflects the harm the crime caused independent of the offender’s personal traits.<sup>52</sup> In other words, people are sentenced for their crime, not their character. This is the most common theoretical argument for not including remorse in sentencing, and by extension, parole. Under this view, there is no logical place for the expression of remorse in determining or reducing punishment.<sup>53</sup> Some scholars of this mindset justify their position by arguing that offenders should not be given credit for feeling what one ought to feel; remorse is an expectation, not a virtue.<sup>54</sup>

However, for *offender*-based retribution, remorse is relevant to the extent that it makes an offender less culpable and therefore less deserving of punishment.<sup>55</sup> Remorse serves to distance the act from the offender’s true character.<sup>56</sup> Under offender-based retribution, punishment for the “worst of the worst” should differ from punishment delivered to those with substantial mitigating circumstances, including sincere remorse.

### C. Remorse Serves the Aims of Restorative Justice

Encouraging and expecting remorse at a parole hearing may also be justified as a way to acknowledge victims’ experiences and to encourage offender reintegration, which are twin aims of the restorative justice movement. Restorative justice is an approach to dealing with wrongdoing in which “all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.”<sup>57</sup> An ideal restorative justice practice is one in which victims are able to explain the impact of an offense on their lives and offenders are able to acknowledge responsibility personally before the victims and make symbolic or actual reparations.<sup>58</sup> The result is restoring the relationships and moral balance disrupted by the crime.<sup>59</sup> Empirical studies

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52. See, e.g., Zhong, *supra* note 6, at 139.

53. Mirko Bagaric & Kumar Amarasekara, *Feeling Sorry? – Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing*, 40 HOW. J. 364, 364–65 (2001).

54. *Id.*

55. See Zhong, *supra* note 6, at 139–40.

56. See, e.g., Richard M. Weisman, *Being and Doing: The Judicial Use of Remorse to Construct Character and Community*, 2009 SOC. & LEGAL STUD. 47, 50 (2009).

57. Bibas & Bierschbach, *supra* note 45, at 103 (citing John Braithwaite, who is considered the top scholar on restorative justice).

58. See, e.g., Hayes & Daly, *supra* note 39, at 726–28.

59. Bibas & Bierschbach, *supra* note 45, at 103.

of restorative justice programs suggest that they are at least as effective as traditional prosecution methods for controlling some kinds of crimes and that some victims feel participation helps them process their pain.<sup>60</sup> Although some restorative justice advocates call for this process to act as a substitute for punishment, a more radical position, the aims of this movement are not limited to that position.

Indeed, even scholars such as Professor Bierschbach and Judge Stephanos Bibas – who reject the movement’s broad goals – agree that the legal system should recognize the insights of restorative justice and make greater use of apology and remorse.<sup>61</sup> As they argue, apology and the expression of remorse are integral to how humans navigate our daily lives, serving as powerful means to “heal psychic wounds, teach lessons, and reconcile damaged relationships.”<sup>62</sup> This is part of the reason why people intuitively seek remorse from offenders and feel satisfied at its exhibition. Just as remorse and apology can improve interpersonal interactions, they can improve criminal procedure as well. Indeed, when criminal procedure foregoes remorse, the crime becomes abstract and the relational dimension of wrongdoing is lost.<sup>63</sup>

Considering remorse during a parole hearing aligns with this model proposed by Bibas and Bierschbach. A focus on remorse at a hearing provides an opportunity for victims to encounter offenders in a controlled setting and for offenders to reintegrate – but only after the offender has served a substantial portion of the punishment.

#### *D. Remorse is a Ritual with Important Communicative Value to Society*

Finally, an increasing number of sociologists and legal scholars have suggested that the expression of remorse in a legal setting does more than just attempt to repair the moral balance between victim and offender; it constitutes a ritual through which social norms are shaped and affirmed.<sup>64</sup> When an offender expresses genuine remorse at a parole hearing, he or she commits to the norms that define membership in a moral community, thereby reintegrating.<sup>65</sup> Offenders’ demonstration of remorse may be most appropriate at a parole hearing because it indicates their knowledge of and

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60. *Id.* at 116–17.

61. *Id.* at 147–48.

62. *Id.* at 87.

63. *Id.*

64. See generally NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* (1991) (formulating apology as a moral ritual); WEISMAN, *supra* note 29 (examining remorse in the context of moral communities); Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. DISP. RESOL. 829 (2003) (exploring the concept of apology and the role it can play in the dispute resolution process).

65. WEISMAN, *supra* note 29, at 13.

capacity to satisfy community norms at the very point in time when their readiness to be imminently released to that community is under consideration.

Richard Weisman, Professor Emeritus at York University, contends that this remorse ritual is a kind of “moral performance.”<sup>66</sup> Regardless of how remorse might naturally manifest in an individual, successful demonstration of remorse must follow a certain script to be effective and accepted by the moral community. Examining 178 Canadian cases in which the remorse of a party was at issue, Weisman concluded that judges shape what this performance is expected to look like through their dialogue with the parties.<sup>67</sup> At least in the Canadian cases he analyzed, successful demonstration of remorse must include acknowledgement of responsibility, gestures and signs of internal suffering observable in demeanor, and evidence of personal epiphany or transformation.<sup>68</sup>

Interestingly, while ideal, sincerity is not as important under this justification for considering remorse. After all, the more the act of remorse is ritualized, the easier it is to feign; offenders come to know what decision-makers seek. However, because a moral performance has a symbolic and communicative value to community independent of the individual’s true state of mind, an individual’s ability and a willingness to perform the norm may be more important than an individual’s subjective embrace of that norm. The performance alone is both a reaffirmation of community values and submission to those values. Weisman contends that this is why failure to demonstrate remorse is seen as a different affront than the original offense. He explains, “Outrage at the absence of remorse has far less to do with the gravity of the offence than with the lack of deference that such a stance communicates.”<sup>69</sup>

### III. ASSESSMENT IN THE PAROLE PROCESS: WHO EVALUATES REMORSE, WHEN, AND UNDER WHAT AUTHORITY?

Remorse hangs in the background of parole decisions as a likely, though not always dispositive, criterion. At times, it is explicitly acknowledged as a consideration via statutes and regulations governing parole board decisions. However, remorse may also figure into decisions indirectly via inmate demeanor and testimony, risk assessments, psychological evaluations, program participation, or simply as a matter of commissioner discretion. This Section details the various ways remorse can be considered in parole board hearings. Examples of statutes and regulations in this Section are pulled from states that release comparatively high numbers of inmates via discretionary parole.

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66. *Id.* at 38.

67. *Id.* at 23–45.

68. *Id.*

69. *Id.* at 44.

### A. Parole Statutes and Regulations

States vary in the specificity of parole criteria in statutes and regulations. Some states use mandatory language, such as that a state *shall* release an inmate *unless* they fail to meet certain enumerated criteria. California law, for instance, instructs that a board

shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual.<sup>70</sup>

Other states use precatory language, such as that a state *may* release an inmate *only when* they meet certain criteria, and emphasize that release remains a matter within the board's expansive discretion.<sup>71</sup> Texas makes clear that, "Release to parole is a privilege, not an offender right, and the parole decision maker is vested with complete discretion to grant, or to deny parole release as defined by statutory law."<sup>72</sup> In the same vein, some states have regulations listing particular factors tending to show suitability or unsuitability while others emphasize that each decision is individual.<sup>73</sup>

The explanation for the varied level of generality at which these statutes or regulations are written is twofold. On one hand, the language may reflect genuinely different approaches to the criteria that should or should not be considered in making a decision. Therefore, whether or not a State lists remorse as a factor in the parole decision may reflect that State's unique penological values. On the other hand, the descriptiveness of the statutes and regulations is often a response to legal or political challenges unrelated to any specific criterion like remorse. Listing or not listing particular factors can be part of an overarching strategy to expand or limit the flexibility of the parole boards to make granting parole harder or easier.<sup>74</sup>

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70. CAL PEN. CODE § 3041(b)(1) (2018).

71. 37 TEX. GOV'T CODE ANN. § 508.141 (West 2018).

72. 37 TEX. ADMIN. CODE § 145.3 (1) (2017).

73. *Compare id.*, with CAL. CODE REGS. tit. 15, § 2281(c) (2019).

74. Maximizing parole board discretion is often an intentional step to prevent inmates from being able to challenge parole denials on due process grounds or new regulations limiting release as *ex post facto* laws. For instance, in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979), the Supreme Court recognized that inmates have a Fifth Amendment due process liberty interest in the denial or delay of parole *if* the state parole system, through its statutory language, creates an entitlement to parole. In essence, the more discretion that remains with the parole board – the more a release remains an act of "legislative grace" rather than a rubberstamp – the less likely a prisoner can challenge procedural aspects of their denials for violating their constitutional rights.

With that caveat in mind, most states do not explicitly mention remorse as a factor to be considered;<sup>75</sup> California and Pennsylvania are unusual for doing so.<sup>76</sup> California, in particular, extensively references remorse throughout its regulations, which authorize consideration of “past and present attitude toward the crime” and list “signs of remorse” as a factor tending to show suitability.<sup>77</sup>

However, even in those states whose statutes do not explicitly reference remorse, parole boards may still assign enormous weight to it.<sup>78</sup> For instance, although neither “remorse” nor a near proxy for it appear in the factors New York parole boards should consider, New York’s case law frequently mentions remorse as a factor that the board either appropriately considered or inappropriately failed to consider.<sup>79</sup>

Moreover, state statutes and regulations often contain criteria that either directly entail consideration of remorse or can be construed to do so. For instance, if an inmate’s remorse is valued for its communicative value to society and to pay respect to victims, a parole commissioner could well deem that the release of a remorseless inmate would “deprecate the seriousness of his crime.”<sup>80</sup> Likewise, in a state where a parole board can only release an

75. See Laura Cohen, *Freedom’s Road: Youth, Parole, and the Promise of Miller v. Alabama and Graham v. Florida*, 35 CARDOZO L. REV. 1031, 1076 (2014).

76. California includes “signs of remorse” as a factor tending to show suitability within its regulations. CAL. CODE REGS. § 2281(d). Pennsylvania includes “stated remorse for the offense(s) committed” as one of its non-weighted factors in its parole decisional instrument. Parole Decisional Instrument, PA. BD. OF PROB. AND PAROLE (April 15, 2017), <https://www.pbpp.pa.gov/Parole%20Supervision/Documents/PDI%20361%2009-2014.pdf> [perma.cc/DDD3-8NHC].

77. Interestingly, the factor “signs of remorse” is further described in the regulation as follows: “The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or the prisoner has given indications that he understands the nature and magnitude of the offense.” CAL. CODE REGS. § 2281(b), (d) (2019). Providing guidance to what is meant by remorse is unusual.

78. See Cohen, *supra* note 75, at 1076, 1082.

79. *E.g.*, *Rossakis v. N.Y. State Bd. of Parole*, 146 A.D.3d 22, 27–28 (N.Y. App. Div. 2016) (“Based on the record before us, we conclude . . . that the Board acted with an irrationality bordering on impropriety in denying petitioner parole. The Board focused exclusively on the seriousness of petitioner’s conviction and the decedent’s family’s victim impact statements . . . without giving genuine consideration to petitioner’s remorse, institutional achievements, release plan, and her lack of any prior violent criminal history.”); *Molinar v. N.Y. State Div. of Parole*, 119 A.D.3d 1214, 1215 (N.Y. App. Div. 2014) (finding that the parole board properly considered the inmate’s continued failure to accept responsibility and the connection of that factor to his rehabilitation in denying parole).

80. MODEL PENAL CODE § 305.9 (AM. LAW INST., Proposed Official Draft 1962). New York employs similar phrasing: The board may only release an inmate after considering whether [his] release “will not so deprecate the seriousness of his crime as to undermine respect for law.” N.Y. EXEC. LAW § 259-i(2)(a)(ii)(c)(A) (McKinney 2017).

inmate if “[he] will live and conduct himself as a respectable and law-abiding person,”<sup>81</sup> a parole board could determine that a remorseless person is less easily deterred from reoffending and therefore less likely to obey the law. At the least, they could decide such a person is not respectable.

Courts have generally refrained from second-guessing the parole boards’ application of the broad factors listed in states’ statutes and regulations. A reviewing court often is only willing to overturn the decisions of a parole board if commissioners have far-fetched interpretation of listed criteria<sup>82</sup> or have considered factors that are unlisted and deemed a detriment to rule-of-law or fair procedure.<sup>83</sup>

While a boilerplate rationale for denial is generally insufficient,<sup>84</sup> even the due process protections in select states impose “only a minimal burden upon parole boards to reveal the rationales for their decisions.”<sup>85</sup> California has perhaps one of the most demanding requirements of parole board reasoning: determinations must be related to “current dangerousness” and be supported by “some evidence.”<sup>86</sup> However, even in California, a parole commissioner who believes an inmate’s lack of remorse means that he is unable or unwilling to critically evaluate what behaviors led to the crimes and to avoid those behaviors in the future could conceivably connect remorselessness to a conclusion that the inmate’s release would “pose an unreasonable risk of danger to society.”<sup>87</sup>

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81. GA. CODE ANN. § 42-9-42 (West 2015).

82. *E.g.*, *Hamilton v. N.Y. State Div. of Parole*, 119 A.D.3d 1268, 1273 (N.Y. App. Div. 2014) (ridiculing a parole board’s determination that a “nearly 90-year-old, terminally ill cancer patient with additional debilitating medical conditions that required continuous medical care had ‘a propensity for extreme violence’ based solely on the nature of the crime.”).

83. *Id.* (referencing other cases where the board considered unlisted and improper criteria, such as commissioners’ own personal penal philosophy and views on the historical treatment of murderers or a requirement that the inmate demonstrate how his release would *enhance* society). Other factors are sometimes limited or forbidden by statute. For instance, in Texas, parole boards are not allowed to consider “an offender’s litigation activities” when determining candidacy for parole. 37 TEX. ADMIN. CODE § 145.3 (2017). In Georgia, HIV status can be considered but cannot be the only factor weighed. GA. CODE ANN. § 42-9-42.1 (2015).

84. Alexis Watts, *Parole Release Reconsideration in States with Discretionary Release*, ROBIN INSTITUTE OF CRIM. LAW & CRIM. JUST. (Apr. 10, 2016), [https://robinainstitute.umn.edu/news-views/parole-release-reconsideration-states-discretionary-release#footnote12\\_zm1w6a4](https://robinainstitute.umn.edu/news-views/parole-release-reconsideration-states-discretionary-release#footnote12_zm1w6a4) [perma.cc/U5H5-HHT8].

85. Daniel S. Medwed, *The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 493 (2008).

86. *In re Lawrence*, 190 P.3d 535, 553 (Cal. 2008).

87. CAL. CODE REGS. tit. 15, § 2281(a) (2019).

### B. Inmate Testimony and Demeanor at Hearing

Because parole commissioners already have access to an inmate's prison file, which describes his crimes of conviction and institutional behavior, parole board members receive little new information from interviews other than their assessments of the offender's character, remorse, and sincerity.<sup>88</sup> Nonetheless, there is "near unanimity" that boards need to evaluate testimony and demeanor at some point in the parole process.<sup>89</sup> In 2015, the Robina Institute disseminated a survey of states' releasing authorities endorsed by the Association of Paroling Authorities International. Of the forty states responding to Robina Institute's 2015 parole survey, thirty-eight considered inmate demeanor,<sup>90</sup> thirty-seven states considered inmate testimony, and thirty-seven states considered inmate family testimony.<sup>91</sup>

Commissioners can assess an offender's remorsefulness through any of these means, and indeed, this often appears to be the point of having an inmate appear in person. In California, for instance, hearings for inmates who have been sentenced to life often focus on determining an inmate's level of "insight."<sup>92</sup> Though not listed in the parole regulations, inmates are aware of it as an informal requirement. In the words of one California lifer released on parole, "insight is the buzzword."<sup>93</sup>

In his memoir about his time on the Rhode Island State Parole Board, Dr. Frederic Reamer described the power of the interview as follows:

It was not unusual for me to have a tentative opinion in mind – based on my review of the copious records – when the inmate entered the

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88. Leanne ten Brinke et al., *Crocodile Tears: Facial, Verbal and Body Language Behaviors Associated with Genuine and Fabricated Remorse*, 36 LAW & HUM. BEHAV. 51, 51–55 (2012); R. Barry Ruback & Charles H. Hopper, *Decision Making by Parole Interviewers: The Effect of Case and Interview Factors*, 10 LAW & HUM. BEHAV. 203, 203–04 (1986).

89. Ebony L. Ruhland et al., *The Continuing Leverage of Releasing Authorities: Findings from a National Survey*, ROBINA INST. OF CRIM. L. & CRIM JUST. 26 (2016), [https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/final\\_national\\_parole\\_survey\\_2017.pdf](https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/final_national_parole_survey_2017.pdf) [perma.cc/R2U5-3C2U].

90. Demeanor is generally thought to encompass "outward appearance or behavior, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions." *Demeanor*, BLACK'S LAW DICTIONARY (11th ed. 2019).

91. Ruhland et al., *supra* note 89, at 26. While important, it is worth nothing that these factors were generally ranked lower in importance by parole commissioners than factors like "severity of current offense," "prior criminal history," and "empirically based risk assessments." *Id.* at 27.

92. California case law recognizes and affirms that despite not appearing in parole regulations, "insight" falls within their scope, being related to criteria like "past and present attitude about the crime" and "remorse." *In re Shaputis*, 265 P.3d 253, 270 (Cal. 2011).

93. Interview with paroled California inmate in Stanford, Cal. (Feb. 16, 2017).

hearing room and then shift my position based on the in-person interview. Sometimes my shift was in the inmate's favor and sometimes not. An inmate who had what appeared to be slim chances of getting my vote for parole would overwhelm me with her insight and sincerity, so much so that I changed my mind. In other cases I found my in-person encounter with the inmate quite discouraging.<sup>94</sup>

Administrative reviews, another form of discretionary parole, provide less of an opportunity to assess remorse. In these reviews, inmates are evaluated on their paper files alone and paroled without an interview.<sup>95</sup> Inmates are allowed to submit a written statement,<sup>96</sup> which can still serve as a vehicle for assessing an offender's internal thoughts, but demeanor evidence is eliminated entirely. Indeed, administrative reviews, mainly for offenders convicted of less serious crimes, seem almost intentionally to relegate remorse and other judgments of an offender's character to the sidelines. For instance, California's regulations for implementing Proposition 57, which expands the use of administrative reviews to determinately-sentenced nonviolent offenders, differ substantially from the regulations in place for parole hearings for long-term offenders. Whereas the regulations for parole hearings in place for long-term offenders mention remorse as an explicit factor to consider, the regulations for determinately sentenced nonviolent offenders focus commissioners on objective factors like whether an inmate participated in rehabilitative programming.<sup>97</sup>

### *C. Psychological Evaluations, Risk Assessments, and Institutional Programming*

Even in states where a board does not personally meet with an offender or is more restricted in its decision-making, remorse is often assessed indirectly by considering psychological evaluations, risk assessments incorporating psychological evaluations, or in some cases, institutional program participation.

In the Robina Institute Survey, all forty responding states reported using a psychological report.<sup>98</sup> And while the process for conducting psychological evaluations varies by state, it commonly includes an interview with the inmate by a trained psychologist. The psychologist includes in her report an opinion on a matter relevant to the parole decision. In California, those reports are

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94. FREDERIC G. REAMER, ON THE PAROLE BOARD: REFLECTIONS ON CRIME, PUNISHMENT, REDEMPTION, AND JUSTICE 62 (2017).

95. *See, e.g.*, CAL. CODE REGS. tit. 15, § 2449.5 (2019).

96. *Id.*

97. *Compare* CAL. CODE REGS. tit. 15, § 2281 (2019), *with* CAL. CODE REGS. tit. 15, § 2449.5 (2019).

98. Ruhland et al., *supra* note 89, at 26.

based on a two to four-hour interview<sup>99</sup> in which a trained psychologist evaluates “factors impacting an inmate’s risk of violence, including but not limited to factors of suitability and unsuitability [such as “signs of remorse”] . . . .”<sup>100</sup>

Thirty-nine of the forty surveyed states reported using a risk assessment instrument.<sup>101</sup> Generally, risk assessment tools use a combination of static and dynamic factors but vary in the factors selected and the weight given to each factor. Remorse can appear in a number of ways. For instance, “lack of remorse” is one of twenty items on the assessment used to measure psychopathy, the PCL-R.<sup>102</sup> Likewise, the HCR-20, used in California, has a clinical item described as “insight” and a historical item of “psychopathy,” for which lack of remorse is an indicator.<sup>103</sup>

Finally, all forty of the reporting jurisdictions reported using institutional program participation.<sup>104</sup> How this criterion is evaluated affects whether remorse plays a role. For instance, some jurisdictions may heavily weigh participation in classes that develop or manifest remorse, such as victim offender dialogue, or substance abuse therapy if a crime was the result of substance issues. Commissioners may ask inmates about these programs to verify that the inmate took them seriously, testing them for basic knowledge they should have acquired through the program or asking more in depth questions about how lessons impacted them.

However, program participation can also be counted in a summary and indiscriminate manner.<sup>105</sup> Participation in a program that could foster remorse, like victim-offender dialogues, may be treated the same as a program to teach a skill like haircutting. Remorse does not play a large part in the analysis when this is the case.<sup>106</sup>

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99. Interview with Jasmine Tehrani, Senior Psychologist, California Board of Parole Hearing’s Forensic Assessment Division, in Stanford, Cal. (Feb. 23, 2017).

100. See CAL. CODE REGS. tit. 15, § 2240 (2019) (“Comprehensive Risk Assessments”). This evaluation is related to requirement that the board evaluate the “risk of danger” the inmate poses to society. § 2281(a).

101. Ruhland et al., *supra* note 89, at 26.

102. See, e.g., Cooke & Michie, *supra* note 44, at 7.

103. KEVIN S. DOUGLAS ET AL., RATING SHEET FOR VERSION 3 OF THE HCR-20 1 (2013).

104. Ruhland et al., *supra* note 89, at 26.

105. In Michigan, points are given for “adequate completion” of “recommended or approved programs” and points are deducted for “inadequate” completion, but programs aren’t broken down by category. MICH. DEP’T OF CORR., PAROLE GUIDELINES POLICY DIRECTIVE 8 (2008), [https://www.michigan.gov/documents/corrections/06\\_05\\_100\\_330065\\_7.pdf](https://www.michigan.gov/documents/corrections/06_05_100_330065_7.pdf) [perma.cc/PVH3-NK58]. Texas only weighs participation in educational or vocational programs in its risk assessment. RISK ITEM FACTORS SCALE 1, [http://www.paroletexas.com/articles/Risk\\_assesment\\_new.pdf](http://www.paroletexas.com/articles/Risk_assesment_new.pdf) [https://perma.cc/J6JN-JN26].

106. An additional complication with equating program participation with remorsefulness is that offerings in programs may vary across institutions in ways outside the control of the offender.

## IV. HOW MUCH DOES REMORSE MATTER IN PAROLE HEARINGS?

In *Riggins v. Nevada*,<sup>107</sup> the Supreme Court heard the case of David Riggins, a man convicted of murder and sentenced to death. His defense was insanity. The state administered him antipsychotic drugs involuntarily to prevent him from being declared incompetent. Throughout the course of the trial, Riggins was given high dosages of a medication known to produce side-effects of sedation, unresponsiveness, and decreased emotional range.<sup>108</sup>

In concurring that this involuntary medication violated due process, Justice Kennedy noted the effects of demeanor on punitive outcomes, writing,

As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion . . . . In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.<sup>109</sup>

In *Riggins* and other cases, the Court has accepted as fact *and* normatively affirmed the influence of demeanor on a jury's perception of a witness or defendant.<sup>110</sup> While the effect on parole release decisions specifically is less studied, experimental data on the effects of remorse on judgment generally as well as studies of its use in other legal decision-making contexts indicates that remorse can profoundly affect release decisions.

First, evidence in controlled experimental research in psychology suggests that remorse matters to how offenders' culpability and future dangerousness are perceived and what sentences are deemed appropriate. Frequently, studies randomly assign participants to view two versions of a scenario of wrongdoing, one in which the wrongdoer expresses remorse and one in which the wrongdoer does not. For instance, a 2000 study used a

107. 504 U.S. 127 (1992).

108. Brief for American Psychiatric Association as Amicus Curiae at 16, *Riggins v. Nevada*, 504 U.S. 127 (1992).

109. *Riggins*, 504 U.S. at 143–44 (Kennedy, J., concurring).

110. *See, e.g.*, *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (“The primary object of the [Confrontation Clause of the Constitution] was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”); *see also* *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (“The combined effect of these elements of confrontation – physical presence, oath, cross-examination, and observation of demeanor by the trier of fact – serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.”).

scenario where a spy was caught passing secret documents and another scenario in which a student cheated on an exam.<sup>111</sup> Remorse, or the lack thereof, was indicated by a narrative paragraph provided to study participants describing the transgressor's actions and describing their exhibition of remorse or lack thereof. In both, where the transgressor was described as remorseful, participants perceived the offenders as more moral and less likely to recidivate.<sup>112</sup>

Other studies have examined how remorse alters participants' recommended punishments for the offenders. For instance, a 1976 study presented a scenario where an intoxicated driver killed a pedestrian.<sup>113</sup> The experiment varied information about the defendant's upbringing and his expression of remorse. While the varied upbringing did not influence sentencing recommendations, the presence of remorse led to sentencing recommendations four to seven years shorter.<sup>114</sup> Another study presenting a similar scenario found more positive personal judgments for remorseful offenders but did not see an effect on sentence recommendations.<sup>115</sup>

A small-scale meta-analysis by Proeve examined sixteen studies of a similar experimental design supported two principles.<sup>116</sup> First, where an offender expressed remorse, participants had a more positive judgment about the offender and recommended less severe punishment.<sup>117</sup> Second, the effect of remorse on both personal judgments and recommended punishment is stronger for less serious offenses than for more serious offenses.<sup>118</sup> For instance, a 1992 study presented a rape scenario; while the expression of remorse did lead to a less negative assessment of the defendant, it did not induce participants to prescribe shorter sentences.<sup>119</sup>

Similar effects of defendant remorsefulness on real capital jury decisions have been captured via the Capital Jury Project, an ongoing multi-state research effort to systematically gather data from jurors who serve on death penalty cases.<sup>120</sup> After serving, randomly selected jurors are interviewed for

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111. Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22 BASIC & APPLIED SOC. PSYCHOL. 291, 293–97 (2000).

112. *Id.*

113. See Michael G. Rumsey, *Effects of Defendant Background and Remorse on Sentencing Judgments*, 6 J. APPLIED SOC. PSYCHOL. 64, 65 (1976).

114. *Id.* at 66–67.

115. Christy Taylor & Chris L. Kleinke, *Effects of Severity of Accident, History of Drunk Driving, Intent, and Remorse on Judgments of a Drunk Driver*, 22 J. APPLIED SOC. PSYCHOL. 1641, 1650 (1992).

116. See PROEVE & TUDOR, *supra* note 14, at 82–83.

117. *Id.*

118. *Id.*

119. Chris L. Kleinke, Robert Wallis & Kevin Stalder, *Evaluation of a Rapist as a Function of Expressed Intent and Remorse*, 132 J. SOC. PSYCHOL. 525, 529–33 (1992).

120. *What is the CJP?*, NE. UNIV., <https://web.archive.org/web/20071115212142/http://www.cjp.neu.edu/> (last visited Feb. 22, 2020).

three to four hours in order to understand the facts and attitudes that shape their decisions.<sup>121</sup> Multiple analyses of this data have revealed the importance of remorse in those decisions.

A 1998 study analyzing the South Carolina arm of the project found that, of the various factors jurors considered in their decision to impose the death penalty, failing to express remorse was the third most aggravating factor, following only prior history of violent crime and future dangerousness.<sup>122</sup> When a defendant failed to express remorse, nearly forty percent of jurors were at least slightly more likely to vote for the death penalty.<sup>123</sup> A study in the same year analyzing the California arm of the project found that almost seventy percent of jurors who voted for the death penalty indicated the lack of remorse as a reason for their vote, and two-thirds of jurors reported that their panels discussed remorse in deliberation a “fair amount” or a “great deal.”<sup>124</sup>

In federal sentencing, the importance of remorse is institutionalized in the “acceptance of responsibility” sentence reduction, which can remove years from a sentence.<sup>125</sup> In many cases, “acceptance of responsibility” equates to pleading guilty. However, the application notes within the guidelines suggest that “appropriate considerations” may include “voluntary payment of restitution prior to adjudication of guilt” and “post-offense rehabilitative efforts (e.g., counseling or drug treatment).”<sup>126</sup> Some courts assert that the “acceptance of responsibility” adjustment is not “automatically to be conferred upon every accused who pleads guilty” but rather “necessitates candor and authentic remorse.”<sup>127</sup>

State judges also wield discretionary power through which they can accord remorse weight as a mitigating factor at sentencing. Recent qualitative research by psychiatrist Rocksheng Zhong suggests its influence in a sentencing decision depends largely upon a judge’s personal views.<sup>128</sup> Zhong interviewed twenty-three Connecticut State Superior Court Criminal Docket judges.<sup>129</sup> He found judges’ views on the importance of remorse ran the full

121. *Id.*

122. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1561 (1998).

123. *Id.* at 1560–61. Within that group, twenty-one percent were “much more likely” to vote for death. *Id.*

124. See Sundby, *supra* note 8, at 1560.

125. See U.S. SENTENCING GUIDELINES MANUAL, § 3E1.1 (U.S. SENTENCING COMM’N 2016); see also, Michael O’Hear, *Remorse, Cooperation, and “Acceptance of Responsibility”: The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. L. REV. 1507, 1508 (1997).

126. See U.S. SENTENCING COMM’N, *supra* note 125, at § 3E1.1 n.1 (C), (G). Note how these volitional acts tend to show both acknowledgement of the crime, a sense of transformation, and attempts at atonement, elements of Proeve and Tudor’s definition, see *supra* pp. 4–5.

127. *United States v. Royer*, 895 F.2d 28, 30 (1st Cir. 1990).

128. Zhong, *supra* note 6, at 148.

129. *Id.* at 145.

spectrum, with some describing it as “one of the most important things” in sentencing, something they are “always looking for,” and a “very bedrock type of thing.”<sup>130</sup> However, others expressed views that they do not consider remorse “even, as a matter of principle, terribly important” and that it is just one factor among many to consider.<sup>131</sup>

The effect of remorse on parole decisions has not received the same amount of scholarly attention. However, some principles from the above research are applicable to the parole setting. The experiments showing remorse has a significant effect on perceptions of an offender’s character and their likelihood to recidivate is relevant to a hearing where a panel will decide whether to release an offender to the community based on their “future dangerousness.” Its mitigating influence on punishment may persuade commissioners to feel less punishment is justified for a remorseful offender. Moreover, as Zhong’s interviews suggest, judges hold a range of views as to the relevance and effect of remorse, the same would likely be expected in parole commissioners.

Various writings by parole commissioners have corroborated that remorse is a threshold factor; the lack of remorse disqualifies a candidate but the presence of remorse is far from a guarantee of release. In his memoir about his time on the Rhode Island parole board, Dr. Frederick Reamer described remorse as “essential” but not “a get out of jail free card.”<sup>132</sup> Likewise, David Tidmarsh, a former psychiatric member of the parole board in England and Wales, wrote that in his experience, boards were unlikely to parole an offender who had not accepted responsibility for his crime of conviction and “only slightly less reluctant” when an offender showed no signs of remorse.<sup>133</sup> Expressions of guilt are “important and probably necessary,” at least where there are no claims of innocence.<sup>134</sup>

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130. *Id.* at 148.

131. *Id.* Judges who did consider it also had differing beliefs on how to use it. Some would be moved extend a more lenient sentence if remorse was expressed but would *not* impose a harsher sentence if remorse was absent; others would extend a harsher sentence in the absence of remorse. *Id.* at 149–50.

132. REAMER, *supra* note 94, at 45–46.

133. David Tidmarsh, *Necessary but Not Sufficient: The Personal View of a Psychiatric Member of a Parole Board*, in REMORSE AND REPARATION 49, 54 (Murray Cox ed., 1999).

134. *Id.* at 58. There is one famous and oft-cited case where remorse was absent, but an offender was released, albeit only by the overturning of the parole board’s denial. *See, e.g.,* Joanne Martel, *Remorse and the Production of Truth*, 12 PUNISHMENT & SOC’Y 414, 418 (2010). This was a “mercy-killing” case in which a father killed his severely disabled daughter just before she was going to go through another painful surgery. *Id.* at 414. He maintained that his action was morally justified. *Id.* at 418. Claims of innocence are another story, as some states have regulations that prohibit the board from requiring an admission of guilt to any crime, such that some inmates who maintain their innocence are granted parole without expressing remorse. *See* CAL. CODE REGS. tit. 15, § 2236 (201

However, to date there has been little quantitative analysis of this principle. An analysis of transcripts from 2007 to 2010 parole hearings for inmates sentenced to life in California belongs to this limited body of research.<sup>135</sup> The analysis coded the transcripts for multiple variables to see which had a significant effect on release decisions. The expression of remorse did not have a significant effect, which as the authors of the study point out, can be read either to mean that remorse was not heavily weighted by parole commissioners or that it was evaluated by nonverbal cues, such as demeanor, which could not be gleaned from transcripts.<sup>136</sup> The analysis did show that psychological evaluation had a significant impact.<sup>137</sup> An inmate who received “low risk” scores across the board was more than twice as likely to receive a grant of parole than an inmate who received at least one score that was not “low risk.”<sup>138</sup> At least some of the assessments used by forensic psychologists for the population in this study incorporated the evaluation of remorse as at least one factor.<sup>139</sup>

## V. JUDGING REMORSE

While most of the theoretical justifications for punishment are amenable to considering remorse, the actual practice of evaluating remorse raises more substantial concerns. The crux of the matter is: How does one begin to assess objectively the “heart and mind” of another?<sup>140</sup> By far, the greatest objection to evaluating remorse at parole hearings is that it may be impossible to examine accurately or fairly. Part A of this section discusses the difficulty of agreeing to a common perception of remorse and Part B discusses the various impermissible factors that can, and likely do, affect the assessment of remorse.

### A. Accuracy: What Does Genuine Remorse Look Like?

The difficulty of assessing remorse begins with identifying it. There are no objective, external markers of remorse, such as facial expressions or

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135. Kathryn M. Young, Debbie A. Mukamal & Thomas Favre-Bulle, *Predicting Parole Grants: An Analysis of Suitability Hearings for California’s Lifer Inmates*, 28 FED. SENT’G REP. 268, 268 (2016).

136. *Id.* at 275. Research has shown that nonverbal indicators of remorse are more important than verbal indicators to the perception of remorse. See Zhong, *supra* note 6, at 168.

137. Young, Mukamal, & Favre-Bulle, *supra* note 135, at 274.

138. *Id.*

139. *Id.* at 269. The assessments used were the HCR-20, Clinician Generic Risk assessment, Axis-V Global Assessment of Function, and the PCL-R. The HCR-20 and PCL-R are discussed *supra* Part III.C.

140. *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring) (“[T]he sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness.”).

gestures.<sup>141</sup> Even psychologists who believe that there are universal ways of expressing emotions across cultures<sup>142</sup> cannot assign a “face” to remorse, as they assert they can for more basic emotions such as happiness, sadness, fear, or disgust.<sup>143</sup>

Given that fact, and with no additional guidance from statutes and regulations, legal decision-makers unsurprisingly hold different and sometimes contradictory ideas of what remorse looks like. In Zhong’s interviews, for example, state judges revealed polar opposite interpretations of the exact same indicators.<sup>144</sup> Some judges felt silence reflected shyness or mental illness; others felt it indicated remorselessness and detachment.<sup>145</sup> Some felt eye contact was respectful; others found it disrespectful.<sup>146</sup> Some felt hanging one’s head indicated remorse; others felt it indicated remorselessness.<sup>147</sup> Finally, some judges believed genuine remorse would have been expressed immediately after the crime, before conviction.<sup>148</sup> Others believed people could genuinely change and develop remorse years after the offense.<sup>149</sup>

Complicating the matter further is that even behavior that may be considered an obvious tell of remorselessness like making jokes, laughing, or impassivity, can have nuanced explanations having little to do with an offender’s actual emotional state.<sup>150</sup> A statement or behavior that appears remorseless may be a defense mechanism, an act of denial, a cultural attitude, a response to an intimidating environment, or an unrelated act of defiance toward the legal system.<sup>151</sup> This is why Proeve and Tudor suggest that remorse can best be identified through consistent presence of indicia “over time and across situations.”<sup>152</sup> A psychologist making a diagnosis likewise examines a cluster of behaviors before making a judgment; a single statement

141. See Bandes, *supra* note 20, at 17.

142. This is controversial within the field of affective psychology. Compare Paul Ekman, *An Argument for Basic Emotions*, 6 COGNITION & EMOTION 169, 169 (1992) (contending that emotions are a product of our evolution), with Raphael E. Jack et al., *Facial Expressions of Emotion Are Not Culturally Universal*, 109 PSYCHOL. & COGNITIVE SCIS. 7241, 7241 (2012) (refuting common cultural expressions of emotion). Others maintain a more neutral position, that some emotional expression is innate and some is learned. See, e.g., Hilary Anger Elfenbein & Nalini Ambady, *On the Universality and Cultural Specificity of Emotional Recognition: A Meta-Analysis*, 128 PSYCHOL. BULL. 203, 203 (2002).

143. See Ekman, *supra* note 142 at 191.

144. Zhong, *supra* note 6, at 158.

145. *Id.*

146. *Id.* at 159.

147. *Id.* at 158–59.

148. *Id.* at 159.

149. *Id.* at 160.

150. See Duncan, *supra* note 5, at 1469.

151. See, e.g., *id.* at 1474; Ward, *supra* note 16 at 151; Zhong, *supra* note 6, at 140–41 (referring to the work of Duncan and Ward).

152. PROEVE & TUDOR, *supra* note 14, at 49.

or behavior is not dispositive of character.<sup>153</sup> The idea that an offender is afforded a full opportunity to demonstrate his remorse during an interview that could be as short as fifteen minutes and occurs in an intimidating environment supports the view that the evaluation of remorse “is more art than science.”<sup>154</sup>

A commonly proposed solution to this problem of pinpointing remorse is that one can assess credibility or truthfulness rather than the emotional expression itself (*i.e.*, “I can’t tell if he’s remorseful, but I can tell if he’s lying about being remorseful.”). However, despite being ingrained in our legal system, substantial empirical research casts doubt that ordinary people are skilled in using demeanor to evaluate credibility.<sup>155</sup>

This has been demonstrated in the criminal justice setting, not just for jurors but also for sophisticated repeat-players like parole commissioners. A famous 1986 study by researchers Ruback and Hopper compared parole commissioner judgments regarding an offender’s potential for post-release success both before and after an in-person interview with the offender.<sup>156</sup> Before the hearing, commissioners made a decision based on offenders’ files.<sup>157</sup> After the hearing, they made a decision with the additional evidence they gleaned from the parole interview, including the offender’s attitude and degree of remorse.<sup>158</sup> The results of the study indicated that after the in-person interview, commissioners made *less* accurate predictions of post-release success than they had based on the files alone.<sup>159</sup> More shocking yet, a 2009 study of Canadian offenders showed that high psychopathy-offenders, as identified via the PCL-R scores in their prison files, were 2.5 times more likely to be granted conditional release than non-psychopathic offenders despite the fact that the commissioners had access to these scores.<sup>160</sup> One explanation for this result, as well as the Ruback and Hopper study, is that decision-makers

153. Duncan, *supra* note 5, at 1492.

154. Melwed, *supra* note 85, at 505–06 (calling parole hearings “wrought with subjectivity” and contending that unclear guidance for parole boards and lack of judicial oversight exacerbate the problem).

155. See, e.g., Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Credibility*, 72 NEB. L. REV. 1157, 1159 (1993) (“The studies establish that typical subjects are unable to use the ‘manner and conduct’ of a speaker to successfully detect deceptive information on any reliable basis.”); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991) (“According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility.”).

156. Ruback & Hopper, *supra* note 88, at 203.

157. *Id.* at 203–07.

158. *Id.*

159. *Id.* at 211.

160. Stephen Porter, Leanne ten Brinke, & Kevin Wilson, *Crime Profiles and Conditional Release Performance of Psychopathic and Non-Psychopathic Sexual Offenders*, 14 LEGAL & CRIMINOLOGICAL PSYCHOL. 109, 116 (2009).

were duped during the interview by the demeanor and verbal expressions of the offender.

The research that does exist concerning the external manifestations of deception indicates that common beliefs about a liar's tells are misguided. For instance, there is no empirical support that gaze aversion is an indicator of deceit.<sup>161</sup> In fact, because they are aware of its folkloric connection to truth-telling, liars may make greater eye contact.<sup>162</sup>

The cues that do indicate deceit are more subtle and more difficult to assess in the moment. On the verbal side, liars generally speak slower, provide less detail, include more verbal hesitations like “um” and “er,” and use fewer first-person pronouns.<sup>163</sup> In terms of demeanor, because lying requires cognitive efforts, emotional leakage of one's genuine emotions may involuntarily occur. A recent study focused on this issue in the expression of remorse specifically.<sup>164</sup> The researchers asked participants to recall an event for which they felt genuine remorse and “feign” remorse for an event for which they did not feel remorse.<sup>165</sup> They filmed the narratives and coded each frame (1/30<sup>th</sup> of a second) for universal emotional expressions.<sup>166</sup> The results showed that deceivers engaged in more emotionally turbulent displays of emotion, swinging from deliberate and false expressions to involuntary leakage of genuine emotion with fewer neutral expressions.<sup>167</sup>

As promising as this research may be, it is currently of little value to parole commissioners who must determine in the moment whether the person before them presents an authentic or deceptive narrative of guilt and personal transformation.

### *B. Fairness: Impermissible Factors Influencing the Perception of Remorse*

Beyond accuracy, isolating remorse from other non-culpable identities and characteristics of an offender is an additional problem. A parole commissioner viewing an offender sees not just contrition or the lack thereof; the commissioner views a person with a race, a gender, a cultural background, a socioeconomic class, and a mental status, all factors that may either be apparent or become apparent during an interview and may affect the commissioner's perception of remorse.

While occasionally extant, explicit bias is not the primary concern. Even thoughtful and well-intentioned people are prone to implicit bias and selective

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161. ten Brinke et al., *supra* note 88, at 53.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 53–54.

166. Here, happiness, sadness, fear, disgust, anger, surprise, and contempt. *Id.* For those who do believe there are universal innate emotional expressions, these are those most frequently cited. *Id.*

167. *Id.* at 57–58.

empathy, two sides of the same coin.<sup>168</sup> Prejudicial associations across a number of characteristics develop over time and may particularly work injustice into cases where evidence is ambiguous.<sup>169</sup>

### 1. Race

Race is one of the most salient characteristics to examine for implicit bias and selective empathy, and evidence suggests that evaluation of remorse is not safe from racially influenced judgments. One well-studied prejudicial association is between “blackness” and “criminality.”<sup>170</sup> On the other hand, empathy may flow more easily to those who are like us.<sup>171</sup> Neural studies have shown that people have stronger responses to pain of same-race individuals than to the pain of people from different races.<sup>172</sup> For those we perceive as similar, we are also more prone to use our own feelings as a template for how we imagine they must feel, whereas for those who are dissimilar from us, we are more likely to resort to stereotypes to infer internal states.<sup>173</sup> A study found that minority defendants were less likely to receive the federal sentence reduction for “acceptance of responsibility” even after controlling for offender and offense characteristics.<sup>174</sup> Similarly, a mock experiment presenting capital penalty trials, with the race of the defendant manipulated, showed participants were less willing to allow identical

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168. Susan Bandes, *Remorse, Demeanor, and the Consequences of Misinterpretation*, 3 J. L. RELIGION & ST. 170, 177–78 (2014).

169. For instance, white research participants evaluating job candidates for a position based on ostensible interview transcripts “did not discriminate against black relative to white candidates when the candidates’ qualifications were clearly strong or weak, but they did discriminate when the appropriate decision was more ambiguous.” John F. Davidio & Samuel L. Gaertner, *Aversive Racism and Selective Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 315 (2000).

170. In a typical study exploring this association, research participants primed with black faces more readily detect crime-relevant objects than those primed with white faces. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 880 (2004).

171. Bandes, *supra* note 168, at 177. For an example of how empathic connection can prejudicially advantage some offenders, see Michael Winerip et al., *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. TIMES (Dec. 4, 2016), [https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html?\\_r=0](https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html?_r=0) [perma.cc/3PTJ-SPLV] (noting that a New York Times analysis found fewer than one in six black or Hispanic men were released at his first hearing compared with one in four white men and excerpting a portion of a transcript where a white commissioner spent time during the parole hearing of a white, well-educated offender jovially reminiscing about their respective experiences of spending summers in the Adirondacks).

172. Sheri Lynn Johnson et al., *When Empathy Bites Back: Cautionary Tales from Neuroscience for Capital Sentencing*, 85 FORDHAM L. REV. 573, 584 (2016).

173. Bandes, *supra* note 168, at 177–78.

174. Everett & Nienstedt, *supra* note 7, at 119.

evidence to weigh as a mitigating factor when it was introduced for black defendants than when it was introduced for white defendants.<sup>175</sup>

This effect may be exacerbated when a perceiver not only has implicit bias against the offender but a heightened ability to empathize with the victim. A review of capital jury decisions from 1976 to 1980 found black defendants were four to five times more likely to be put to death for killing a white victim than for killing a black victim.<sup>176</sup> A recent study had self-identified white and Asian participants rate pictures of black men for perceived stereotypical black features.<sup>177</sup> Unknown to the raters, the pictures were of black defendants who had committed death-eligible offenses and had reached the end of their penalty phase between 1979 and 1990.<sup>178</sup> The study found that when the murder victim had been white, the perceived stereotypicality of black features was predictive: defendants with perceived stereotypically black-looking features had been sentenced to death at over twice the rate than lighter skinned African Americans.<sup>179</sup>

## 2. Culture

Identifications of remorse are also complicated by cultural differences, broadly defined. Multiple scholars argue that, for instance, apology is more frequent in Japanese culture.<sup>180</sup> They suggest that in Japan, people are more likely to apologize as part of the process to resolve a conflict, even when they are not at fault.<sup>181</sup> One study analyzing the final statements of those put to death in the United States found that Southerners were more likely to include apologies in their final statements than non-Southerners.<sup>182</sup> However, they were not more likely to express remorse, which was coded separately as a combination of taking responsibility, asking for forgiveness, expressing personal regret, and earnestness.<sup>183</sup> The author concluded that belonging to a

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175. The participants were also significantly more likely to sentence the black defendant to death, especially in the black defendant/white victim condition. Mona Lynch & Craig Haney, *Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 583 (2011).

176. See, e.g., Samuel R. Gross & Robert Mauro, *An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 96 (1984) (using data from eight states from 1976-1980).

177. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 385 (2006).

178. *Id.* at 384.

179. *Id.*

180. See, e.g., Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 850-51 (2002).

181. *Id.*

182. Judy Eaton, *Honor on Death Row: Apology, Remorse, and the Culture of Honor in the U.S. South*, Apr.-June 2014 SAGE OPEN 1, 1.

183. *Id.* at 4-5.

“culture of honor” like the South made offenders more likely to apologize out of a sense of politeness or reputational protection.<sup>184</sup>

On the other hand, membership in a particular ethnic culture or subculture may make one less prone to admit guilt. Generally, belonging to a minority ethnic or racial group may evoke certain emotional responses before authorities representing the majority that seem inconsistent with remorse. For instance, Marquette University Law School Professor Michael O’Hear argues that the “acceptance of responsibility” federal sentencing reduction has been consistently denied to those demonstrating “concealment, dissimulation, and noncooperation” but that these behaviors are those which have been identified in ethnographic studies to be common defensive strategies inculcated in members of a subordinated class or ethnic group.<sup>185</sup> Teenagers may similarly put up a defensive front and try to appear “tough,” “alien,” and “mean” to be accepted by peers, even if this does not express their genuine emotions.<sup>186</sup> Youth culture can be at odds with or even categorically opposed to expressions of remorse.<sup>187</sup>

### 3. Gender

Gender is another factor that can shape expectations about what remorse looks like. Outward demonstration is crucial to a successful display of remorse. As women are generally more expected and more likely to emote, they may be more likely to be perceived as remorseful.<sup>188</sup> Judges have suggested that women may receive more lenient sentences because of their expression of remorse.<sup>189</sup> In the experimental context, mock jurors perceiving guilt in a scenario of medical malpractice found female doctors expressing remorse as less culpable than male doctors expressing remorse.<sup>190</sup> On the flip side, female doctors failing to express remorse were found more culpable than male doctors failing to express remorse.<sup>191</sup> This data suggests women may have a greater advantage in successfully demonstrating remorse than men but receive a greater penalty for not emoting.

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184. *Id.* at 7–8.

185. O’Hear, *supra* note 125, at 1551–52.

186. Duncan, *supra* note 5, at 1500.

187. *Id.*

188. Desiree Adams Griffin, *Exploring Remorse Behaviors: Verbal and Nonverbal Indicators of Authentic, Exaggerated, and Feigned Remorse* 16–18 (2011) (unpublished PhD dissertation, University of Alabama), [http://libcontent.lib.ua.edu/content/u0015/0000001/0000654/u0015\\_0000001\\_0000654.pdf](http://libcontent.lib.ua.edu/content/u0015/0000001/0000654/u0015_0000001_0000654.pdf) [perma.cc/DS2Q-CRKG].

189. *Id.*

190. *Id.*

191. *Id.*

## 4. Class

Even beyond engaging in certain defensive mannerisms that may be inculcated in a subordinated class, a lower class individual may face additional difficulties in demonstrating remorse to a parole board primarily consisting of educated individuals.<sup>192</sup> While a more educated offender may be able to explain his emotional transformation more articulately or with greater attention to story craft, a person who is illiterate or did not graduate from middle school will likely have a harder time artfully expressing his remorse, even though his actual experience of remorse is the same. Furthermore, economic class can also determine whether an offender is able to afford a good lawyer who can help the offender prepare for this evaluation.<sup>193</sup>

The class background of the parole commissioners themselves may also affect which narratives they find compelling. A story of remorse from an educated professional, fallen from grace, may resonate more with a commissioner than the more common tale of a former gang member and drug dealer.

Additionally, psychological research has shown that individuals from lower-class backgrounds are more likely to have extensive, interdependent relationships and to experience life as something shaped extensively by forces outside their control, whereas upper class individuals are more likely to have an ethic of independence and a sense that life is shaped by personal disposition.<sup>194</sup> There is currently a lack of empirical evidence concerning the relation between such experiences and a divergent assessment of remorse. However, consider the following scenario:

An offender describes how he knew his friends were leading him down a bad path but he continued to engage in increasingly violent and ultimately lethal behavior in order to impress them and feel a sense of control.<sup>195</sup>

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192. At present, almost ninety percent of parole commissioners have achieved a bachelor's degree or higher and almost fifty percent hold advanced degrees. Ruhland et al., *supra* note 89, at 20–21.

193. O'Hear, *supra* note 125, at 1549.

194. See e.g., Michael W. Kraus et al., *Social Class, Sense of Control, and Social Explanation*, 97 J. PERSONALITY & SOC. PSYCHOL. 992, 1002 (2009) (finding that lower class individuals are more likely to experience social and personal outcomes as contextualized by their environment and to view the world as less controllable); see also Michael W. Kraus et al., *Social Class as Culture: The Convergence of Resources and Rank in the Social Realm*, 20 CURRENT DIRECTIONS IN PSYCHOL. SCI. 246, 248 (2011).

195. Interview with Sal Lempert, Social Psychology PhD student at Stanford University, in Stanford, Cal. (Apr. 8, 2017). This scenario is an elaboration of one Lempert proposed.

Someone from an upper class background may be more likely to see this explanation as a prototypical neutralization technique, an attempt by the offender to distance himself from the crime and a failure to accept responsibility or develop insight. Someone from a lower class background, however, may be more likely to view this explanation as a nuanced demonstration of insight, in that it incorporates an understanding of the forces within and outside the offender's control. In this scenario, it is hard to say that one perception is wrong and one is right; it is enough to say that an offender's release may depend on the commissioner's background and not an objective assessment of his "heart and mind."

## 5. Mental Impairment

Zhong's interviews with sentencing judges indicate that legal decision-makers are often unfamiliar with psychiatric disorders and their manifestations or the effects of medication on outward demeanor.<sup>196</sup> Most commonly, these judges felt mental illness neutralizes remorse; neither its presence nor its absence affects their judgment.<sup>197</sup> While this attitude may prevent mental impairment from acting as an aggravating factor, it does not help the truly remorseful offender who has a mental illness or impairment that prevents him or her from understanding and performing the behaviors commonly associated with remorse.

Judges in Zhong's study also voiced widely divergent opinions about how much value was added by psychiatrists' input on remorse. Some were inclined to be deferential to a psychiatric report; others felt it had no bearing, that a professional degree was not required to assess such a basic thing, or that the short duration of a psychiatric evaluation may make it an inadequate basis for an assessment.<sup>198</sup> In the parole context, the education of commissioners on mental impairments or their deference to psychological evaluations is also likely to vary.<sup>199</sup>

## VI. CONCLUSION AND RECOMMENDATIONS

In theory, evaluating remorse in criminal proceedings aligns with any justification of punishment that takes the offender, and not just the offense,

196. Zhong, *supra* note 6, at 160; *see also* O'Hear, *supra* note 125, at 1549–50.

197. Zhong, *supra* note 6, at 160–61.

198. *Id.* at 161–63.

199. A 2010 report by the California Inspector General found that commissioners have varying (but improving) levels of confidence in the psychological evaluations and attorneys frequently have very little confidence in these evaluations. OFFICE OF THE INSPECTOR GEN., SPECIAL REPORT, THE BOARD OF PAROLE HEARINGS: PSYCHOLOGICAL EVALUATIONS AND MANDATORY TRAINING REQUIREMENTS (July 2010), <https://www.oig.ca.gov/wp-content/uploads/2019/05/Special-Report-on-the-Board-of-Parole-Hearings-Psychological-Evaluations-and-Mandatory-Training-Requirements.pdf> [perma.cc/WS5U-BY5J].

into account. Moreover, as demonstrated by the pervasiveness of remorse in popular cultures throughout the world, remorse plays an important role in shaping norms. Remorse is a ritual by which a community reintegrates those who affirm its values and condemns those who cannot; it is the perceived demarcation between man and monster. Regardless of whether its potential link to decreased recidivism is ever proven, it is unlikely that legal decision-makers will cease to care about this profoundly human emotion.

Perhaps at no point is the evaluation of remorse more important than when a parole board is deciding whether to release an inmate back to the community. Parole commissioners have a difficult job; they must examine an inmate's background and character to decide if he or she is likely to obey the law or will instead pose a danger to the public. Being human and judging humans, some of their decisions will turn out to be wrong. The legal and psychological research presented in this Article suggests that the evaluation of remorse is especially prone to error.

At present, more can be done to standardize expectations of remorse or mitigate bias in evaluations. Viewing the evidence presented in this Article, a state parole board wishing to make improvements has two rational options: eliminate remorse as a consideration in parole hearings or assess it better. Recommendations for both possibilities are presented below.

#### A. Eliminate Remorse

An intentional and explicit strategy is necessary to reduce the weight that remorse is given in parole hearings. Simply failing to mention remorse in a list of statutory or regulatory factors will not remove it from consideration. As discussed above, many of the criteria that seemingly do not incorporate remorse, like "future dangerousness" or "the best interest of society," can be easily interpreted to do so.<sup>200</sup> With such broad criteria, differences in the personal philosophies of commissioners will continue to produce inconsistent results. For that reason, an explicit admonition is necessary.

Best practices from the realm of jury instructions can inform this admonition. A common assumption is that jury instructions to disregard evidence don't work and in fact may highlight and exacerbate the effect of that evidence in jurors' decision-making.<sup>201</sup> However, recent scholarship suggests that while imperfect, evidentiary instructions can work to reduce the effect of inadmissible evidence in juror deliberation under certain conditions.<sup>202</sup> Those conditions include when juries are given a cogent explanation of why they should disregard the evidence, when they are admonished at the end of the trial proceedings, and when they must deliberate before rendering a verdict.<sup>203</sup>

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200. *See supra* Part IV.

201. David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 412 (2013).

202. *Id.* at 439.

203. *Id.*

Extended to the parole context, parole commissioners could be guided in their regulations to read, at the end of each hearing or review, an admonition. The admonition should not be: “Don’t consider remorse,” as this unexplained statement is likely to be ineffective and only prime a commissioner to consider it. More promising would be a statement along the lines of the following:

Remorse is not to be considered because of its proven inability to be assessed accurately or fairly. Psychological research has revealed that no behavior can be reliably assessed as ‘remorseful’ without technological equipment. On the contrary, many behaviors that are typically associated with remorse by legal decision-makers have been proven to have no correlation to its authentic expression.

That admonition can be strengthened by requiring parole boards to articulate their deliberations and reasons for denial on the record *and* by allowing limited judicial or some higher-level administrative review of parole decisions. If there is a clear indication<sup>204</sup> that parole commissioners based their decision entirely on the inmate’s appearance of inadequate remorse, courts could overturn those denials.

Eliminating the in-person inmate interview would likely be one of the most effective ways to reduce evaluation of remorse. Such a step is not beyond the pale, considering that there is at least some evidence supporting the conclusion that paper assessments lead to more accurate predictions of inmate risk. By not having an inmate appear before the board, parole commissioners’ confidence in their ability to assess the character of the inmate would naturally falter, and they would be likely to base decisions on criteria that can be more objectively assessed. As for the “inmate statements” included in administrative reviews in California, the role of remorse could be reduced by instructing inmates to limit their statements to making corrections or to contesting conclusions in their file.

Regarding other factors considered by the board that may involve remorse, it may be too dramatic a step to exclude any psychological reports. After all, the risk of inaccurate assessment is reduced in these reports, at least in systems where correctional psychologists are well-trained and given adequate time to complete evaluations. However, a state committed to eliminating remorse as a factor should investigate whether psychologists are truly consistent in their assessment by researching reliability among raters on items related to remorse.<sup>205</sup> If there is a cause for concern, they should eliminate, redesign, or reduce the weight given to psychological reports.

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204. The standard of proof could vary based on how rigorously the court wanted to police parole decision-making.

205. See Stephen J. Morse, *Commentary: Reflections on Remorse*, 42 J. AM. ACAD. PSYCH. L. 49, 54 (2014) (noting a recent field trial, with Swedish prisoners, in which the overall reliability among raters was found to be moderately good but the reliability of the “lack of remorse” item was relatively low at 0.51, with a large confidence interval).

Finally, risk assessments could be designed only to use dynamic factors that don't involve a character judgment – factors like age and the number of institutional infractions. Institutional programming could still be considered but only in the broad sense of whether an inmate participated in any programs, without discussing with the inmate the nature and impact of those programs.

### *B. Assess Remorse Better*

States may also seek to develop practices that allow the assessment of remorse but aim to reduce inconsistent conceptualization and the effect of implicit bias among commissioners.

The first step in addressing the lack of a common understanding of what constitutes remorse would be to have parole boards articulate an agreed definition in their guidelines. Ideally, the definition would be specific and nuanced, along the lines of that provided by Proeve and Tudor.<sup>206</sup> Parole boards should then include in their new member trainings discussions of that definition. New and returning commissioners should be encouraged to come together and unpack the definition, sharing their own questions, thoughts, and experiences in order to show the complexity of the inquiry.

Parole commissioners should also be alerted to misconceptions about remorse and common pitfalls in its evaluation. For instance, they should be informed that there is, as of yet, no firm link between an expression of remorse and decreased recidivism. In their training, commissioners should also be warned of how common it is for legal decision-makers to feel confident in their assessments of remorse, even though research does not support this confidence and instead has shown that legal decision-makers will at times interpret identical behaviors to reach polar opposite conclusions about an offender's remorsefulness.<sup>207</sup>

Finally, parole commissioners should understand the concepts of implicit bias and empathic divides, even if they are confident that their judgment is unaffected by these psychological phenomena. Most commissioners, like most people, do not consider themselves biased and do not consciously make judgments based on in-group/out-group identities. However, implicit bias works in a much more subtle, unconscious, and involuntary way than overt bias. By acknowledging the ubiquity of implicit bias and focusing on strategies for mitigation, commissioners can be alerted to the influence of factors like race, class, and gender on judgment, without feeling their own character is under attack. Commissioners should be asked to acknowledge group differences and to put effort into being aware of the effects these differences might have on their thinking.<sup>208</sup>

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206. *See supra* Part I.

207. Zhong, *supra* note 6, at 158.

208. HELPING COURTS ADDRESS IMPLICIT BIAS, NAT'L CTR. FOR STATE COURTS 5 (2012). Currently, this recommendation does not entail use of the Implicit Association Test ("IAT"), a measure of racial implicit bias that some researchers have claimed can be a predictor of discriminatory behavior. Recent metaanalyses have cast considerable

Additionally, certain conditions of decision-making may increase implicit bias – namely, distraction, pressure, ambiguity, low-cognitive processing, and a lack of feedback. Parole boards can focus on creating conditions that reduce bias by addressing those negative factors. To reduce distraction and pressure, parole boards can allot sufficient time for each hearing and responsibly manage commissioner workload. States can assist their parole boards in this process by providing a budget for more commissioner positions and administrative assistant positions. Ambiguity and low-cognitive processing can be addressed by having a clear definition of remorse as well as the other criteria articulated in guidelines. The board can consider a protocol of having commissioners articulate their rationale for their decision in writing before announcing it publicly.<sup>209</sup> This would allow commissioners to review their own reasoning before committing to it.

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In sum, as political and scholarly attention returns to discretionary parole, legal and psychological researchers should critically investigate the criteria parole board members use to base their decisions. Doing so will help parole commissioners feel they have adequate guidance to make difficult decisions and, ideally, produce more consistent and accurate results. Parole release decisions have momentous consequences; at stake are the inmate's liberty, the safety of the community, and at times, even a community's values. Legal scholars and psychological experts should work together to make this process as fair and principled as possible, whether it includes evaluation of inmate remorse or not.

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doubt on whether IAT scores are reliable predictors of racial or ethnic discrimination. See, e.g., Frederick L. Oswald et al., *Using the IAT to Predict Ethnic and Racial Discrimination: Small Effect Sizes of Unknown Societal Significance*, 108 J. PERSONALITY & SOC. PSYCHOL. 562, 569 (2015). Rather, for the moment, it would be beneficial for parole boards simply to provide structured opportunities for commissioners to have thoughtful discussion about implicit bias as to race, class, gender, and other factors, as a part of their orientation or at separate trainings.

209. *Id.* (recommending this process for judges and jurors).