

# The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings

*Daniel S. Medwed\**

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\* Associate Professor of Law, University of Utah-S.J. Quinney College of Law; J.D., Harvard Law School, 1995; B.A., Yale College, 1991. I would like to thank Robert Adler, Jensie Anderson, Adele Bernhard, Paul Cassell, Leslie Francis, Sharissa Jones, Erik Luna, Alice Ristroph, George Thomas, and Manuel Utset for their thoughtful comments on previous drafts of this piece. Moreover, I am grateful for the financial support provided by the S.J. Quinney College of Law Summer Stipend Program and the outstanding research assistance conducted by Utah law students David Everitt, Tara Harrison, Jordinn Long, Helene Simvoulakis, and Tyler Williams. Finally, I am indebted to Curt Garner, a member of the Utah Board of Pardons and Parole, for facilitating my access to the Board’s records and for answering all of my many (and varied) questions with grace and aplomb.

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## INTRODUCTION

The granting of parole in the criminal justice system is often viewed as an act of grace: the dispensation of mercy by the government to an individual prisoner deemed worthy of conditional release prior to the expiration of his sentence.<sup>1</sup> Yet the criteria upon which state parole boards base these acts of grace remain something of a mystery.<sup>2</sup> Denials of parole are largely unreviewable,<sup>3</sup> and courts have held that due process imposes only a minimal burden upon parole boards to reveal the rationales for their decisions.<sup>4</sup> Nevertheless, surveying state parole release decisions demonstrates that a prisoner's willingness to "own up" to his misdeeds—to acknowledge culpability and express remorse for the crime for which he is currently incarcerated—is a vital part of the parole decision-making calculus. That is, admitting guilt increases the likelihood of a favorable parole outcome for an inmate whereas proclaiming innocence serves to diminish the chance for release.<sup>5</sup> The main objective of this Article is to consider whether this practice is wise. Should a prisoner's assertions of innocence be held against him in the parole process?

On the one hand, several arguments suggest that parole boards are correct in disregarding an aspiring parolee's claim of innocence and, in fact, holding it against him. The primary argument in support of the current practice relates to the issue of institutional competence. Factual questions of

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1. See, e.g., Mary West-Smith et al., *Denial of Parole: An Inmate Perspective*, FED. PROBATION, Dec. 2000, at 3 ("Parole is legally considered a privilege rather than a right; therefore, the decision to grant or deny it is 'almost unreviewable.'"). For an overview of parole and how it differs from probation, see generally NEIL P. COHEN, *THE LAW OF PROBATION AND PAROLE* § 4:1 (2d ed. 1999).

2. See, e.g., Ronald Burns et al., *Perspectives on Parole: The Board Members' Viewpoint*, FED. PROBATION, June 1999, at 16–17 ("Despite both the pivotal role and dynamic nature of parole in the criminal justice system, few research efforts have been directed at understanding parole board decision-making processes.").

3. See, e.g., *Scarpa v. U.S. Bd. of Parole*, 477 F.2d 278, 280–81 (5th Cir. 1973) ("The courts are without power to grant a parole or to determine judicially eligibility for parole. . . . Furthermore, it is not the function of the courts to review the discretion of the Board in the denial of the application for parole or to review the credibility of reports and information received by the Board in making its determination."); see also William J. Genego et al., *Parole Release Decision-making and the Sentencing Process*, 84 YALE L.J. 810, 842 (1975).

4. See, e.g., *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 14–16 (1979) (holding that due process merely requires notice regarding a parole hearing, a hearing at which the inmate may present his case, and if parole is denied, a description of the reasons for the rejection).

5. See *infra* notes 91–93 and accompanying text; see also Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 282 ("It is not uncommon for parole boards to require an admission of guilt before considering an inmate for release."); Bryan H. Ward, *A Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea*, 68 MO. L. REV. 913, 932 (2003) (noting that many states "include consideration of the inmate's remorse, or lack thereof, for the offense committed" in their parole decisions).

guilt or innocence ordinarily stand outside the scope of parole commissioners' delegated duties and, rather, fall within the province of juries and judges.<sup>6</sup> Moreover, without the resources to conduct extensive field investigations, parole boards simply lack the capacity to verify a prisoner's claim of innocence. Thus, parole boards normally presume the guilt of the inmates seeking release before them and leave it to the post-conviction litigation process to conclude otherwise.<sup>7</sup> The second major justification for the existing norm lies in the parole board's understandable desire to minimize the risk of discharging individuals who are likely to re-offend.<sup>8</sup> Prevailing psychological doctrine maintains that taking responsibility for one's actions is crucial to mental health.<sup>9</sup> According to

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6. See, e.g., James Kimberly, *Parole Board Often Deaf to Claims of Innocence*, HOUS. CHRON., Feb. 6, 2001, at A5 (“The argument about guilt or innocence should rest with the courts.” (quoting the chairman of the Texas Board of Pardons and Parole)). British corrections authorities, in fact, are extremely explicit about this. A booklet published by the Prison Reform Trust and HM Prison Service, which is given to prisoners describing the parole process, contains a series of questions and answers. The response to the hypothetical prisoner question “What if I say I am innocent?” is illuminating: “Prison staff must accept the verdict of the court, even if you say that you did not commit the offence for which you are in prison.” See Michael Naughton, *Why the Failure of the Prison Service and the Parole Board to Acknowledge Wrongful Imprisonment is Untenable*, 44 HOW. J. CRIM. JUST. 1, 2 (2005).

7. See, e.g., Stuart G. Friedman, *The Michigan Parole Board: A Smoldering Volcano*, 77 MICH. BUS. L.J. 184, 187 (1998) (observing that in Michigan, the Parole Board “has adopted an administrative policy of treating all allegations contained in the presentence report as true (with the exception of the offender's description of the offense)”). Parole boards often penalize inmates who maintain their innocence—even inmates who plead guilty under an “Alford plea” agreement in which they agree to the sentence but do not acknowledge their factual guilt. See *North Carolina v. Alford*, 400 U.S. 25, 168–69 (1970) (holding that a trial court may accept a guilty plea even where the defendant maintains her innocence, at least where it was in the defendant's best interest to accept the plea). For instance, in *Silmon v. Travis*, the defendant pleaded guilty via an Alford plea and received a sentence of five to fifteen years' imprisonment on a manslaughter charge. *Silmon v. Travis*, 741 N.E.2d 501, 502 (N.Y. 2000). At the five-year mark he appeared before the parole board in New York State seeking his release. *Id.* His request, however, was denied on the grounds that “he lack[ed] remorse and insight and accepted no responsibility for the actions that resulted in the brutal homicide of his wife.” *Id.* at 503. The defendant, in turn, claimed that he was merely acting in accord with his previous statements at his plea allocution and, therefore, the parole board's decision was irrational. *Id.* The New York Court of Appeals eventually upheld the decision, finding that the trial court's “acceptance of his plea without an admission of culpability was not an indication that the State viewed him as innocent. . . . Nor was there any promise that petitioner would be treated as ‘innocent’ by the Parole Board.” *Id.* at 504. For a discussion of *Silmon*, see Ward, *supra* note 5, at 932–33.

8. See, e.g., Joseph T. McCann, *Risk Assessment and the Prediction of Violent Behavior*, FED. LAW., Oct. 1997, at 18 (summarizing “the current status of clinical risk assessment and the prediction of violent behavior” that may come into play in parole hearings as well as other contexts).

9. British barrister Alec Samuels describes this phenomenon, as applied to the United Kingdom, very succinctly:

Those that persist in claiming innocence . . . are in difficulty when in due course it comes to consideration for parole, that is, the minimum sentence has been served.

many psychologists, upon whom parole boards frequently rely, refusing to acknowledge one's guilt signals mental instability or immaturity.<sup>10</sup> These attributes, in turn, may reflect that the inmate has not been rehabilitated during his incarceration and may also portend recidivism, the reduction of which is a central goal and measure of success for parole.<sup>11</sup>

On the other hand, the slew of post-conviction exonerations of innocent prisoners in recent years proves that juries and judges do not always effectively sort the guilty from the innocent at the trial level and indicates that perhaps parole boards can (and should) fill this void to facilitate the release of the innocent. Over the past nineteen years, 212 prisoners have been exonerated through post-conviction DNA testing,<sup>12</sup> their innocence proven to a scientific certainty, and states have freed over 300 other inmates on grounds consistent with innocence during that period.<sup>13</sup> As I have argued elsewhere, these cases represent the proverbial tip of the innocence iceberg in light of (1) the scarcity of biological evidence suitable for DNA testing in criminal cases;<sup>14</sup> (2) the bewildering array of obstacles to relief contained in most state post-conviction procedures in

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If he will not accept the situation, show contrition, cooperate in discussion and on pre-release courses, he is considered to be a poor prospect for parole, his attitude is "all wrong," he may appear to be a danger to the public, so he does not get parole, or possibly only after very considerable delay.

Alec Samuels, *In Denial of Murder: No Parole*, 42 HOW. J. CRIM. JUST. 176, 177 (2003).

10. See *infra* notes 207–11 and accompanying text (surveying psychological studies on denial, guilt, and empathy).

11. See, e.g., *Hicks v. Parole Bd.*, No. 224807, 2001 WL 792153, at \*1 (Mich. Ct. App. Jan. 9, 2001) (per curiam) (citing findings by the Michigan parole board that an inmate's "likelihood for recidivism was difficult to determine because he 'does not take responsibility for the offense' and remains in 'denial'"); *State ex rel. Bergmann v. Faust*, 595 N.W.2d 75, 78 (Wis. Ct. App. 1999) (noting the Wisconsin parole commission's characterization of an inmate as high-risk—in part, because of his assertion of innocence—and its decision to deny parole); see also PAUL F. CROMWELL, JR. ET AL., *PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM* 173 (2d ed. 1985) ("Few things about parole evoke consensus, but there is some agreement that one objective and measure of success is reduction of recidivism."). The rehabilitation of prisoners has historically served as a central objective of corrections officials in the United States. See *infra* notes 27–29, 89–90 and accompanying text.

12. For an up-to-date list of the number of inmates exonerated through post-conviction DNA testing, see Innocence Project Homepage, <http://www.innocenceproject.org/> (last visited Jan. 15, 2008).

13. See, e.g., Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 337 (2006) (discussing the study of exonerations conducted in Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523–24 (2005)).

14. See, e.g., Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence of Innocence in State Courts*, 47 ARIZ. L. REV. 655, 656 (2005) ("Evidence suitable for DNA testing, however, exists only in a smattering of criminal cases: an estimated 80-90% of cases do not have any biological evidence.").

regard to non-DNA cases;<sup>15</sup> and (3) the waning availability of federal habeas corpus.<sup>16</sup> Furthermore, with all due respect to psychological theory, inmate expressions of remorse in applying for parole may not reflect genuine acknowledgment and acceptance of the criminal act—a true coming to terms, if you will. The prison grapevine has presumably informed the parole hearing-bound population that remorse is essentially a quid pro quo for release, casting doubt on the sincerity of many pleas of repentance before the board, however contrite they may seem.<sup>17</sup> In reality, considering the profound disincentive to claim innocence at parole hearings, logic suggests those assertions should be taken quite seriously.<sup>18</sup>

Part I of this Article briefly discusses the origins of parole in the United States as well as the contemporary features of parole release decision-making. Next, Part II explores how a parole board's reliance on prisoner admissions of guilt in the parole release decision intersects and potentially interferes with the efforts of innocent inmates to win their freedom. Part III then critically examines the theoretical and normative implications of the current parole system's emphasis on remorse and responsibility. Finally, Part IV recommends several reforms concerning the treatment of inmate claims of innocence at parole hearings. These reforms include limiting the use of parole hearing transcripts at subsequent post-conviction proceedings,

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15. See generally Daniel S. Medwed, *California Dreaming? The Golden State's Restless Approach to Newly Discovered Evidence of Innocence*, 40 U.C. DAVIS L. REV. 1437 (2007) (analyzing California's approach to post-conviction claims of innocence); Medwed, *supra* note 14.

16. See Medwed, *supra* note 14, at 717 n.380 (describing how the Supreme Court, in *Herrera v. Collins*, 506 U.S. 390 (1993), held that “freestanding claims of actual innocence based on newly discovered DNA evidence do not provide an independent ground for habeas relief absent compelling circumstances”); see also Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 4 (1997) (discussing the one year statute of limitations on petitions for habeas corpus relief that Congress passed in 1996). Nevertheless, the U.S. Supreme Court's recent decision in *House v. Bell* does provide some hope for innocent prisoners wishing to present their claims via federal habeas corpus. *House v. Bell*, 126 S. Ct. 2064, 2086–87 (2006) (allowing a habeas corpus petitioner to proceed under the actual innocence exception to procedural bar, yet emphasizing that such petitioners must make stringent showings).

17. See Carol Sanger, *The Role and Reality of Emotions in Law*, 8 WM. & MARY J. WOMEN & L. 107, 111 (2001) (noting that in events like parole hearings, “[A] convicted and guilty defendant can put on a great show of remorse and be rewarded for the display. All of the players now understand the ‘proper’ emotional response and each can act accordingly.”).

18. Contrary to popular perception, inmates' unwavering protestations of innocence seem to be relatively rare, in part due to the pressures to admit guilt before the parole board. See, e.g., Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 513 n.111 (2000) (“There is a popular but inaccurate assumption that everyone in prison professes innocence.”). But see Danielle Lavin-Loucks, *Building a Case and Getting Out? Inmate Strategies for Obtaining Parole*, at 31 (July 2002) (unpublished Ph.D. dissertation, Indiana University-Bloomington) (on file with the Iowa Law Review) (“The notion that they are innocent and have been falsely incarcerated is a common claim by offenders within the penal institution, so much so that they may concede the commonness in their appeals to the [parole] board.”).

distinguishing statements of remorse from those of responsibility, and reconceiving the role parole boards play in entertaining questions of guilt and innocence at the release decision stage.

To put it bluntly, innocent inmates currently face a true “prisoner’s dilemma”<sup>19</sup> when encountering parole boards. Choice A consists of proclaiming innocence and consequently hindering the possibility of parole; Choice B involves taking responsibility for a crime the prospective parolee did not commit and bolstering the chance for release, albeit with dire effects for any post-conviction litigation involving the underlying innocence claim.<sup>20</sup> This type of choice is one that no actually innocent prisoner should be forced to make.<sup>21</sup> Ultimately, parole boards should be mindful of the possible legitimacy of some innocence claims and, at the very least, not reflexively hold those assertions against the prisoner in the release decision.

## I. THE THEORY AND PRACTICE OF PAROLE

### A. HISTORICAL ORIGINS AND PURPOSES OF PAROLE

The name coined for the conditional release of a prisoner before completing a sentence derives from the French phrase *parole d'honneur*, loosely translated as “word of honor.”<sup>22</sup> From the outset, the concept of parole was aimed at the rehabilitated prisoner—the inmate who had exhibited model (or “honorable”) behavior while incarcerated, professed to be a reformed person, and accordingly proved to be a safe candidate for

19. Scholars in the field of law and economics often use the term “prisoner’s dilemma.” Typically, scholars discuss prisoners’ dilemmas in the context of collective action problems, i.e., situations where the harmful effect of a decision could be tempered by coordination or cooperation with other actors. See, e.g., Manuel A. Utset, *Reciprocal Fairness, Strategic Behavior & Venture Survival: A Theory of Venture Capital-Financed Firms*, 2002 WIS. L. REV. 45, 118 (“A prisoner’s dilemma game is one in which both parties would be better off agreeing to cooperate; however, the parties, for whatever reason, cannot reach an enforceable agreement to cooperate.”). Innocent prisoners facing parole boards encounter a dilemma unrelated to collective action problems, but a dilemma nonetheless.

20. For instance, in some states, such as Utah, parole boards may make information that prisoners revealed available to prosecutors in responding to post-conviction innocence claims. See *infra* notes 180–81 and accompanying text.

21. See, e.g., Arnold H. Loewy, *Systemic Changes That Could Reduce the Conviction of the Innocent* 14 (Univ. N.C. Sch. Law, Legal Studies Research Paper No. 927223, 2006), available at <http://ssrn.com/abstract=927223> (noting that the “requirement of contrition as a condition of parole . . . is a fairly common practice, at least in the United States, and its upshot is that truly innocent people have to spend *more* time in prison for a crime than one who was actually guilty”); Samuels, *supra* note 9, at 179 (“Paradoxically the innocent lifer will probably never be released, whereas the guilty lifer will probably be released.”).

22. CROMWELL, JR. ET AL., *supra* note 11, at 153; see GRAY CAVENDER, *PAROLE: A CRITICAL ANALYSIS* 15 (1982) (suggesting that the term “parole” was first used in the United States by a Boston physician, Dr. S. G. Howe, who used the term in correspondence with the New York Prison Association).

discharge.<sup>23</sup> Specifically, parole emerged in nineteenth-century English and Irish prisons through a process in which inmates earned release upon the accumulation of a certain number of “marks” for adhering to institutional rules and progressing toward self-improvement.<sup>24</sup> This precursor to the modern parole system migrated across the ocean to the United States in the late nineteenth century at a time when rehabilitation comprised the dominant punishment theory in state correctional facilities.<sup>25</sup> Borrowing heavily from medical jargon, the rhetoric in penal circles during this era tended to refer to prisoners as “sick” and the goal of punishment to “cure.”<sup>26</sup>

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23. CAVENDER, *supra* note 22, at 15.

24. See, e.g., Burns et al., *supra* note 2, at 16 (reviewing the origins of parole since the nineteenth century). As Daniel Weiss notes:

Alexander Maconochie, the superintendent of the British penal colony on Norfolk Island in 1840, created a philosophy of . . . rehabilitation . . . . [T]he State punished an inmate for the past while . . . training [him] for the future. The State did not release inmates until they had received a certain number of marks . . . awarded for good . . . behavior.

Daniel Weiss, Note, *California's Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1573, 1584 (2005); see also HOWARD ABADINSKY, PROBATION AND PAROLE 205–06 (7th ed. 2000) (discussing the development of parole in the 1850s in Irish prisons); DAVID DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 67–68 (2d ed. 1969) (describing the mark system crafted by Maconochie). For an interesting discussion of the historical precursors to the concept of parole, see CAVENDER, *supra* note 22, at 6–16.

25. See *supra* note 24 and accompanying text (examining the history of parole); Adam L. Pollock, Comment, *Using Parole to Constitutionally Reconcile the Criminal Punishment Goals of Desert and Incapacitation*, 8 U. PA. J. CONST. L. 115, 132–33 (2006) (discussing the development of parole in the United States). One team of scholars has suggested that

[t]he motives for the development and spread of parole were mixed. They were: partly humanitarian, to offer some mitigation of lengthy sentences; partly to control in-prison behavior by holding out the possibility of early release; and partly rehabilitative, since supervised reintegration into the community is more effective and safer than simply opening the gates.

CROMWELL, JR. ET AL., *supra* note 11, at 179–80.

26. See, e.g., Douglas Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 4 (discussing the importance of rehabilitation in sentencing theory in the late nineteenth and twentieth centuries). Berman observes that

[t]he rehabilitative ideal often was conceived and discussed in medical terms, with offenders described as “sick” and punishments aspiring “to cure the patient.” Sentencing judges and parole officials were thought to have unique insights and expertise in deciding what sorts and lengths of punishments were necessary to best serve each criminal offender’s rehabilitation potential.

*Id.* In the last quarter of the nineteenth century,

[b]ased primarily on a rehabilitation model, judges—moved by their particular idiosyncratic emphases—set widely varying indeterminate terms for similar crimes. A parole board determined when each prisoner was rehabilitated, *i.e.*, cured or treated and therefore now ready to reenter the community. Each prisoner was supposed to serve a sentence which in turn served his individual needs and his potential for rehabilitation.



Indeed, the first American penal institution to utilize a parole-like system, a state reformatory in Elmira, New York, in 1876, alluded to rehabilitation as its underlying principle in embracing the new archetype from abroad:

Criminals can be reformed; that reformation is the right of [convicts] and the duty of the State; that every prisoner must be individualized and given special treatment adapted to develop him to the point in which he is weak—physical, intellectual, or moral culture, in combination, but in varying proportions, according to the diagnosis of each case; that time must be given for the reformatory process to take effect, before allowing him to be sent away, uncured; that his cure is always facilitated by his cooperation, and often impossible without it.<sup>27</sup>

Despite this optimistic portrayal of the potential for rehabilitation, parole was far from routine in its initial American form.<sup>28</sup> As the Massachusetts prison manual explained to incoming felons in the 1880s, one should expect to serve a full term, but “[i]n deserving cases, . . . where it can be reasonably assumed that a man will be better off outside of the reformatory, he may be given the privilege of parole.”<sup>29</sup>

The growing use of “the privilege of parole” in the United States largely coincided with the proliferation of state indeterminate sentencing regimes in the early twentieth century, whereby defendants received a sentencing range upon conviction (say, three to six years in prison) instead of a fixed

Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1203 (1990); see also Joel M. Caplan, *Parole System Anomie: Conflicting Models of Casework and Surveillance*, FED. PROBATION, Dec. 2006, at 33 (“Since the inception of prisons, correctional workers sought to identify themselves with the medical profession.”); ABADINSKY, *supra* note 24, at 209 (describing the medical model as applied to corrections theory).

27. Weiss, *supra* note 24, at 1585 n.89; see also CROMWELL, JR. ET AL., *supra* note 11, at 151 (noting that parole first appeared in the United States at the Elmira Reformatory in 1876). Following Elmira’s lead, parole was soon adopted in other American prisons. See ABADINSKY, *supra* note 24, at 208 (“The Elmira system—which included military-style uniforms, marching, and discipline—was copied by reformatories in other states, such as the Massachusetts Reformatory at Concord, the Minnesota State Reformatory at St. Cloud, and the Illinois State Reformatory at Pontiac and made applicable to all or part of the prison population in Pennsylvania and Michigan.”); PEGGY B. BURKE, NAT’L INST. OF CORR., U.S. DEP’T OF JUSTICE, CURRENT ISSUES IN PAROLE DECISION-MAKING: UNDERSTANDING THE PAST; SHAPING THE FUTURE 25 (1988), available at <http://www.nicic.org/pubs/pre/007017.pdf> (noting that “by 1922, 37 states had adopted some form of independent parole board system”).

28. Notwithstanding its allusions to principles of reform, Elmira was a notoriously violent and overcrowded facility in which prisoners suffered extreme punishments, including whippings and psychological torture. See ABADINSKY, *supra* note 24, at 207. During this era, as Cavender notes, “American penology was couched in the rhetoric of reformation, but, as was the case in Europe, there were strong overtones of social control.” CAVENDER, *supra* note 22, at 36.

29. Pollock, *supra* note 25, at 133.

term (six years flat).<sup>30</sup> Defendants subject to an indeterminate sentence typically confronted the parole board at or shortly after the expiration of the minimum term to seek conditional release, with the condition being the ability to live as a law-abiding citizen through the end of the maximum term under supervision by a parole officer.<sup>31</sup> The expansion of indeterminate sentencing transferred much of the power for establishing an inmate's actual prison term from the sentencing judge to the parole board and provided an incentive for prisoners to comport themselves properly during their incarceration in order to satisfy parole commissioners.<sup>32</sup> The rehabilitative ideal and its concrete manifestation, parole, received praise from many quarters. For example, President Franklin D. Roosevelt insisted in 1940 that "parole, when it is honestly and expertly managed, provides better protection for society than does any other method of release from prison."<sup>33</sup> To be fair, the emergence of parole cannot be attributed wholly to magnanimous motives on the part of legislators seeking to aid prisoners and safeguard the public. Parole's inherent appeal also stems from the more mundane desire to reduce prison expenses and overcrowding.<sup>34</sup> Jointly

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30. *Id.* at 132–33 (mentioning that New York created a parole board and an indeterminate sentencing structure in 1889); see also JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 58 (2003) (crediting Michigan penologist Zebulon Brockway with devising a two-pronged approach to preparing inmates for release—indeterminate sentencing paired with parole supervision—and then implementing it at the Elmira Reformatory). For a brief discussion of the difference between determinate and indeterminate sentencing, see Weiss, *supra* note 24, at 1582–86; see also CROMWELL, JR. ET AL., *supra* note 11, at 158 ("Parole legislation spread much more rapidly than did indeterminate sentence legislation. By 1901, twenty states had parole statutes, but only eleven states had indeterminate sentence laws."). The "[p]arole of federal prisoners began after [the] enactment of legislation" by Congress in 1910. PETER B. HOFFMAN, HISTORY OF THE FEDERAL PAROLE SYSTEM 1 (2003). For a discussion of the history to the emergence of parole in California, see generally Sheldon L. Messinger et al., *The Foundations of Parole in California*, 19 LAW & SOC'Y REV. 69 (1985).

31. See, e.g., *McCoy v. Harris*, 160 P.2d 721, 722 (Utah 1945) (describing the effect of parole). The Utah Supreme Court explained:

[I]t is clear that a parole is in the nature of a grant of partial liberty or a lessening of restrictions to a convicted prisoner. Granting of a parole does not change the status of a prisoner; it merely "pushes back the prison walls" and allows him the wider freedom of movement while serving his sentence. The paroled prisoner is legally in custody the same as the prisoner allowed the liberty of the prison yard, or of working on the prison farm.

*Id.*

32. See ABADINSKY, *supra* note 24, at 206–10 (describing some of the features of the "medical model" of corrections and some of the theories advanced to support the introduction and use of parole in the United States).

33. CROMWELL, JR. ET AL., *supra* note 11, at 180–81; see also *Williams v. New York*, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.").

34. See, e.g., LLOYD F. OHLIN, SELECTION FOR PAROLE 9 (1951) ("Some find [parole] useful because it relieves the overcrowding of prisons and makes the construction of new buildings

fueled by rehabilitative ideology and fiscal reality, the pace of parole's implementation in the United States accelerated. All fifty states had parole systems by 1942,<sup>35</sup> and as of the 1970s a majority of prisoners—over seventy percent—obtained release on parole prior to the termination of their sentences.<sup>36</sup>

Attitudes toward sentencing in general and parole in particular changed dramatically in the 1970s due to shifting political winds that unmoored punishment theory from the rehabilitative paradigm that had been in vogue for decades.<sup>37</sup> Instead of rehabilitation, retributive models for punishment based on the “eye for an eye” concept gained momentum.<sup>38</sup> Ultimately, the “tough on crime” and “truth in sentencing” movements of the 1980s produced a return to determinate sentencing and, concomitantly, a retreat from the use of discretionary parole systems; stiff sentences became the nationwide norm.<sup>39</sup> This is not to say that states have abandoned the

unnecessary. Some defend it because it costs less to supervise a prisoner on parole than to maintain him in prison.”); DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE* 189 (1980) (noting how some state parole boards in the 1920s and 1930s explicitly acknowledged that overcrowding was a factor in parole release policies); JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990*, at 35 (1993) (“The ideas of Progressive Era reformers may have provided the justifications for parole, but the specific reasons for its adoption in each state had more to do with the political problems of managing increasingly large state prison systems.”).

35. Joan Petersilia, *Parole and Prisoner Reentry in the United States*, in 26 *CRIME & JUST.* 479, 489 (1999).

36. See CROMWELL, JR. ET AL., *supra* note 11, at 166.

37. See, e.g., *id.* at 181 (“In the middle seventies, with a suddenness remarkable in social change, there was a dramatic turnabout. Individualization, rehabilitation, sentence indeterminacy, and parole all seemed to fall from grace and, indeed, appeared to be on their way out.”); PETERSILIA, *supra* note 30, at 65 (mentioning that “incapacitation and ‘just deserts’ replaced rehabilitation as the primary goal of American prisons” and citing data that seventy-three percent of Americans in 1970 viewed rehabilitation as the chief purpose of prison as opposed to twenty-six percent in 1995). Nevertheless, almost from its onset, the parole system was denigrated for its perceived inability to separate the reformed from the recidivist. See, e.g., ROTHMAN, *supra* note 34, at 159. Rothman notes:

Whenever fears of a “crime wave” swept through the country, or whenever a particularly senseless or tragic crime occurred, parole invariably bore the brunt of the attack . . . . Practically every crime commission and investigatory body of the 1920’s and 1930’s began its examination of parole with a statement conceding massive public opposition.

*Id.*

38. See, e.g., Weiss, *supra* note 24, at 1585 (“The modern parole system has morphed from a rehabilitative mechanism into a form of deferred retributive sentencing.”). *But cf.* Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 *IOWA L. REV.* 951, 954 (2006) (asserting that the rehabilitation ideal has survived and even thrived in the context of specialty juvenile justice courts).

39. Pollock, *supra* note 25, at 133–34. The desire to “incapacitate” individuals perceived to be dangerous and thereby decrease crime contributed to the increase of longer prison sentences in the 1980s. See BURKE, *supra* note 27, at 27–28 (discussing the escalation in prison sentences in the late 1970s and early 1980s); see also Burns et al., *supra* note 2, at 16 (“Over the

notion of parole altogether. Rather, in lieu of discretionary parole systems in which parole boards have the power to choose whether and when an inmate should be released, numerous states have endorsed mandatory parole regimes.<sup>40</sup> In states with mandatory parole systems, release decisions are usually preordained by statute as a fixed percentage of an inmate's determinate term with some credit for good time served.<sup>41</sup> Inmates released pursuant to a mandatory parole system may then face monitoring by parole officers for the remainder of their sentences or for some other specified period of time.<sup>42</sup> Between 1990 and 1999, the number of discretionary parole releases in the United States declined nearly twenty percent, while the number of mandatory parole releases almost doubled.<sup>43</sup> During this phase, several states also restricted the parole eligibility of certain classes of offenders.<sup>44</sup> The imposition of prison sentences "without possibility of

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last 20 years, however, the nature of parole has changed. The political constituencies of many jurisdictions began to view indeterminate sentencing as too lenient and opted to shift to determinate sentencing." Attacks on indeterminate sentencing did not derive solely from the political right. See ABADINSKY, *supra* note 24, at 210–11 (mentioning that members of both the political left and right began to take issue with parole, if for different reasons). Leftist criticisms of the parole system and indeterminate sentencing during this period stemmed, in part, from fears of "differential treatment of persons convicted of similar crimes." *Id.* at 213.

40. See, e.g., TIMOTHY A. HUGHES ET AL., U.S. DEP'T OF JUSTICE, TRENDS IN STATE PAROLE, 1990–2000, at 1 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tsp00.pdf> ("[R]elease determined by statute (mandatory parole) became the most common method of release from State prison.").

41. *Id.*; see also JOAN PETERSILIA, U.S. DEP'T OF JUSTICE, WHEN PRISONERS RETURN TO THE COMMUNITY: POLITICAL, ECONOMIC, AND SOCIAL CONSEQUENCES 2 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/184253.pdf> ("Today, indeterminate sentencing and discretionary release have been replaced in 14 states with determinate sentencing and automatic release. Offenders receive fixed terms when initially sentenced and are released at the end of their prison term, usually with credits for good time.").

42. Inmates provided with mandatory release are often subject to a period of parole supervision thereafter. See, e.g., PETERSILIA, *supra* note 41, at 2 (noting that "most California offenders are subject to 1 year of parole supervision" after release).

43. HUGHES ET AL., *supra* note 40, at 1; see also LAUREN E. GLAZE & THOMAS P. BONCZAR, PROBATION AND PAROLE IN THE UNITED STATES, 2005, at 8 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus05.pdf> ("As a percentage of all releases from State prison, discretionary releases by a parole board steadily declined from 55% in 1980 to 22% in 2004 . . ."); Caplan, *supra* note 26, at 33–34 ("In 1977, over 70 percent of prisoners were released on discretionary parole. By 1995 and 2002 this had declined to 50 percent and 39 percent, respectively."); Petersilia, *supra* note 35, at 495 ("By the end of 1998, fourteen states had abolished discretionary parole release for all inmates. In addition, in twenty-one states, parole authorities are operating under what might be called a 'sundown provision,' in that they have discretion over a small or diminished parole eligible population.").

44. See Alison Virag Greissman, *The Fate of "Megan's Law" in New York*, 18 CARDOZO L. REV. 181, 191 (1996) (discussing limitations on parole for sex offenders); Edward R. Hammock & James F. Seelandt, *New York's Sentencing and Parole Law: An Unanticipated and Unacceptable Distortion of the Parole Boards' Discretion*, 13 ST. JOHN'S J. LEGAL COMMENT. 527, 563 n.201 (1999) (citing D. Michael Fisher, *Changing Pennsylvania's Sentencing Philosophy Through the Elimination of Parole for Violent Offenders*, 5 WIDENER J. PUB. L. 269, 294 (1996) (suggesting the elimination of parole for violent, high-risk offenders)).

parole” increased in the 1980s as well, a trend facilitated by the U.S. Supreme Court’s rejection of claims that such sentences constituted cruel and unusual punishment.<sup>45</sup>

Nonetheless, parole weathered the retributive storm of the 1980s and remains an entrenched aspect of American corrections policy today, as underscored by the fact that the overall number of adults under state parole supervision tripled between 1980 and 2000.<sup>46</sup> What is more, many states have retained discretionary parole systems,<sup>47</sup> or at least mixed schemes in which parole boards retain partial discretion to approve release dates within statutory parameters.<sup>48</sup> Some commentators have even argued that the replacement of an earned release model for candidates vetted by parole boards (discretionary parole) with an automatic release structure (mandatory parole) for virtually all inmates may be counter-productive in the long haul.<sup>49</sup> To that end, the empirical data show that discretionary parole decisions are more effective than their mandatory counterparts from the vantage point of public safety—of the total number of state parole discharges in 1999, over half of discretionary parolees succeeded in completing their term of post-release supervision without violating parole as opposed to only a third of mandatory parolees.<sup>50</sup> These statistics indicate that discretionary parole has lingering value as a crime control device.<sup>51</sup>

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45. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (concluding that mandatory life in prison without parole was not cruel and unusual punishment for cocaine possession).

46. HUGHES ET AL., *supra* note 40, at 1 (noting the trend away from discretionary parole, but mentioning its continued use); PETERSILIA, *supra* note 30, at 65 (stating that by the end of 2002, sixteen states still vested full authority in their parole boards to release inmates through a discretionary process). The most recent data indicates that the overall number of parolees continues to rise, with a nationwide increase of 1.6% in 2005, and that some states have experienced significant growth. GLAZE & BONCZAR, *supra* note 43, at 1–2.

47. HUGHES ET AL., *supra* note 40, at 2 (describing the movement away from discretionary releases in the 1980s and 1990s but noting that many states have kept this structure); see also Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 186–87 (2005) (“Although discretionary parole release is largely off the national sentencing reform radar, it remains a vital part of American criminal justice. In fact, indeterminate sentencing regimes—that is, systems with discretionary parole release—continue to be the most common approach to sentencing in the United States.”).

48. See GENE KASSEBAUM ET AL., DEP’T OF THE ATT’Y GEN., HAWAII, PAROLE DECISION-MAKING IN HAWAII: SETTING MINIMUM TERMS, APPROVING RELEASE, DECIDING ON REVOCATION, AND PREDICTING SUCCESS AND FAILURE ON PAROLE 3 (2001), available at <http://hawaii.gov/ag/cpja/main/rs/Folder.2006-02-06.3414/parole2.pdf> (commenting that Hawaii has a “mixed indeterminate” scheme of parole board discretion in setting minimum sentences and approving releases within the confines of legislative mandates).

49. See PETERSILIA, *supra* note 41, at 5 (“No-parole systems sound tough but remove a gatekeeping role that can protect victims and communities.”).

50. *Id.* at 1.

51. See *id.* at 2 (criticizing mandatory release and observing that “in California, where more than 125,000 prisoners are released yearly, there is no parole board to ask whether the inmate is ready for release, since he or she *must* be released once his or her term has been served”).

Pragmatic concerns about the burgeoning American prison population may also contribute to discretionary parole's eventual return to favor.<sup>52</sup> Simply put, prison overcrowding and budget constraints place near constant pressure on corrections officials to lobby for early release procedures, and discretionary parole generally permits discharge earlier in an inmate's term than mandatory parole.<sup>53</sup> In sum, decisions to grant or deny discretionary parole affect thousands of prisoners in state penitentiaries and will continue to have an impact in the foreseeable future, meaning that the process through which these decisions are made warrants rigorous examination.

*B. PAROLE RELEASE DECISION-MAKING: CONTEMPORARY STANDARDS AND POLICIES*

The composition of parole boards and the criteria used in exercising the discretion to grant parole vary across the states. Several features, however, appear common. State parole boards normally have jurisdiction to consider releasing defendants incarcerated pursuant to felony convictions and occasionally high-level misdemeanors.<sup>54</sup> As for their structure, parole boards often are situated in the state executive branch with their members appointed by the governor.<sup>55</sup> Although the appointed nature of positions on

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52. See BURKE, *supra* note 27, at 6–7 (predicting in the late 1980s that prison overcrowding “may well be the single most important factor in derailing the move to abolish parole”).

53. See, e.g., *id.*; Burns et al., *supra* note 2, at 16 (describing budget constraints on pretrial and probation service offices); PETERSILIA, *supra* note 30, at 55 (noting that, paradoxically, mandatory releases often result in shorter prison terms than is the case in discretionary parole systems).

54. See, e.g., UTAH CODE ANN. § 77-27-5(1)(a) (2003 & Supp. 2007); see also *id.* § 77-27-9(1)(a) (“The Board of Pardons and Parole *may* pardon or parole any offender or commute or terminate the sentence of any offender committed to a penal or correctional facility under the jurisdiction of the Department of Corrections for a felony or class A misdemeanor except as provided in Subsection (2).” (emphasis added)). In exercising its “exclusive” and broad power to establish the duration of an inmate’s sentence, the Board is even capable of releasing an inmate before the expiration of his minimum term, provided that certain procedural requirements are met and mitigating circumstances are present. See *id.* § (1)(b). In Oregon, the parole board likewise possesses the authority to grant early parole under particular conditions. See *Houck v. Bd. of Parole & Post-Prison Supervision*, 865 P.2d 476, 478 (Or. Ct. App. 1993) (noting that Oregon law requires the Board set sentences consistent with established rules “[t]o the extent permissible under law”).

55. See COHEN, *supra* note 1, § 4:2, at 4-8 (“Usually [parole board members] are appointed by the governor with the advice and consent of the state senate, although other methods of appointment are also used.”); CROMWELL, JR. ET AL., *supra* note 11, at 168 (“In most jurisdictions the governor appoints parole board members and it is not unusual to have a new board appointed when a new governor takes office.”); PETERSILIA, *supra* note 41, at 6 (“In most States, the chair and all members of the parole board are appointed by the Governor.”).

The structure of the Utah Board of Pardons and Parole seems rather representative of state practice across the country. At present, the Board is an independent agency within the state executive branch that has five voting members who are appointed by the governor, subject to legislative confirmation, and serve staggered five-year terms. See UTAH CODE ANN. § 77-27-2 (2003). There are also five pro-tempore members who serve in the event that a Board member is absent or under other “extraordinary circumstances.” *Id.* One of the five voting members

parole boards may insulate commissioners from direct political pressure to a degree,<sup>56</sup> parole decisions hardly seem divorced from politics entirely—nor do the individuals making these decisions.<sup>57</sup> Gauging the qualifications and skill levels of state parole board members is a difficult enterprise, especially considering the politicization of the parole process,<sup>58</sup> and one that far exceeds the scope of this Article. More importantly, even assuming that the bulk of parole board members are well-meaning, well-informed, and well-positioned to make the most accurate appraisal of a prisoner's worthiness for parole,<sup>59</sup> it remains clear that parole release decisions are wrought with

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serves as chairperson "at the governor's pleasure." *Id.* § 77-27-4(1). With few limitations, the chairperson possesses leeway over how the Board administers this power. *See id.* ("The chairperson may exercise the duties and powers, in addition to those established by this chapter, necessary for the administration of daily operations of the board, including personnel, budgetary matters, panel appointments, and scheduling of hearings."); *see also id.* § 77-27-5 (2003 & Supp. 2007). For instance, although the full Board must participate in commutation or pardon hearings as per statute, the entire group is not obligated to hear parole cases; instead, panels designated by the chairperson may bear responsibility for this task. *See id.* §§ (b)–(d); *see also* COHEN, *supra* note 1, § 4:3 (discussing the use of panels by state parole boards across the country).

56. *See, e.g.*, Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 151–52 (2004) (discussing the merits of appointed versus elected prosecutors and concluding that "all members of a prosecutor's office—be it state, local, or federal—must be mindful of the political ramifications of their conduct in handling cases").

57. *See, e.g.*, Friedman, *supra* note 7, at 184–85 (describing the "politicization of the parole board" in Michigan); Victoria J. Palacios, *Go and Sin No More: Rationality and Parole Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 576–79 (1994) ("Parole board members are generally gubernatorial appointees, thus raising two additional criticisms: Political patronage often results in underqualified board appointees and boards are fertile breeding grounds for corruption."). Some states have tried to minimize the risk of undue political influence in the parole process by limiting the number of board members from any single political party or by banning certain political activity. COHEN, *supra* note 1, § 4:2, at 4-9 to 4-10. Also, in an effort to distance parole boards from external influence, many states make boards independent of the department of corrections. *Id.* at 4-10.

58. *See supra* notes 55–57 and accompanying text; *see also* Mark R. Pogrebin et al., *Parole Decision-making in Colorado*, 14 J. CRIM. JUST. 147, 153 (1986) (describing one highly-publicized incident involving a prisoner convicted of slaying a prominent Colorado beer producer and how "external pressure by the community and the district attorney of Denver no doubt influenced the board's decision to deny parole").

59. Some commentators have contended that many, if not most, parole board commissioners remain underqualified. *See* PETERSILLA, *supra* note 41, at 6 ("In two-thirds of the States, there are no professional qualifications for parole board membership."); ROTHMAN, *supra* note 34, at 163 (discussing the composition of state parole boards and observing that "[t]he Washington parole board in the early 1930's was composed of a wholesale jeweler from Spokane (as chairman), an insurance broker, and the 'farmer member of the board,' who actually ran a general store in Palouse, the center of the state's wheat belt"). To guard against political cronyism, some states have merit-based civil-service systems for determining a prospective parole board member's suitability for the position. *See, e.g.*, CROMWELL, JR. ET AL., *supra* note 11, at 168 ("On some occasions this has resulted in appointments on the basis of political affiliations rather than qualifications necessary for making parole decisions. Many states, to avoid this, have adopted civil service or merit systems for appointment of parole board

subjectivity; they are intrinsically more art than science.<sup>60</sup> Furthermore, two factors have historically served to exacerbate the problems generated by the subjective quality of parole decision-making: first, the shortage of legislative or regulatory guidance extended to parole boards regarding the specific criteria to employ in determining whether to grant or deny parole to an inmate,<sup>61</sup> and second, the lack of judicial oversight to examine the wisdom of parole decisions.<sup>62</sup> As one group of scholars has concluded, “Parole release decision-making has thus suffered . . . from judicial neglect and ‘hands-off-ism.’”<sup>63</sup>

Given the absence of much judicial, legislative, and regulatory oversight of their work, parole boards tend to consider a wide-ranging (and apparently ever-changing) assortment of variables in their discretionary release decisions. Concerned about disparities in parole decisions for similarly situated inmates, prisoners’ rights advocates, scholars, and state legislatures have tried repeatedly since the 1960s to rein in parole board

members.”). Similarly, some jurisdictions may impose limitations on the number of parole board members enjoying the same political affiliation or forbid a parole commissioner from simultaneously holding a political office. *See* CAVENDER, *supra* note 22, at 41 (reviewing the types of qualifications used by various jurisdictions).

60. *See* OHLIN, *supra* note 34, at 29 (mentioning a remark from a prisoner that recognizes and reflects the difficult nature of engaging in parole release decisions: “That job’s so tough I wouldn’t be a parole board member even if I could get parole by being one.”); *see also* Don M. Gottfredson & Kelley B. Ballard, Jr., *Differences in Parole Decisions Associated with Decision-Makers*, 3 J. RES. CRIME & DELINQ. 112, 119 (1966) (finding “no support for the hypothesis that differences in parole decision outcomes may be partly attributed to decision-makers rather than to offenders . . . paroling authority members tend to make similar sentencing decisions” in an empirical study of 2,053 randomly selected cases).

61. *See, e.g.*, Palacios, *supra* note 57, at 576. Palacios notes:

[B]oards . . . have little guidance in making release decisions. Once information is compiled regarding the offender’s crime, victim, criminal history, social history . . . and institutional adjustment, parole boards . . . interview eligible offenders either informally or at a hearing. The members then make a decision to grant or deny parole according to imprecise standards.

*Id.*

62. *See supra* notes 3–4 and accompanying text. To be sure, states may have procedures under which a prisoner may seek review of parole release hearings, but the ability to do so is often quite restricted. *See* ABADINSKY, *supra* note 24, at 234 (describing the process for appealing parole release decisions in Tennessee and citing two potential grounds: (1) “significant new evidence or information that was not available at the time of the hearing” or (2) “allegations of misconduct by the hearing official”); *see also* UTAH CODE ANN. § 77-27-5(3) (2005) (stating that decisions “involving paroles, pardons, commutations or terminations of sentence, restitution, or remission of fines or forfeitures are final and are not subject to judicial review”). *See generally* Alexander K. Mircheff, *In Re Dannenberg: California Forgoes Meaningful Judicial Review of Parole Denials*, 39 LOY. L.A. L. REV. 907 (2006) (discussing the obstacles to review of parole denials in California). It should be noted, moreover, that some states expressly permit the judiciary to play a more pronounced role in the initial parole release decision than is the norm. *See* COHEN, *supra* note 1, § 4:1, at 4-4 (describing how Missouri and Pennsylvania vest parole release decision-making power, in some instances, partly in the judicial branch).

63. Genego et al., *supra* note 3, at 815.



discretion by advocating the creation of visible standards to provide an element of uniformity and predictability to the process.<sup>64</sup> Inmates often decry the lack of transparency and certainty in parole release decision-making, and stories of perceived injustices at the hands of parole boards abound within state correctional facilities.<sup>65</sup> In particular, allegations of parole board racism have thrived for decades, with one examination of the New Jersey state system terming the stereotypical recipient of a parole grant “white and contrite.”<sup>66</sup> To be sure, many jurisdictions have responded to

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64. See, e.g., CROMWELL, JR. ET AL., *supra* note 11, at 200–06 (reviewing methods of decision-making by parole boards, including an in-depth review of an actuarial method called the salient factor score); see also AD HOC PAROLE COMM., *THE PAROLE DENIAL PROCESS IN NEW JERSEY* 15 (1975) (noting that the New Jersey State Parole Board is “omnipotent, answerable to nobody, and not required to justify its actions”); Michael R. Gottfredson, *Parole Board Decision-making: A Study of Disparity Reduction and the Impact of Institutional Behavior*, 70 J. CRIM. L. & CRIMINOLOGY 77, 77 (1979) (“One issue that permeates the sentencing-parole field is concern for disparity—dissimilar treatment of equally situated offenders. Numerous reform proposals concentrate on disparity, including suggestions for sentencing councils and appellate review of sentences as well as legislatively fixed mandatory terms and the abolition of parole.”). Gray Cavender aptly summarizes the traditional critique of parole as unfair:

The first variety of injustice pertains to disparity in sentences. . . . The individualization of sanctions means that two offenders, although they committed the same crime, might serve different terms of imprisonment since their treatment needs may vary. . . . While the first category of injustice pertains to a comparison of penalties, the second variety deals with the fairness of a sanction for the individual offender. Because of discretion and a lack of procedural rights, the offender is subjected to punishment that is deceptively severe and arbitrary . . . [and] criteria for parole are vague or nonexistent.

See CAVENDER, *supra* note 22, at 59.

65. West-Smith et al., *supra* note 1, at 9; see also OHLIN, *supra* note 34, at 24–28 (describing, in a 1951 text, prisoner perceptions of the factors that influence parole decisions, including current public opinion; the perspective of the trial judge, prosecutor, psychologists, and victim on the merits of the parole application; the number of other prisoners seeking parole at the time; and the applicant’s prior criminal record); Mika’il A. Muhammad, *Prisoners’ Perspectives on Strategies for Release*, 23 J. OFFENDER REHABILITATION 131, 134 (1996) (reviewing the literature regarding prisoner perceptions of the parole system and concluding that inmates generally “perceive parole decisions as ‘capricious,’ ‘whimsical, arbitrary, discriminatory, and unjust’” (internal citations omitted)); cf. Gottfredson, *supra* note 64, at 77–82 (noting that, in theory, parole boards often aim to equalize penalties for similarly situated offenders, though the author’s empirical study “casts some doubt on the hypothesis that parole board decisions substantially reduce sentence-length disparity”).

66. AD HOC PAROLE COMM., *supra* note 64, at 11; see also CAVENDER, *supra* note 22, at 48 (citing a study finding that “certain institutional behaviors have become conditions precedent to release via parole. Interestingly, however, these institutional concerns are different for black and white prisoners. To be paroled, white inmates must avoid institutional infractions, while black prisoners must avoid institutional violations and also participate in treatment programs.”); Joti Samra-Grewal et al., *Recommendations for Conditional Release Suitability: Cognitive Biases and Consistency in Case Management Officers’ Decision-making*, 42 CAN. J. CRIMINOLOGY 421, 425 (2000) (observing that in Canada “full parole release rates for natives (20%) are approximately half those of whites (44%)”); Martin Silverstein, *What’s Race Got to Do with Justice? Responsibilization Strategies at Parole Hearings*, 45 BRIT. J. CRIMINOLOGY 340, 340 (2005) (studying

these criticisms by formulating guidelines that list the relevant factors for consideration in the parole release decision, and periodically these efforts have aspired to be empirical, assigning weighted values to each factor and establishing scoring matrices or actuarial tables to calculate eligibility for release.<sup>67</sup> As of the late 1990s, half of the states utilized such official risk assessment tools to modulate parole board discretion in release determinations.<sup>68</sup> Additionally, the U.S. Supreme Court has held that due process requires that parole denials must be accompanied by an explanation, even if a cursory one, specifying the basis of the decision.<sup>69</sup>

Despite these changes, parole boards still enjoy widespread discretion in reaching their decisions, a state of affairs that, according to some critics,

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the use of racial and ethnic considerations in making risk assessments in the Australian parole process); cf. Victor H. Elion & Edwin I. Megargee, *Racial Identity, Length of Incarceration, and Parole Decision-making*, 16 J. RES. CRIME & DELINQ. 232, 243 (1979) (finding in a study of parole decisions in a federal correctional facility that “[a]lthough the pattern of factors associated with decisions to grant parole differed somewhat for blacks and whites, there was no evidence that race per se was an overriding factor in parole decision-making”). Notably, the courts have clarified that race—like gender, religion, national origin, and poverty, among other things—is an impermissible consideration in the parole release decision. See COHEN, *supra* note 1, § 4:33, at 4-63 to 4-64.

67. See ABADINSKY, *supra* note 24, at 240–41; CAVENDER, *supra* note 22, at 65 (discussing the development and use of an actuarial table in parole guidelines); CROMWELL, JR. ET AL., *supra* note 11, at 200–06 (describing the use of a matrix guideline in parole decisions); Palacios, *supra* note 57, at 579 (listing factors relevant to parole decisions); West-Smith et al., *supra* note 1, at 4. Parole release guidelines, on the whole, are rarely treated as directives, and many states fail to issue guidelines whatsoever. See, e.g., Michael M. Pacheco, *The Educational Role of the Parole Board*, FED. PROBATION, Dec. 1994, at 38, 38 (commenting that, in light of the Oregon felony sentencing guidelines, “the Board of Parole has no authority on any issue regarding the prison term” except for rare cases).

68. Petersilia, *supra* note 35, at 498; see also COHEN, *supra* note 1, § 4:34, at 4-67 to 4-68 (discussing the emergence of guidelines and praising the way in which they “encourage the parole board to depart from the traditional ‘gut reaction’ approach and to adopt decision-making models which utilize the results of years of research on predicting parole success”). The surfacing of guidelines in the sphere of parole release guidelines has also coincided largely with the growth of risk assessment tools designed to predict individuals’ likelihood of future violence. See, e.g., Stephen C.P. Wong & Audrey Gordon, *The Validity and Reliability of the Violence Risk Scale*, 12 PSYCHOL. PUB. POL’Y & L. 279, 279–81 (2006) (discussing the evolution of violence risk assessment tools). For a discussion of the evolution of statistical risk assessment models in the area of parole, see generally Daniel Glaser, *Who Gets Probation and Parole: Case Study Versus Actuarial Decision-making*, 31 CRIME & DELINQ. 367 (1985). For a critique of the use of actuarial and risk assessment models in criminal law, see generally Bernard E. Harcourt, *Against Prediction: Sentencing, Policing, and Punishing in an Actuarial Age* (Univ. of Chi. Law Sch. Chi. Pub. Law & Legal Theory Working Paper Series, Paper No. 94, 2005), available at <http://ssrn.com/abstract=756945>.

69. *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 15–16 (1979); see also COHEN, *supra* note 1, § 4:1, at 4-5 to 4-6 (characterizing *Greenholtz* as a “setback” that “implicitly reaffirmed the cardinal principle that there is no inherent or constitutional right to parole”). At present, many states provide these explanations in writing, and several states go even further, spelling out the grounds for the decision as well as offering advice to shore up any deficiencies for the future. *Id.* § 6:24, at 6-44 to 6-48. Some states are not so forthcoming and issue only general reasons for the denial. *Id.* § 6:24, at 6-47 to 6-51.

allows for the personal cognitive biases of parole commissioners to infect the process.<sup>70</sup> The continuing vitality of parole board discretion, however, is often justified by the sentiment that board members need some measure of autonomy so as to appropriately consider the full range of each prisoner's individual characteristics.<sup>71</sup> That is, concrete standards or "checklists" for release may be seen as dehumanizing the process and detracting from commissioners' ability to take a holistic view of the candidate, thereby reducing the probability of a fair result.<sup>72</sup> Whether parole boards do, in practice, treat each prospective parolee individually and humanely is subject

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70. See, e.g., Samra-Grewal et al., *supra* note 66, at 424–25 (noting that in Canada "a lack of clearly articulated decision-making criteria may allow decision-makers' personal biases to affect decisions" and mentioning that "unwarranted weight has been placed upon offenders' attitudes, personalities, institutional behavior, and psychiatric history, with leniency being demonstrated toward offenders who are female and older" (internal citations omitted)).

71. See, e.g., *Cable v. Warden, N.H. State Prison*, 666 A.2d 967, 968 (N.H. 1995) ("The parole board has broad discretion in carrying out its obligation to 'aid[] in the [prisoner's] transition from prison to society . . . [and] to protect the public from criminal acts by parolees.'" (alteration in original) (quoting *Baker v. Cunningham*, 513 A.2d 956, 960 (N.H. 1986))); CROMWELL, JR. ET AL., *supra* note 11, at 199 ("Parole decisions traditionally have been considered matters of special expertise, involving observation and treatment of offenders and release under supervision at a time that maximizes both the protection of the public and offenders' rehabilitation. This idealistic . . . aim . . . serve[s] as an additional justification for the broad discretionary powers . . ."); see also Gene Bonham Jr. et al., *Predicting Parole Decisions in Kansas Via Discriminant Analysis*, 14 J. CRIM. JUST. 123, 124 (1986) (observing that parole authorities are often opposed to statistical methods of decision-making for many reasons, including beliefs in the uniqueness of each inmate, faith in the superiority of clinical prediction methodology, distrust of statistical analyses, and/or fears that reliance on such methods might undermine the authority of parole board members); Robert M. Garber & Christina Maslach, *The Parole Hearing: Decision or Justification?*, 1 LAW & HUM. BEHAV. 261, 262–63 (1977) (noting that parole practice in California assumed "no two prisoners are alike" and had "a stated concern for the unique and individual qualities of each prisoner being considered for parole").

72. See, e.g., Pacheco, *supra* note 67, at 41 (criticizing the Oregon legislature's implementation of guidelines for "removing the [parole] Board's ability to 'custom-fit' each prisoner with a unique prison term and parole period"). Some state parole boards make an effort to retain a modicum of autonomy over prison terms even in the face of statutory guidelines. For instance, the Georgia Board of Pardons and Paroles, which has parole guidelines designed to account for the seriousness of the current offense and the defendant's criminal history, also strives to individualize the parole assessment and proclaims that "[j]ustice demands that punishment should be tailored to fit both the offense and the offender." ABADINSKY, *supra* note 24, at 241. Moreover, one study of decisions of the Pennsylvania Board of Probation and Parole concluded that "decisions did not appear to be affected by guidelines recommendations. It may be that guidelines affect only marginal cases, representing a kind of 'check' on the assessments of the decision makers rather than an 'anchor' that influences their judgments." John S. Carroll & Pamela A. Burke, *Evaluation and Prediction in Expert Parole Decisions*, 17 CRIM. JUST. & BEHAV. 315, 325 (1990); see also *Preece v. House*, 886 P.2d 508, 512 (Utah 1994) (upholding a parole release decision even though it was based on an erroneous computation pursuant to the Utah Sentence and Release Guidelines and greatly extended the inmate's sentence and observing that "[i]n our indeterminate sentencing scheme, the board of pardons acts as a sentencing entity, having exclusive authority to 'determine the actual number of years a defendant is to serve.'" (citing *Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 907 (Utah 1993))).

to much debate.<sup>73</sup> A study of the Colorado parole board paints an alarming picture of a conveyor belt-like operation where most cases are disposed of in a matter of minutes;<sup>74</sup> an analysis of the parole process in Nebraska reached a similar conclusion, finding that release decisions were largely “automatic,” based on eligibility criteria with little in the way of individualized assessment.<sup>75</sup> Moreover, state parole boards are often cognizant of the threat to public safety created by granting inmates conditional freedom—and the public backlash certain to ensue upon the commission of a heinous crime by a parolee—and thus may adopt a conservative approach to release decisions.<sup>76</sup>

Regardless of whether parole decision-making practice matches theory, the belief prevails that parole commissioners deserve flexibility to evaluate each prisoner on an individual level. As part of this fluid vision of parole assessment, a moderately elastic set of factors has developed for reference in the decision-making process.<sup>77</sup> At the risk of generalizing too much, the factors usually (but not exclusively) valued by parole boards and/or included in written guidelines for parole decisions are, in no particular order:

- the likelihood of recidivism by the inmate;
- public safety;
- behavior during incarceration and institutional record;
- the nature of the crime and criminal history;

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73. Steven Chanenson has recently commented that “[t]he romantic vision of discretionary parole release involves a wise parole board divining, based in large part on assessments of an inmate’s rehabilitative progress, when an inmate should be released, and thus producing a just result.” Chanenson, *supra* note 47, at 187. Instead, in Chanenson’s estimation, “[t]he reality can be quite different. Parole release has historically been an unstructured and wildly discretionary power, subject to the same kinds of irrationalities and abuses that afflict old-style, fully discretionary judicial sentencing on the front end.” *Id.*

74. See West-Smith et al., *supra* note 1, at 4 (noting a 1980s study that demonstrated the parole board heard too many cases to allow for individualized judgments); see also Pogrebin et al., *supra* note 58, at 153 (studying the Colorado parole system and concluding that “the board decision to grant parole nearly always coincided with the [correctional facility’s] recommendation”).

75. See Jon L. Proctor, *The ‘New Parole’: An Analysis of Parole Board Decision-making as a Function of Eligibility*, 22 J. CRIME & JUST. 193, 198 (1999) (“An analysis of Nebraska parole rates suggests that board decisions have become less of an evaluation and prediction process and more of an automatic process based primarily upon parole eligibility.”).

76. See, e.g., Beth M. Huebner & Timothy S. Bynum, *An Analysis of Parole Decision-making Using a Sample of Sex Offenders: A Focal Concerns Perspective*, 44 CRIMINOLOGY 961, 963 (2006) (“Despite the centrality of the decision point, parole staff generally get feedback on their judgments only when there is bad news to report; parole officials therefore often adopt conservative release strategies to minimize risk to the community and the organization.”).

77. The drafters of the Model Penal Code created a rather thorough list of factors that they deemed pertinent to the parole release decision. See MODEL PENAL CODE § 305.9(2) (1962).

- post-release employment and housing prospects;
- substance and alcohol abuse history;
- intelligence and social history;
- physical and mental health; and
- evidence of rehabilitation.<sup>78</sup>

The exact weight that parole boards assign to each variable often correlates with the jurisdiction's policy objectives and the individual goals of the commissioners.<sup>79</sup> A state primarily concerned with public protection might, for example, count the prisoner's criminal history and the severity of the current offense over other factors.<sup>80</sup> Sometimes the prerequisites for granting parole are quite ethereal, to say the least, straying from the aforementioned list of variables and requiring simply that the parolee live without violating the law and that the release is not incompatible with the public welfare.<sup>81</sup>

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78. See, e.g., CROMWELL, JR. ET AL., *supra* note 11, at 199; Palacios, *supra* note 57, at 579; see also Joel M. Caplan, *What Factors Affect Parole: A Review of the Empirical Research*, FED. PROBATION, June 2007, at 16 (commenting that "a detailed review of the empirical literature on parole release decision-making suggests that despite guidelines, parole release decisions remained irregularly applied and were primarily a function of institutional behavior, crime severity, criminal history, incarceration length, mental illness, and victim input"). Professor Neil Cohen has written:

Perhaps the most basic criteria for release on parole are simply these: the parole board, acting within its discretion, must determine whether there is a reasonable probability that a prison inmate, if placed on parole, will be able to live and conduct himself or herself as a respectable, law-abiding person, and whether release will be compatible with the offender's own welfare and the welfare and safety of society.

COHEN, *supra* note 1, § 4:30, at 4-49; see also Huebner & Bynum, *supra* note 76, at 964 ("Individuals serving time for more serious crimes are less likely to be released on parole and serve a larger proportion of their sentences than less serious offenders." (citations omitted)).

79. See, e.g., CAVENDER, *supra* note 22, at 41 (observing that the criteria for parole board membership "should reflect the orientation of parole, whatever it might be. Stated differently, if the parole release decision is oriented toward rehabilitation, that focus should be manifested in the qualifications of parole board members; they should be competent to assess whether parole applicants are rehabilitated.").

80. See Palacios, *supra* note 57, at 579-80; see also ABADINSKY, *supra* note 24, at 237 (citing a 1995 study of parole decisions in Massachusetts in which Betty Luther concluded "that the election of a 'law and order' governor caused the board (whose membership remained almost unchanged) to decrease parole release rates, particularly for high-security inmates for whom they were virtually eliminated"); cf. KASSEBAUM, *supra* note 48, at 9-13 (discussing the effect of inmate participation in institutional rehabilitative programs on parole release decisions by the Hawaii Paroling Authority).

81. See COHEN, *supra* note 1, § 4:30, at 4-51. Regrettably, as Cohen observed, "[T]hese laws do not indicate how a parole board is supposed to divine (1) whether an offender will violate the law if released, (2) what the welfare of society comprises, and (3) when the inmate's release is compatible with that welfare." *Id.*

Notwithstanding the precise factors used by parole boards and the significance ascribed to each one, the live hearing component of the release process has traditionally played a role in the final decision.<sup>82</sup> The live hearing affords an opportunity for a face-to-face meeting between the prisoner and the board members, typically outside the presence of defense counsel.<sup>83</sup> This allows examiners to compare the information contained in the parole file, including psychological reports, with their personal observations of the applicant.<sup>84</sup> Most notably, the parole hearing provides—

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82. The parole hearing and/or personal interview of the aspiring parolee have long been construed as instrumental to the release decision. *See, e.g.*, NAT'L COUNCIL ON CRIME & DELINQ., GUIDES FOR PAROLE SELECTION 59–70 (1963) (discussing the importance of the face-to-face meeting with the prisoner in the parole release decision). Howard Abadinsky provides the following summary of how state parole release hearings tend to proceed:

Parole board members usually hold release hearings in the state's prisons. The members of the board panel will have available a case folder prepared by an institutional parole officer (or correctional staff person) containing information about each inmate: the presentence investigation report; institutional reports relative to education, training, treatment, physical and psychological examinations, and misconduct; and a release plan in the event that parole is granted. Typically, from one to three members briefly interview an inmate who is eligible for parole.

ABADINSKY, *supra* note 24, at 226. Some states impose restrictions on prisoner participation in the hearing. *See* COHEN, *supra* note 1, § 6:18, at 6-28. Indeed, at least one state supreme court has found that the requirement of the hearing does not mean that the inmate is necessarily entitled to a personal appearance. *See Mahaney v. State*, 610 A.2d 738, 743 (Me. 1992). At the very least, though, it appears that inmates should be entitled in some fashion to present statements or letters on their behalf. *See Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 15–16 (1979); *see also Wilkinson v. Dotson*, 544 U.S. 74, 78–82 (2005) (noting that constitutional challenges to state parole procedures may be pursued through § 1983 actions as well as federal habeas corpus petitions). Some observers have suggested that parole hearings may be mere formalities designed to verify the correctness of a hearing officer's preliminary assessment based on a review of the applicant's file. *See Garber & Maslach, supra* note 71, at 276; Proctor, *supra* note 75, at 196–97; *cf. Lavin-Loucks, supra* note 18, at 85 (“Parole hearings are not merely ceremonial events centered on official ‘facts’ or DOC files; Instead, they involve elaborate exchanges dedicated to establishing whether or not an offender is deserving of early conditional release.”).

83. *See, e.g.*, UTAH CODE ANN. § 77-27-7(2) (2003) (“Before reaching a final decision . . . the chair shall cause the offender to appear before the board, its panel, or any appointed hearing officer, who shall personally interview the offender . . . and verify as far as possible information furnished from other sources. Any offender may waive a personal appearance . . . .”). The vast majority of jurisdictions do not expressly allow for legal representation at parole hearings. *See* ABADINSKY, *supra* note 24, at 233. Hawaii is a rare example of a state that permits—and even facilitates—the receipt of legal advice during this process. *Id.*; *see also* Amanda N. Montague, Note, *Recognizing All Critical Stages in Criminal Proceedings: The Violation of the Sixth Amendment by Utah in Not Allowing Defendants the Right to Counsel at Parole Hearings*, 18 BYU J. PUB. L. 249, 249 (2003) (criticizing the absence of a statutory right to counsel at parole hearings in Utah).

84. *See* ABADINSKY, *supra* note 24, at 226 (describing parole board procedures); *see also* COHEN, *supra* note 1, § 6:20, at 6-31 (commenting that formal state rules of evidence do not tend to apply at parole release hearings with the effect that “parole boards may consider reliable hearsay” statements).

in the words of one set of observers—the occasion “to search for such intuitive signs of rehabilitation as repentance, willingness to accept responsibility, and self-understanding.”<sup>85</sup> In fact, the remainder of this Article studies the magnitude of this issue in parole release decision-making, namely, a prisoner’s acceptance of responsibility for the underlying criminal act, and ponders whether the emphasis on this factor may be detrimental to justice.

Two caveats should be mentioned before proceeding further. For one, this Article is chiefly concerned with initial parole release decisions as opposed to parole revocations, which are post-release determinations regarding whether individuals have violated the terms of their parole.<sup>86</sup> In addition, considering that the overwhelming majority of parole release decisions emanate from state parole boards and that recent developments have rendered federal parole decision-making largely obsolete,<sup>87</sup> it is the process of state parole decision-making upon which this Article focuses its attention.

## II. THE EFFECT OF PAROLE RELEASE DECISION-MAKING NORMS ON THE INNOCENT

In light of parole’s roots in the rehabilitative ideal of punishment, it should come as no surprise that words and acts associated with rehabilitation—acceptance of responsibility, remorse, and repentance—linger as fixtures in the contemporary parole evaluation process. After all, if discretionary parole is the upshot for the prisoner “cured” of the propensity toward criminal transgression, then how else are board members to divine whether an inmate is healthy if not partially through proof of emotional maturity in the form of verbal admissions of one’s past mistakes? At the very core of American rehabilitative theory lies this commingling of acceptance and renunciation, be it a member of Alcoholics Anonymous who must first admit “I am an alcoholic”<sup>88</sup> or a prisoner seeking a pardon or clemency.<sup>89</sup>

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85. CROMWELL, JR. ET AL., *supra* note 11, at 200; *see* AD HOC PAROLE COMM., *supra* note 64, at 11 (“The ‘good’ inmate who gets paroled is like the good child who pleads guilty, accepts punishment, and begs for forgiveness. This apparently proves to the Parole Board that the criminal has been rehabilitated.”).

86. For background information concerning parole revocations, *see* generally COHEN, *supra* note 1, § 18:1.

87. *See, e.g.*, 18 U.S.C. §§ 4201–18 (2000) (codifying a plan to phase out federal parole commissions).

88. For a discussion of this organization’s philosophy and approach to alcohol addiction, *see* ALCOHOLICS ANONYMOUS: THE STORY OF HOW MANY THOUSANDS OF MEN AND WOMEN HAVE RECOVERED FROM ALCOHOLISM (3d ed. 1976); *see also* Stephanos Bibas, *Using Plea Procedures to Combat Denial and Minimization*, in *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* 169, 170 (Bruce J. Winick & David B. Wexler eds., 2003) (“In Alcoholics Anonymous and other twelve-step programs, one must admit that one has a problem in order to conquer it. This admission shatters one’s illusions of goodness; the recognition that one has fallen is a prerequisite for standing up again.”).

Moreover, inmate participation in the rehabilitative endeavor (ideally in an active, honest, and palpable manner) has always been a centerpiece of the American conception of parole; as noted above, the leaders of the Elmira Reformatory, the first prison to use parole in the United States, declared in 1876 that the inmate's "cure is always facilitated by his cooperation, and often impossible without it."<sup>90</sup> It may not be too farfetched to suggest that, in their modern incarnation, parole boards view sincere admissions of guilt at a hearing as evidence of that inmate's cooperation in his own rehabilitation and, thus, indicia of having been cured. *Mea culpa* meets medical restoration, so to speak.

The available quantitative and qualitative data support the assertion that a prisoner's acceptance of responsibility proves vital to his prospects for an affirmative parole decision. Specifically, empirical findings from Great Britain,<sup>91</sup> as well as anecdotal accounts throughout the United States,<sup>92</sup>

89. Clemency, like parole, is a discretionary power held by the executive branch. Instead of releasing a prisoner under continued supervision, however, clemency often serves to "pardon" or excuse the prisoner's conduct, in effect wiping his criminal slate clean with respect to that conviction. *See, e.g.*, HOWARD ABADINSKY, DISCRETIONARY JUSTICE: AN INTRODUCTION TO DISCRETION IN CRIMINAL JUSTICE 147–48 (1984) ("All states and the federal government have provisions for clemency. . . . The basis for a pardon varies from state to state, and it is not used extensively anywhere."). Moreover, clemency determinations are generally not subject to judicial review. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 273 (1998) (reaffirming the principle that "pardon and commutation decisions are rarely, if ever, appropriate subjects for judicial review"). In recent years, a number of scholars have debated and occasionally criticized the perceived reduction in the exercise of clemency in the United States. *See, e.g.*, Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 241 (2003) (noting that "an increase in the number of death sentences has coincided with a decrease in the number of defendants removed from death row through clemency"); *cf.* Beau Breslin & John J.P. Howley, *Defending the Politics of Clemency*, 81 OR. L. REV. 231, 231 (2002) ("In the past quarter century more than forty-five prisoners have been removed from death row because of executive orders . . .").

90. Weiss, *supra* note 24, at 1585; *see also supra* note 27 and accompanying text.

91. The Parole Board in the United Kingdom reported that "[t]he figures from 2003 show that in twenty-four percent of cases where prisoners maintained their innocence, parole was granted. This compares with fifty-one percent of all applications granted." Naughton, *supra* note 6, at 5.

92. *See, e.g.*, BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 309–15 (2003) (discussing the case of Kevin Green, who was wrongfully convicted in California and denied parole multiple times because he proclaimed his innocence rather than accepting responsibility for the crime); Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1, 19 (2002) (noting that a Massachusetts prisoner, who was later exonerated by DNA testing, "was denied parole because he proclaimed his innocence and refused to enter treatment for sexual deviance" (internal quotations and citation omitted)); Friedman, *supra* note 7, at 186 (noting that in Michigan "the Parole Board often denies parole because the prisoner denies guilt of the offense"); Smith, *supra* note 18, at 512–13 n.111 (describing the case of Benjamin LaGuer, a Massachusetts inmate who maintained his innocence for years and was denied parole, in part, due to his failure to "admit" guilt to the parole board); Kimberly, *supra* note 6, at A5 (discussing how the Texas Board of Pardons and Paroles does not consider the validity of inmate claims of innocence); Nina Martin, *Innocence Lost*, S.F. MAG., Nov. 2004, at 98–100, *available at*



confirm (1) that parole boards attach great importance to inmate statements taking responsibility for the crime underlying their current conviction and (2) that the refusal to admit guilt decreases the likelihood of receiving parole.<sup>93</sup> Parole officials seldom deny that inmate acceptance of responsibility is a critical variable in the release decision and, instead, are often overt in showing their dependence on this factor.<sup>94</sup> For instance, the preprinted “Rationale Sheet” that the Utah Board of Pardons and Parole uses in explaining its decision after each parole hearing expressly designates *complete acceptance of responsibility* as a mitigating factor and *denial or minimization* as an aggravating one.<sup>95</sup>

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<http://www.sanfrancmag.com/files/pdfs/exonerated.pdf> (citing the saga of one former prisoner who was allegedly told by a California parole commissioner that “[i]f you don’t admit that you did this crime, you’ll never get out”); Greg Mathis, *DNA Must Be Used to Resolve Older Cases*, CHI. DEFENDER, July 21, 2006, at 12 (describing the case of Alan Newton, a man who was denied parole in Illinois in part due to his assertions of innocence and who was eventually exonerated through DNA testing); Bill Moushey, *DNA Test Clears Man After 20 Years in Jail*, PITT. POST-GAZETTE, July 30, 2005, at A1 (noting that Thomas Doswell, who remained a Pennsylvania inmate after DNA testing proved his innocence, was “denied parole four times over the past eight years because he refused to take responsibility for the crime”); Sue Anne Pressley, *Asking for Freedom, Not Forgiveness: Ex-GI Tries for Parole in Notorious 1970 Case*, CHI. TRIB., May 10, 2005, at 2 (quoting a U.S. Parole Commission spokesman who noted that the majority of prisoners seeking release express sorrow for their crimes and that “[i]t gets dicey when a person expresses innocence—you can’t accept responsibility for it when it’s something you say you never did”). Notably, with respect to the Benjamin LaGuer case, DNA tests later confirmed LaGuer’s connection to the crime scene. See Andrea Estes, *Patrick Apologizes for Disclosure Missteps*, BOS. GLOBE, Oct. 6, 2006, at A1 (discussing Massachusetts gubernatorial candidate Deval Patrick’s role in the effort to free LaGuer and the political fallout stemming from the DNA test results linking LaGuer to the rape for which he was convicted); cf. Natalia Munoz, *Hands of Time Frozen for an ‘Innocent’ Man*, REPUBLICAN (Springfield, Mass.), July 2, 2006, at 19 (“[LaGuer’s] DNA was connected to the crime, but LaGuer points to that as further evidence of evidence tampering.”).

93. See *supra* notes 91–92 and accompanying text.

94. Danielle Lavin-Loucks has written a doctoral dissertation on the manner in which inmates in a particular Midwestern state “build” a case for release before the parole board and reached some interesting conclusions regarding the premium that parole commissioners place on admissions of guilt. See, e.g., Lavin-Loucks, *supra* note 18, at 89–90 (citing interviews with parole board members that indicate that they rely on evidence of rehabilitation, including acknowledgment of responsibility, in the release decision); *id.* at 110 (“Finally, accepting responsibility for a crime or admitting fault can also contribute to a case for rehabilitation.”); *id.* at 131–38 (discussing how the parole board in this study treated inmate complaints about innocence and wrongful conviction as negative factors in the parole release decision).

95. See Utah Board of Pardons and Parole Rationale Sheet (on file with the Iowa Law Review) [hereinafter Rationale Sheet]. As indicated previously, the United States Supreme Court has insisted that parole boards bear some obligation to disclose the underlying rationales for their release decisions. See *supra* notes 4, 69 and accompanying text. Utah’s Administrative Code requires the disclosure of these forms to inmates after parole release decisions. UTAH ADMIN. CODE r. 671-305-1 (2006). This rule has been held to satisfy the demands of due process. See, e.g., *Monson v. Carver*, 928 P.2d 1017, 1031 (Utah 1996) (“While perhaps not a perfect explanation . . . , this document nonetheless satisfies the Board’s own requirement that it provide a written explanation . . . for its decision. Because Monson has failed to identify . . . the type of detail he claims he should have received . . . we conclude that he was not denied due

Having observed that inmate statements on the topic of guilt or innocence are important factors in the parole release decision-making process, it is now time to consider how this circumstance might affect an individual prisoner. Generally speaking, an incentive exists for all prisoners facing parole boards to admit guilt and apologize for the crime in order to maximize their chances for release, irrespective of their true feelings and culpability. To gain release from prison—the *penitent-iary*<sup>96</sup>—inmates must essentially display evidence of their repentance.<sup>97</sup> Some inmates who accept responsibility and express remorse for the crime at parole hearings are surely both factually guilty and genuinely apologetic; others are factually guilty yet truly unrepentant; and still others may be factually innocent and motivated solely by the desire for liberty in choosing to “admit” guilt. It is this last group that troubles me deeply.

My concern about the pressures confronting actually innocent prisoners when appearing before parole boards originated during my tenure from 2001 to 2004 as assistant director of the Second Look Program at Brooklyn Law School. During that period, students and faculty in the Second Look Program worked together to investigate and litigate post-conviction claims of innocence by New York state prisoners.<sup>98</sup> As my students and I struggled, usually to no avail, to help free prisoners whom we thought to be innocent based on extensive preliminary investigations,<sup>99</sup> it became evident that

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process.”). In addition, Utah maintains verbatim records of parole hearings. UTAH CODE ANN. § 77-27-8(1) (2005) (“A verbatim record of proceedings before the Board of Pardons and Parole shall be maintained by a certified shorthand reporter or suitable electronic recording device, except when the board dispenses with a record in a particular hearing or a portion of the proceedings.”). In certain circumstances, states may even be quite explicit regarding their expectation that admitting guilt is a requirement for release. *See, e.g.*, KY. REV. STAT. ANN. § 197.400 n.3 (West 2006) (citing *Seymour v. Colebank*, 179 S.W.3d 886, 890 (Ky. App. 2005), in which the court held that requiring parolee to admit guilt before admission to a treatment program did not violate the statute). Lavin-Loucks has noted:

Board members’ responses to . . . denial strategies vary greatly depending on how the claim is structured . . . . When offenders blame their victims, board members react with forceful disagreement. Denying all responsibility . . . is likewise an undesirable . . . strategy because it presumes innocence in the face of evidence to the contrary—the offender’s previous conviction . . . .

Lavin-Loucks, *supra* note 18, at 158–59.

96. *See* SOLOMON SCHIMMEL, WOUNDS NOT HEALED BY TIME: THE POWER OF REPENTANCE AND FORGIVENESS 182 (2002) (“Criminals are sent to *penitent-iaries*, suggesting that they are expected to become penitent and repent for their crimes during their stay in prison.”).

97. *Id.*

98. For a description of the formation of the Second Look Program and the features of its operation, see Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097, 1103–04 (2003).

99. *Id.* at 1103–04, 1116–23 (describing the case selection process).

parole might be the only viable alternative to incarceration in many situations, save for completing a sentence.<sup>100</sup>

Procedural obstacles embedded in most state post-conviction procedures—obstacles relating to statutes of limitations, burdens of proof, and appellate review, among other things—hinder the ability of wrongfully convicted prisoners to prove their innocence through litigation in each and every case, especially in those cases lacking biological evidence suitable for DNA testing.<sup>101</sup> Frequent instances of prosecutorial opposition to inmates' claims of innocence,<sup>102</sup> coupled with the decline of federal habeas corpus as an effective collateral remedy,<sup>103</sup> further reduce the likelihood of exonerating innocent prisoners by means of the court system. Accordingly, one can safely conclude that factually innocent prisoners in the United States, however many there may be,<sup>104</sup> do not always find recourse in the post-conviction arena. For such inmates, addressing the parole board assumes enormous significance as the most realistic opportunity for freedom and gives rise to the following predicament: what should the inmate say about guilt or innocence at the parole hearing?

The manner in which innocent prisoners respond to questions about guilt or innocence at parole release hearings can directly and adversely affect their plight, as the following two qualitative case studies demonstrate. The first study exemplifies not only how parole may occasionally serve as an innocent inmate's best chance for relief but also how prisoners in that situation must handle the issue of guilt or innocence with a great deal of finesse. The second study exhibits the pressure imposed on innocent prisoners to admit guilt before parole boards and discusses the ancillary consequences for defendants unable to stave off the temptation to do so.

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100. Professor Mark Godsey, Director of the Ohio Innocence Project, has also suggested on his CrimProf Blog that sometimes parole represents the best possibility for release in his jurisdiction:

I represent a group of inmates at the current time for whom we have developed a reasonable amount of evidence of innocence, and whom I personally believe are innocent. However, given that judges often expect DNA-type ironclad proof of innocence for exonerations, our evidence in some of these cases is arguably insufficient to clear them in court under the exceedingly high standards for exoneration in my state (some of my parole clients could meet the standard, but have chosen to seek release on parole first and then fight to clear their names in court later). Thus, our first step is to obtain parole for these inmates if they are eligible.

Posting to CrimProf Blog, *The Problem of Actual Innocence and Parole Boards*, [http://lawprofessors.typepad.com/crimprof\\_blog/2005/01/actual\\_innocenc.html](http://lawprofessors.typepad.com/crimprof_blog/2005/01/actual_innocenc.html) (Jan. 25, 2005).

101. *See generally* Medwed, *supra* note 14.

102. *See generally* Medwed, *supra* note 56.

103. *See supra* note 16 and accompanying text.

104. *See supra* notes 12–13 and accompanying text.

## A. PAROLE: AN INNOCENCE OPTION OF LAST RESORT

Robert Fennell, one of the Second Look Program's first clients,<sup>105</sup> was convicted of second-degree murder, together with his co-defendant Joseph Perry, after a jury trial in New York state court.<sup>106</sup> The murder conviction stemmed from the fatal shooting of John Williams on February 1, 1984, outside a Manhattan building well-known as a center of cocaine freebasing activity (a "base house") and a site where Perry and Fennell both worked to provide security to the drug operation.<sup>107</sup> The prosecution's case against Fennell and Perry hinged entirely on the testimony of a single purported eyewitness, John McKoy, "a former employee of the base house" and a self-confessed cocaine addict with a lengthy criminal record.<sup>108</sup> No doubt aware of the frailties of its case, the prosecution dangled a generous plea offer before Fennell.<sup>109</sup> Fennell rejected the offer and insisted on his right to proceed to trial.<sup>110</sup>

At trial, McKoy testified that after a dispute in the base house that night, Perry and Fennell escorted Williams from the building.<sup>111</sup> In doing so, Perry and Fennell allegedly resorted to punching Williams and dragging him outside.<sup>112</sup> From his location on the stoop of the base house, McKoy supposedly observed Fennell withdraw a pistol and fire twice at Williams.<sup>113</sup> This prompted Williams to flee, at which point Perry grabbed the weapon from Fennell, gave chase, and fired four shots at Williams.<sup>114</sup> After Perry's first two shots, according to McKoy, Williams fell to the ground.<sup>115</sup>

The threads holding McKoy's story together began to unravel on cross-examination. Contrary to his initial assertions, McKoy ultimately admitted that he was receiving leniency on a pending cocaine possession charge in exchange for cooperating in the Fennell-Perry matter.<sup>116</sup> More notably, defense counsel discredited McKoy by juxtaposing his statements at trial against those from his original police interview. Unable to reconcile the two accounts, McKoy claimed to have lied regarding certain, seemingly salient details that he had provided earlier to the police—"that he saw Perry pistol-whipping Williams," that "Fennell had fired three shots and Perry one," and

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105. See Medwed, *supra* note 98, at 1138 (briefly describing the Fennell case).

106. See generally Letter from the Second Look Program Clinic to the N.Y. State Parole Bd. (Nov. 27, 2001) [hereinafter Letter to Parole Board] (on file with the Iowa Law Review).

107. *Id.* at 1-2.

108. *Id.* at 4.

109. *Id.* at 2.

110. *Id.*

111. Letter to Parole Board, *supra* note 106, at 3-4.

112. *Id.* at 4.

113. *Id.*

114. *Id.*

115. *Id.*

116. Letter to Parole Board, *supra* note 106, at 4.

that he was standing beside a liquor store at the time of the incident.<sup>117</sup> Still, the jury apparently believed McKoy's depiction of the incident and found both Fennell and Perry guilty.<sup>118</sup>

A startling turn of events then transpired. Following the verdict but prior to sentencing, Perry and his attorney, William Mogulescu, met with Fennell's lawyer, Howard Jaffe.<sup>119</sup> During this meeting, Perry admitted that he had acted alone in murdering Williams, and even expressed a willingness to execute an affidavit to that effect.<sup>120</sup> Mogulescu informed Perry that he had absolutely no obligation to agree to this; he could still invoke his privilege against self-incrimination given that he had yet to be sentenced.<sup>121</sup> The ramifications of any admission of guilt on the part of Perry, Mogulescu explained, could be disastrous for his sentence, his appeal, and any potential retrial in the event of appellate reversal of his conviction.<sup>122</sup> Although aware that he was "sinking himself," Perry completed the affidavit because he knew that Fennell was innocent.<sup>123</sup> In March 1985, Perry executed the affidavit, which, in turn, became the crux of a post-conviction motion to set aside the verdict against Fennell.<sup>124</sup> After Perry completed the affidavit and Fennell's attorney submitted the motion, the court sentenced Perry to the maximum term: twenty-five years to life imprisonment.<sup>125</sup>

The court held an evidentiary hearing on Fennell's motion in May 1985.<sup>126</sup> At the hearing, Perry reiterated the statements he had made in his affidavit: that he had shot Williams and that he had operated alone.<sup>127</sup> As for Fennell, Perry declared at the hearing that Fennell was not on the premises at the time of the shooting.<sup>128</sup> Security routines at the base house dictated that guards work regular, eight-hour shifts, with Fennell scheduled for the midnight-to-eight A.M. stretch.<sup>129</sup> Not only was Fennell nowhere to be found at the time of the Williams murder, Perry testified, but neither was McKoy.<sup>130</sup>

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117. *Id.* at 5.

118. *Id.*

119. *Id.*

120. *Id.* at 5–6.

121. Letter to Parole Board, *supra* note 106, at 7.

122. *Id.*

123. *Id.*

124. *Id.* at 5–8.

125. *Id.* at 5.

126. Letter to Parole Board, *supra* note 106, at 5.

127. *Id.* at 5–6.

128. *Id.* at 6.

129. *Id.*

130. What Perry's testimony did not adequately explain was why he had failed to come forward during the trial to clear Fennell's name. Mogulescu, Perry's attorney, supplied this essential piece of the puzzle. After his client testified at the evidentiary hearing, Mogulescu took the rare step of testifying himself and described the circumstances that led to Perry's decision to remain silent at trial. *Id.* On the stand, Mogulescu asserted that Howard Jaffe, Fennell's lawyer,

In addition to Perry, another eyewitness appeared on Fennell's behalf at the post-verdict evidentiary hearing, a man named Charles Gaillard, who lived in the vicinity of the base house.<sup>131</sup> Gaillard testified that he had observed Perry shoot Williams and that Fennell was not at the scene.<sup>132</sup> The prosecution's case at the hearing consisted of a single witness, Henry Martin, "another member of the base house security" squad, who did little to bolster the prosecution's case and, actually, largely corroborated Fennell's evidence.<sup>133</sup> In particular, Martin claimed to have not seen Fennell during the night in question and recalled that Fennell was slated for the midnight-to-eight A.M. security stint, which started approximately an hour and a half after, by all accounts, Williams had died.<sup>134</sup>

Despite the compelling evidence of innocence, the trial judge denied Fennell's motion to set aside the verdict in June 1985—without issuing an opinion, making any findings of fact, or commenting on the credibility of the witnesses—and sentenced Fennell to fifteen years to life in prison.<sup>135</sup> The judge's explanation for rejecting the motion included a few cryptic statements that the jury verdict was "a correct one" and that Fennell had erred at trial in not calling "other witnesses available to [him]."<sup>136</sup> For fifteen years, that decision, in essence, represented the final word on the conviction of Robert Fennell, who had always maintained his innocence and insisted that he was with his girlfriend, Anita Gilmore, at the time of the murder.<sup>137</sup>

Fennell's trial attorney, though, was not convinced that justice had been served, and many years later Jaffe sought out the assistance of William Hellerstein, a law professor who worked with me in forming and supervising the Second Look Program.<sup>138</sup> Together with our students, we began a thorough re-investigation of the case in 2001, which included interviews of Fennell, Gilmore, Jaffe, and Mogulescu. Our efforts to locate McKoy,

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approached him prior to trial and told him that Fennell was not at the base house the night of Williams's death, let alone a participant in the murder. *Id.* Mogulescu then consulted Perry, who verified Jaffe's account and offered to testify on Fennell's behalf at trial. *Id.* Wary of jeopardizing his client's case, Mogulescu advised Perry that testifying would doom his own interests if they were tried jointly. *Id.* To that end, Perry executed an affidavit—prior to trial—indicating his intention to testify in Fennell's defense if their trials were severed. *Id.* The court, however, denied the severance motion and consequently Perry never testified during the joint trial. *Id.*

131. Letter to Parole Board, *supra* note 106, at 5–6.

132. *Id.*

133. Martin, for one thing, echoed Perry's claim that he and Perry were guarding the door of the base house on the evening of February 1, 1984. *Id.* at 7–8.

134. *Id.* at 8.

135. *Id.*

136. Letter to Parole Board, *supra* note 106, at 8.

137. *Id.* See also Affidavit of Anita Gilmore, dated Feb. 24, 2004 (document on file with the Iowa Law Review).

138. Letter to Parole Board, *supra* note 106, at 2.

Gaillard, or any of the other alleged witnesses to the crime were fruitless, perhaps understandably so considering it had been seventeen years since the murder. That being said, our investigation confirmed the chief thrust of the 1985 evidentiary hearing: that Fennell was almost surely innocent. Yet we became increasingly despondent even as Fennell passed a polygraph test and Gilmore buttressed his alibi.<sup>139</sup> We knew that we needed a legal “hook”—newly discovered evidence that would exculpate Fennell and that could not have been discovered with due diligence at the time of the evidentiary hearing.<sup>140</sup> No such hook existed. The polygraph was of limited value in a courtroom;<sup>141</sup> Perry had already testified; Jaffe’s role as Fennell’s attorney compromised any potential testimony offered by him; and Gilmore’s statements did not constitute new evidence because she was available at the time of trial and failed to testify by virtue of a strategic decision by Jaffe.<sup>142</sup>

Without any promising post-conviction option in the state or federal courts, we set our sights on parole, the only other avenue on the horizon. An inmate subject to an indeterminate sentence in New York first faces the parole board upon the expiration of his minimum term and thereafter at two-year intervals.<sup>143</sup> The New York State Division of Parole had already denied Fennell’s initial application for parole and was due to revisit his application in late 2001,<sup>144</sup> coincidentally, just as our investigation was grinding to a halt. Fennell had persisted in his claim of innocence and was

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139. *Id.*

140. N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2004).

141. *See, e.g.*, *People v. Angelo*, 666 N.E.2d 1333, 1335 (N.Y. 1996) (noting that polygraph results are not generally accepted by the pertinent scientific community and thus are inadmissible in New York state courts).

142. It is rather common in criminal defense practice for lawyers to choose not to put a defendant’s alibi witness on the stand when that witness is a lover, close friend, or relative for fear that the jury will discredit the testimony on the grounds that such a witness may risk perjury for the sake of the defendant’s liberty. Accordingly, courts typically consider a defense lawyer’s decision whether to have an alibi witness testify a matter of trial tactics and reject claims that choices in this regard may constitute ineffective assistance of counsel. *See, e.g.*, *Brown v. Miller*, 185 F. App’x 25, 27 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 938 (2007) (noting that it is a strategic choice for defense counsel to opt against putting an alibi witness on the stand if counsel doubts the witness’s credibility); *United States v. Long*, 674 F.2d 848, 855 (11th Cir. 1982) (rejecting ineffective assistance of counsel claims and refusing to “second-guess tactical decisions of counsel in deciding whether to call certain witnesses”).

143. *See* ROBERT DENNISON ET AL., *NEW YORK STATE PAROLE HANDBOOK: QUESTIONS AND ANSWERS CONCERNING PAROLE RELEASE AND SUPERVISION* 14 (2005), available at <http://parole.state.ny.us/Handbook.pdf> (“If you are denied release at your Parole Board interview, the Board must give you reasons for your denial. The Board will also set a date for your reappearance. That date cannot exceed 24 months from the time of appearance.”).

144. The New York State Division of Parole became notoriously stricter in its parole release decisions throughout the 1990s. Data indicates that the parole board granted parole to 60% of defendants with homicide convictions who applied in 1987, but only granted parole to 25% in 1994 and 4% in 1995. *See* Hammock & Sealandt, *supra* note 44, at 527 n.5. For a general discussion of parole release decision-making in New York State, see *id.* at 530–42.

not inclined to waver in that assertion when facing the parole board, even though he—like practically all New York state inmates—knew that a failure to “admit” guilt at his hearing would probably ring the death knell to his chances for parole.<sup>145</sup>

Hellerstein and I thus faced a conundrum of our own. We were diehard litigators who could not litigate, and with no right to counsel at New York state parole hearings,<sup>146</sup> we lacked the capacity to assist Fennell at the hearing itself. Sensing that we had nothing to lose, we decided to submit a letter to the parole board on Fennell’s behalf, which is permissible pursuant to state regulations.<sup>147</sup> Our letter detailed, in sum and substance, the background to his case and requested that the parole board not hold Fennell’s continued assertions of innocence against him.<sup>148</sup> Specifically, we wrote that

[i]f Mr. Fennell’s failure to accept responsibility for the crime for which he has been convicted could serve as a negative factor in his parole application, we would urge the Board to accept it as the only position that a person who has always maintained his innocence, and who the facts strongly suggest is innocent, can logically and in good conscience take.<sup>149</sup>

Much to our delight, the board granted Fennell parole. In the months after the parole grant, I was able to negotiate with employees of the New York and Florida corrections departments to allow Fennell to move to his home state of Florida for parole supervision. Although the specter of parole perpetually looms over Fennell—and even now, years later and miles away in Salt Lake City, I sit in dread of a phone call from him telling me he has violated his parole and has been dispatched up north to serve out the remainder of his life sentence—the situation is clearly superior to continued confinement in a New York state correctional facility. Indeed, I am convinced that without the intervention and commitment of resources by the Second Look Program, Fennell would be languishing in prison to this

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145. The infamous “Central Park Jogger” case from New York City is an example of how the New York State Division of Parole’s reliance on remorse and responsibility can harm innocent prisoners. That case resulted in the wrongful convictions of five teenagers, all of whom were exonerated when another man, Matias Reyes, confessed to the crime, and his DNA matched that of the biological sample taken from the crime scene. See generally N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004). All five of those wrongfully convicted inmates had been denied parole prior to their exonerations partly due to their lack of contrition. *Id.* at 1319.

146. See DENNISON ET AL., *supra* note 143, at 8 (stating that counsel may not be present at parole release interviews before the parole board).

147. See New York State Division of Parole, <http://parole.state.ny.us/Letters.asp> (last visited Aug. 26, 2007) (directing letters of support for or against an inmate’s release to the NYS Division of Parole address).

148. See generally Letter to Parole Board, *supra* note 106.

149. *Id.* at 10.



day. His steadfast plea of innocence, a claim validated through an extensive investigation by a team of pro bono students and law professors, would have likely and ironically served to prolong his imprisonment.

Robert Fennell never yielded to the pressure to “admit” guilt and accordingly there is no evidence on the record that he has confessed to the crime. Therefore, in the rather unlikely event that newly discovered evidence surfaces over time in Fennell’s case, it is conceivable that he could prove his innocence through the New York state court system. Not all innocent prisoners, however, are able to resist the urge to accept responsibility before parole boards.

*B. PRESSURE ON INNOCENT INMATES TO “ADMIT” GUILT*

Bruce Dallas Goodman was convicted after a bench trial of murdering Sherry Ann Fales Williams, a 21-year-old woman whose body was discovered the morning of November 30, 1984, near an Interstate-15 off-ramp north of Beaver, Utah.<sup>150</sup> Bound at the knees and wrists and unclothed below the waist, Williams had multiple contusions and lacerations across her body.<sup>151</sup> An autopsy cited her cause of death as head trauma and attributed the presence of wounds on her hands to efforts to thwart her assailant.<sup>152</sup> The only physical evidence retrieved from the crime scene that gave any clue as to the identity of the perpetrator came in the form of a partially smoked cigarette, which was found in the snow close to the body and later determined to have been smoked by a type “A” secretor.<sup>153</sup> Furthermore, based on the autopsy report, she had engaged in sexual intercourse with a type “A” secretor within the previous twenty-four to thirty-six hours.<sup>154</sup> A type “A” secretor is someone with type “A” blood who secretes “A” antigens into body fluids; according to testimony at Goodman’s trial, thirty-two percent of the general population falls into this broad category.<sup>155</sup> At the time of this murder, more accurate methods of testing biological evidence, such as DNA testing, had not yet been refined and were only beginning to make tentative inroads into criminal cases.<sup>156</sup>

Goodman, an “A” secretor, soon surfaced as the prime suspect. He had met Williams in October 1984, and they started an intimate relationship.<sup>157</sup> On November 19, 1984, they departed Las Vegas in a pickup truck, and their

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150. See *State v. Goodman*, 763 P.2d 786, 786 (Utah 1988).

151. *Id.* (“[She] was unclothed below the waist, with the exception of a pair of socks.”).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Goodman*, 763 P.2d at 786.

156. See Rob Warden, *The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions*, 70 UMKC L. REV. 803, 829 (2002) (“Gary Dotson made history on August 14, 1989, when he became the first American to be exonerated of a criminal offense by DNA.”).

157. *Goodman*, 763 P.2d at 787.

exact whereabouts during the next eleven days were unclear.<sup>158</sup> At trial, Goodman claimed that on November 30 he was in California, having parted ways with Williams, who had expressed “an intention to return to her estranged husband.”<sup>159</sup> Two defense witnesses corroborated Goodman’s alibi that he was in California at the time of Williams’s death.<sup>160</sup> The prosecution, though, put forth evidence from several eyewitnesses suggesting that Goodman had continued to accompany Williams on the 30th.<sup>161</sup> Most pertinently, a witness who worked at a casino in Mesquite, Nevada, placed a couple matching the description of Goodman and Williams at that location between 2:00 A.M. and 4:00 A.M. on November 30 and testified that the two appeared to be in the midst of an argument.<sup>162</sup> Mesquite, not incidentally, is situated off Interstate-15 between Las Vegas and the Utah border.<sup>163</sup>

In 1986, a Utah state trial judge found Goodman guilty of murder in the second degree and sentenced him to a term of five years to life imprisonment.<sup>164</sup> On appeal, the Utah Supreme Court acknowledged that “[w]ithout question this was a close case” but ultimately affirmed Goodman’s second-degree murder conviction by a three-to-two margin.<sup>165</sup> Justice Stewart wrote a spirited dissent in which he emphasized that, even assuming the credibility of the prosecution’s case, the complete paucity of evidence connecting Goodman to Williams between the early morning sighting at a bustling Mesquite casino and the discovery of Williams’s corpse roughly five hours later in rural Utah put the validity of the conviction into question.<sup>166</sup> In Justice Stewart’s estimation, “[t]he evidence in this case falls far short of proving that the defendant committed the crime charged.”<sup>167</sup>

Goodman had always maintained his innocence and continued to do so in the aftermath of his conviction. Still, more than a decade later, when appearing before the Utah State Board of Pardons and Parole in 2000, Goodman “admitted” his culpability for the murder in order to curry favor with parole officials.<sup>168</sup> His comments nevertheless failed to produce his

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158. *Id.*

159. *Id.* at 787–88. Williams’s desire to end their affair, Goodman admitted on the stand, had angered him and led to some disputes, but “he insisted that they had parted ways well before the 30th.” *Id.* at 788.

160. See *DNA Tests Set Man Free After Nineteen Years*, L.A. TIMES, Nov. 10, 2004, at 12 [hereinafter *DNA Tests Set Man Free*].

161. *Goodman*, 763 P.2d at 787–88.

162. *Id.* at 788.

163. *Id.*

164. *Id.* at 787–88; see also *DNA Tests Set Man Free*, *supra* note 160, at 12.

165. *Goodman*, 763 P.2d at 788.

166. *Id.* at 789–90.

167. *Id.* at 790.

168. See *DNA Tests Set Man Free*, *supra* note 160, at 12 (“After insisting for years that he was innocent, Goodman accepted responsibility for the crime at a parole hearing in 2000, but said he did not remember it. His attorney, Josh Bowland, said Goodman was just trying to win favor

long-sought outcome—the Board denied him parole.<sup>169</sup> Goodman's wish for freedom finally was realized four years later, albeit not through the parole process. Instead, he earned his liberty after he enlisted the help of the Rocky Mountain Innocence Center ("RMIC"), a nonprofit organization that investigates and litigates post-conviction claims of innocence by inmates in the Intermountain West.<sup>170</sup> RMIC filed a petition seeking to subject the remaining biological evidence from the Williams murder to Y-STR DNA testing, technology far more advanced than that applied prior to Goodman's trial and capable of determining the source of the evidence with tremendous specificity.<sup>171</sup> After RMIC procured the evidence from the Utah State Crime Laboratory and submitted it for testing, the results proved that none of the existing samples retrieved from the crime scene belonged to Goodman.<sup>172</sup> Rather, the DNA evidence showed that two other, unidentified people had left these samples.<sup>173</sup>

Jensie Anderson and Josh Bowland, RMIC's president and staff attorney, respectively, then began the delicate and complicated process of figuring out exactly how to use this new discovery to prove Goodman's innocence. One option consisted of filing a motion under Utah's Post-Conviction Testing of DNA Statute, enacted in 2001, and asking the court to vacate Goodman's conviction based on the DNA results.<sup>174</sup> Under this remedy, a judge may dismiss the charges with prejudice if the defendant proves his actual innocence by clear and convincing evidence.<sup>175</sup> In the

with the parole board."); *see also* Ashley Broughton, *State: DNA Should Free Inmate*, SALT LAKE TRIB., Oct. 15, 2004, at D1 ("At a 2000 hearing before the state Board of Pardons and Parole, Goodman said he accepted responsibility for the slaying but said he did not remember it because he was using barbiturates and alcohol heavily at the time, prosecutors said."). It is unclear whether Goodman actually accepted responsibility for the crime at the parole hearing or, rather, simply stopped denying his involvement for the first time. In any event, it seems clear that the prosecution interpreted his comments as constituting an admission of some sort.

169. *DNA Tests Set Man Free*, *supra* note 160, at 12.

170. *See* Innocence Project, Other Innocence Organizations, <http://www.innocenceproject.org/Content/313.php> (last visited Jan. 8, 2008) (providing a list of innocence projects by jurisdiction and mentioning the states in which the organization handles cases: Nevada, Utah, and Wyoming).

171. Angie Welling & Jennifer Dobner, *DNA-Test Technology Improving*, DESERET MORNING NEWS (Salt Lake City, Utah), Jan. 30, 2005 ("[RMIC] filed a petition on his behalf asking that newly discovered evidence . . . be retested with recent technology. The 20-year-old evidence was examined through a process called Y-STR DNA testing, which ignores the existence of female DNA in samples and focuses only on the Y chromosomes present.")

172. *Id.* (mentioning that tests were conducted on bodily fluids found in the snow near Williams's corpse and the vaginal washing from the rape kit and noting that the Utah State Crime Lab was unable to locate the cigarette butt).

173. *Id.*

174. UTAH CODE ANN. § 78-35a-303(1)(a) (2002); *see also* Ted S. Reed, Note, *Freeing the Innocent: A Proposed Forensic Evidence Retention Statute to Optimize Utah's Post-Conviction DNA Testing Act for Claims of Actual Innocence*, 2004 UTAH L. REV. 877, 884.

175. *See* UTAH CODE ANN. § 78-35a-303(2)(b), which states:

alternative, RMIC considered pursuing matters through the state habeas corpus remedy, which permits courts to set aside convictions when presented with evidence of previously unknown constitutional violations or newly discovered evidence that undermines confidence in the propriety of the verdict, yet allows for the possibility of a subsequent retrial.<sup>176</sup> I had recently joined RMIC's Board of Directors and became involved in the strategy discussions. As we debated which path to follow, we decided to contact the relevant prosecutors and take their temperature on the case, knowing full well that the likelihood of overturning a wrongful conviction rises considerably with prosecutorial consent to the defense motion or at least refusal to oppose it.<sup>177</sup>

The prosecution's position all along had been that Goodman had slain Williams by himself, and these new findings obviously demolished that theory of the case. Even so, although troubled by the new evidence, the prosecutors involved with the litigation did not immediately jump to the conclusion that Goodman was innocent.<sup>178</sup> In contrast, a novel prosecution theory emerged to justify the status quo: that Goodman was one of several perpetrators who took part in the Williams murder that morning and that the absence of his biological evidence from the crime scene did not conclusively prove his innocence.<sup>179</sup>

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If the court, after considering all the evidence, determines that the DNA test result demonstrates by clear and convincing evidence that the person is actually innocent of one or more offenses of which the person was convicted and all lesser included offenses relating to those offenses, the court shall order that those convictions be vacated with prejudice and those convictions be expunged from the person's record.

*Id.*

176. See UTAH CODE ANN. §§ 78-35a-101-304 ("Post-Conviction Remedies Act"). The Utah Rules of Civil Procedure provide:

If the court vacates the original conviction or sentence [pursuant to the state Post-Conviction Remedies Act], it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action.

UTAH R. CIV. P. 65C(m)(1).

177. See Medwed, *supra* note 56, at 128 ("[T]he prosecution can influence how courts will resolve [post-conviction innocence] claims by deciding whether to cooperate with the defense, for instance, by joining—or at least not contesting—a defendant's request for an evidentiary hearing based on the newly discovered evidence.").

178. Prosecutors at both the local and state level were involved in the Goodman matter because, under Utah law, the Utah State Attorney General's Office handles all post-conviction litigation, whereas the district attorney in the local county of original conviction typically prosecutes any retrial resulting from a post-conviction reversal.

179. See, e.g., Broughton, *supra* note 168 (quoting Utah Assistant Attorney General Erin Riley as suggesting that "[t]he new DNA evidence is not conclusive, but it is troubling. It does

This is where Goodman's statements to the Utah Board of Pardons and Parole came back to haunt him. Utah allows for and even encourages reciprocal exchanges of information between parole boards and prosecutors. Just as evidence of frivolous post-conviction filings may become part of a prisoner's record for purposes of the parole assessment,<sup>180</sup> so might damning statements and other unsavory facts from parole hearings find their way into the prosecutorial response to an inmate's subsequent request for post-conviction relief.<sup>181</sup> As a matter of fact, in discussing the case with the RMIC team in the weeks following the disclosure of the DNA test, lawyers from the Utah State Attorney General's Office noted Goodman's admission of guilt at his 2000 parole hearing as one reason for their hesitancy to declare his innocence.

Even after we struggled to explain the difficulties that innocent prisoners endure in maintaining their innocence over time, especially when they know such statements impair their chances at parole, the prosecution would not budge from its suspicion that Goodman was somehow involved. Indeed, the prosecution indicated that it would vigorously contest a filing under the Post-Conviction Testing of DNA Statute, but would both stipulate to vacate the conviction under the habeas corpus remedy and refrain from seeking a retrial on the grounds that the DNA evidence, while short of proving actual innocence, did create reasonable doubt about the conviction.<sup>182</sup> In the end, upon gauging the prosecution's stance and

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not prove Goodman innocent"); Geoffrey Fattah, *DNA Evidence Could Set Man Free*, DESERET MORNING NEWS (Salt Lake City, Utah), Oct. 16, 2004, at B02 (same); see also Broughton, *supra* note 168 ("State prosecutors said additional evidence, although circumstantial, pointed to Goodman as Williams' killer.").

180. UTAH CODE ANN. § 77-27-5.3(2) (2005) ("In any case filed in state or federal court in which a prisoner submits a claim [found] to be without merit and brought . . . in bad faith, the Board of Pardons and Parole and any county jail administrator may consider that finding in any early release decisions concerning the prisoner."); see also *id.* § 77-27-13(2) ("The Department of Corrections shall furnish pertinent information it has and shall provide a copy of the presentence report and any other investigative reports to the [B]oard [of Pardons and Parole].").

181. The Utah Board of Pardons and Parole is required to produce a transcript of parole hearings, and transcripts are available for purchase. *Id.* § 77-27-8(1); UTAH ADMIN. CODE r. 671-304 (2007). Moreover, the hearings themselves are "open to the public, including representatives of the news media." *Id.* r. 671-302-1. There does not appear to be a rule prohibiting prosecutorial access to the transcript or any other aspect of parole files in Utah. For that matter, such statements could conceivably be utilized in civil litigation related to the crime—for example, a wrongful death action. Notably, even though statements from parole hearings may be treated as hearsay if introduced in subsequent proceedings, those statements would almost certainly satisfy the "party admission" exception to the hearsay rule. See UTAH R. EVID. 801(d)(2) ("A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement . . .").

182. Special thanks to my colleague Jensie Anderson, President of RMIC's Board of Directors, for informing me of the intricate details of these negotiations, much of which I did not participate in. True to their word, prosecutors in the case refused to retry Goodman. See Welling & Dobner, *supra* note 171 ("Goodman was released when Beaver County prosecutors

comparing the respective costs and benefits of each remedy,<sup>183</sup> RMIC filed a state habeas corpus petition to vacate Goodman's conviction.

Goodman was released from prison in November 2004: a free man, but not altogether cleared of the crime.<sup>184</sup> Without the official imprimatur of a finding of actual innocence, the ancillary consequences of Goodman's wrongful murder conviction may dog him for the rest of his life, presenting obstacles in his quests for compensation from the state<sup>185</sup> or gainful employment.<sup>186</sup> Even somewhat insignificant issues, like expunging a conviction from one's record,<sup>187</sup> prove a burden for those exonerees whose release lacked an outright declaration of innocence.

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declined to refile murder charges against him, stating that the DNA evidence of others from the crime scene created enough reasonable doubt that a conviction would be unlikely.”).

183. A major strategic benefit of utilizing the habeas corpus remedy, from RMIC's perspective, was that it allowed for Goodman's release within five days as opposed to the protracted litigation battle that would inevitably ensue under the Post-Conviction DNA Testing statute. UTAH CODE ANN. § 78-35a-108(2)(a). The statute provides:

If the petitioner is serving a felony sentence, the order shall be stayed for five days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action. . . . If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner.

*Id.* §§ 78-35a-108(2)(a)–(b).

184. See Fattah, *supra* note 179, at B02 (“The new DNA evidence is not conclusive, but it is troubling,” said assistant attorney general Erin Riley. “It does not prove Goodman innocent, but it may well create reasonable doubt as to his guilt.”).

185. Although Utah does not currently have a wrongful conviction compensation statute, I am involved with a bipartisan working group—composed of academics, defense attorneys, and prosecutors—that is in the process of presenting just such a bill to the state legislature. Nationally, a number of jurisdictions have legislation explicitly compensating individuals for the harms wrought by wrongful convictions, and these statutes often contain a number of obstacles, including monetary caps and requirements to show that the applicants for relief have not contributed in some fashion to the original convictions. See Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 708–13 (2004) (arguing that compensation statutes are rather equitable, easy to use, and popular); Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 101–10 (1999) (analyzing existing indemnification statutes); Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 690–704 (2002) (explaining and critiquing current legal and legislative remedies for the wrongly convicted); Shawn Armbrust, Note, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 161–81 (2004) (discussing the inadequacy of existing remedies and proposing a model system of holistic compensation for the wrongly convicted).

186. For a discussion of many of the problems, both legal and social, that prisoners may face upon reentry into society, see generally Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006).

187. As Judge Stephen J. Fortunato, Jr., has recently written about Rhode Island:

## III. ADMISSIONS OF GUILT AND THE PAROLE RELEASE DECISION RECONSIDERED

The cases of Bruce Goodman and Robert Fennell illustrate the dilemma that innocent prisoners experience in deciding how to address parole boards. Proclaiming innocence at a parole hearing typically harms one's chances for release, aside from the unique posture of Fennell's case, where he had the institutional credibility and assets of a law school innocence project backing him,<sup>188</sup> while "admitting" guilt can serve as a mitigating factor. Given the stark reality of prison life—its everyday brutality and ample deprivations—the yearning to escape can overwhelm even the strongest and most stoic of people and prompt an innocent prisoner to surrender to the lure of "admitting" guilt before the parole board to boost the odds of a parole grant. Yet regardless of whether that admission accomplishes its objective, inculpatory statements at parole hearings can hamper the prisoner's later attempts to prove innocence through litigation and thus have long-term negative effects.

To be sure, one might contend that the Fennell and Goodman cases are anomalous and do not justify banning altogether the use of admissions of guilt in the parole decision-making process. The weight placed on acknowledging guilt in the parole release equation did not prevent Fennell and Goodman from ultimately obtaining their freedom, even if neither has managed yet to prove his innocence. Contemporary psychological theory and age-old religious principles, moreover, prescribe that accepting responsibility for past transgressions is integral to rehabilitation and that refusing to acknowledge one's errors connotes mental instability or immaturity, neither of which bode well for an inmate's future behavior in society. Victims' interests may also be served through inmate admissions of guilt and expressions of remorse.

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[Its] statute [is] typical of many in force around the country regarding the expungement—or more accurately, the sealing of criminal records. The statute presents problems on its face and as applied. Though the person recently released to the streets needs a job immediately, and preferably one that pays a living wage, there is a five-year waiting period to expunge a misdemeanor conviction and a ten-year wait to remove a felony conviction from public view.

Hon. Stephen J. Fortunato, Jr., *Judges, Racism, and the Problem of Actual Innocence*, 57 ME. L. REV. 481, 507 (2005).

188. Several other inmates have persisted in claiming innocence and still received parole due to the help of an innocence project. *See, e.g.*, Cal. W. Sch. L., Governor Grants Parole to California Innocence Project Client (Apr. 27, 2004), <http://www.cwsl.edu/main/default.asp?nav=news.asp&body=news/Riojas.asp> (describing how the California Innocence Project helped Adam Riojas to obtain his release on parole after Riojas's father confessed to the underlying crime); Carey Hoffman, U. Cin., Innocence Project Marks First Successful Prisoner Release (Dec. 14, 2004), <http://www.uc.edu/news/NR.asp?id=2247> (explaining how the Ohio Innocence Project at the University of Cincinnati College of Law helped Gary Reece procure parole by presenting substantial evidence of his innocence after Reece had been denied parole five times).

Therefore, as long as acknowledging guilt is just one of several variables in the parole release decision, not the sole or outcome-determinative factor,<sup>189</sup> it might arguably be a worthwhile issue for parole boards to consider. State courts have upheld parole decisions in which refusing to acknowledge guilt was explicitly cited as a factor in denying release and, in the process, rejected arguments that this practice violates the privilege against self-incrimination.<sup>190</sup> In addition, questions of guilt and innocence arguably lie beyond the scope of a parole board's job description. That is, state and federal post-conviction court procedures exist to rectify errors in the litigation process—including those related to guilt and innocence—and that objective remains largely foreign to the parole process, which is principally concerned with the basic question of whether to release prisoners into the outside world under supervision. Upon closer inspection, though, the theoretical justifications for using an inmate's admission of guilt as a key criterion in the parole release decision mask a much more sobering reality.

A. *THE DANGER OF ASSUMING THE LITIGATION PROCESS ACCURATELY FILTERS THE GUILTY FROM THE INNOCENT*

The American system for adjudicating criminal cases is far from fail-safe,<sup>191</sup> and it is perilous to rationalize the documented errors wrought by

189. See, e.g., CAL. PENAL CODE § 5011(b) (West 2000) (“The Board of Prison Terms shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed.”).

190. See, e.g., *Quegan v. Mass. Parole Bd.*, 673 N.E.2d 42, 42 (Mass. 1996) (finding no state constitutional violation when a prisoner's refusal to acknowledge guilt is factored into the parole decision); *Romer v. Dennison*, 804 N.Y.S.2d 872, 874 (N.Y. App. Div. 2005) (suggesting that the parole board properly refused to release a prisoner where that record reflected “that petitioner continues to maintain his innocence of the crimes for which he stands convicted—crimes that, the Board observed, involved ‘devious, manipulative and cunning acts perpetrated against vulnerable individuals’ who had placed their trust in petitioner”); *Sontag v. Ward*, 789 A.2d 778, 780 (Pa. Commw. Ct. 2001). The *Sontag* court noted:

[The defendant] maintained that by forcing him to admit guilt . . . to complete the program and thereby be recommended for parole, his right against self-incrimination was violated. . . . The privilege against self-incrimination does not extend to consequences of a non-criminal nature, even if it would result in the loss of probation.

*Id.*; see also *In re Ecklund*, 985 P.2d 342, 346 (Wash. 1999) (holding that the state parole board's reliance on an inmate's denial of guilt as one basis for denying parole did not violate his right to remain silent).

191. In addition to the problem of wrongful convictions, there are problems regarding the arrest and criminal charging process at the outset. See, e.g., Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1199 (2005) (“Assuming that the analysis to this point suggests that a considerable fraction, perhaps half, of the acquitted are innocent, we at a minimum know that the pre-trial sorting process has not reduced to the vanishing point the innocents in the pool of those forced to judgment.”); Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1299 (2000) (“[W]hile



the system as inevitable or incidental,<sup>192</sup> much less assume that the inability of a prisoner to achieve freedom through the courts unequivocally confirms factual guilt. Contrary to what some commentators have argued,<sup>193</sup> the host of exonerations since the advent of DNA hardly proves the post-conviction process works effectively in the end, only that it *may* result in justice where the unique recipe of facts in a particular case yields the perfect stew. The main ingredients in the exoneration stew include situations where: (1) there is either biological evidence appropriate for DNA testing that has not been degraded, destroyed, or lost over time<sup>194</sup> or otherwise compelling, available, and newly discovered non-DNA evidence;<sup>195</sup> (2) the inmate is serving a sufficiently lengthy sentence on a serious crime so as to provoke a lawyer or legal organization into reviewing the case and championing the inmate's cause;<sup>196</sup> (3) the posture of the case enables the defense team to dodge

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innocent people who are . . . acquitted of crimes have far fewer problems than the wrongfully convicted, their burdens are still substantial . . . . In particular, a factually innocent defendant confronts the problem of being publicly accused by the government of criminal behavior with no real prospect of ever being officially vindicated.”)

192. See, e.g., Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES, Jan. 26, 2006, at A23 (dismissing the overall number of wrongful convictions as insignificant). Supreme Court Justice Antonin Scalia recently cited Marquis's data and extrapolated from it to find an error rate in felony convictions of .027, “or, to put it another way, a success rate of 99.973 percent.” *Kansas v. Marsh*, 126 S. Ct. 2516, 2538 (2006). Professor Samuel Gross responded by criticizing Justice Scalia's computation: “In fact, the true number of wrongful convictions is unknown and frustratingly unknowable. But the rate that Justice Scalia advocates is flat wrong and badly misleading.” Samuel R. Gross, *Souter Passant, Scalia Rampant: Combat in the Marsh*, 105 MICH. L. REV. FIRST IMPRESSIONS 67, 69 (2006), available at <http://students.law.umich.edu/mlr/firstimpressions/vol105/gross.pdf>. Notably, Michael Risinger recently wrote a paper that found “an empirical minimum of 3.3% and a fairly generous likely maximum of 5%, for factually wrongful convictions in capital rape-murders in the 1980's.” D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007).

193. See *supra* note 192 and accompanying text; cf. generally Medwed, *supra* note 14 (analyzing some of the procedural, evidentiary, and other impediments that make it difficult for prisoners with innocence claims grounded on non-DNA newly discovered evidence to obtain vindication in the state courts).

194. See Barry Scheck & Peter Neufeld, *DNA and Innocence Scholarship*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 241, 245 (Saundra D. Westervelt & John A. Humphrey eds., 2001) (“In 75 percent of Innocence Project cases, matters in which it has been established that a favorable DNA result would be sufficient to vacate the inmate's conviction, the relevant biological evidence has either been destroyed or lost.”).

195. See generally Medwed, *supra* note 14 (discussing some of the procedural obstacles and risks present in many state post-conviction procedures).

196. See generally Medwed, *supra* note 98 (discussing the case selection process engaged in by most innocence projects).

procedural default;<sup>197</sup> and/or (4) the assigned prosecutor or judge demonstrates openness to the allegations.<sup>198</sup>

What apparently separates the exonerated from the actually innocent who remain incarcerated, then, is more happenstance—the peculiar, often random blend of circumstances in their cases that fall outside their control—than anything else.<sup>199</sup> Even more, the bulk of chronicled wrongful convictions have occurred in rapes and murders, the kinds of crimes likely to merit severe sentences and generate regular appearances before parole boards in jurisdictions with indeterminate sentencing regimes.<sup>200</sup> Accordingly, taking for granted the accuracy of the guilty verdict when weighing an inmate’s request for parole overlooks the more nuanced and obscure truth about the criminal justice system’s ability to invariably “get it right.” Whether parole boards can actually alter this situation is another matter entirely, and one that Part IV of this Article addresses.<sup>201</sup>

### B. POTHoles ON THE PATH TO REDEMPTION THROUGH THE PAROLE PROCESS

Given the lingering doubts surrounding the fundamental accuracy of the criminal adjudicatory process, the expectation that prisoners must admit guilt to earn release on parole is problematic. As noted in Part I of this Article, the concept of parole is grounded partially in rehabilitation theory and rhetoric—the idea that prisoners who succeed in reforming themselves while incarcerated deserve early release contingent upon further state monitoring in the event the parolee falls from grace.<sup>202</sup> Proponents of rehabilitation theory have historically viewed acceptance of responsibility and expressions of remorse as indispensable steps on the road to rehabilitation,<sup>203</sup> and this fusion of admission and apology as a “cure” has ancient roots in the Judeo-Christian tradition in which such acts are deemed

197. See generally Medwed, *supra* note 14 (noting some of the obstacles posed by, among other things, strict statutes of limitations or prohibitions against filing successive petitions).

198. See generally Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006) (detailing prosecutorial unwillingness to admit defendants were wrongly convicted); Medwed, *supra* note 56 (examining prosecutorial resistance to post-conviction innocence claims); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171 (2005) (analyzing the ethical obligations of prosecutors to facilitate the exoneration of innocent prisoners).

199. As a recent in-depth study of 340 exonerations from 1989 to 2003 conducted by scholars at the University of Michigan disclosed, “it is certain—this is the clearest implication of our study—that many defendants who are not on this list, no doubt thousands, have been falsely convicted of serious crimes but have not been exonerated.” Gross et al., *supra* note 13, at 527.

200. See Gross, *supra* note 192, at 69 (observing that ninety-six percent of known exonerations occurred in rape and murder cases, which together constitute less than one in fifty felony convictions).

201. See *infra* notes 250–319 and accompanying text.

202. See *supra* notes 26–27 and accompanying text.

203. See *supra* notes 88–90 and accompanying text.

crucial in atoning for sins.<sup>204</sup> In ancient Jewish law, rehabilitation and atonement served as the pillars of punishment theory.<sup>205</sup> The modern parole process's reliance on remorse and responsibility also mirrors the classic Christian tenets of the Sacrament of Penance: "contrition, confession, the act of penance, and absolution."<sup>206</sup>

The belief that acknowledging past errors is central to individual rehabilitation derives from psychology as well as theology. Since the early twentieth century, psychologists have developed and studied the topic of "denial," characterizing it as a fundamental human coping mechanism that is used to avoid confronting unpleasant realities and that also potentially impedes personal growth.<sup>207</sup> The modern psychological literature surrounding denial stems to a large degree from Sigmund Freud's pioneering work in the area of disavowal and repression.<sup>208</sup> Building on Freudian theories, modern mental health professionals often recommend treatment programs that involve probing into the extent of a patient's denial and attempting to uncover its source.<sup>209</sup> Implicit, and at times explicit, in the current psychological discourse is the precept that only by coming to terms with one's inner demons (and past transgressions) might a patient

204. See Jonathan R. Cohen, *The Culture of Legal Denial*, 84 NEB. L. REV. 247, 254 n.14 (2005). Cohen writes:

In Judaism, see, for example, MISHNAH YOMA 8: 9 ("For transgressions against God, the Day of Atonement atones, but for transgressions against another human being, the Day of Atonement does not atone until one has made peace with that person."). In Christianity, see, for example, *Matthew* 5: 23–24 ("Therefore if thou bring thy gift to the altar, and there rememberest that thy brother hath ought against thee; Leave there thy gift before the altar, and go thy way; first be reconciled to thy brother, and then come and offer thy gift.").

*Id.*

205. See Martin H. Pritikin, *Punishment, Prisons, and the Bible: Does "Old Testament Justice" Justify Our Retributive Culture?*, 28 CARDOZO L. REV. 715, 716 (2006) ("In Jewish law, restitution, rehabilitation, and atonement . . . —and not retribution—were the primary purposes of criminal punishment."). Interestingly, Jewish law sought to differentiate the moral and spiritual quest for atonement from the criminal process itself and banned the use of confessions entirely in the adjudication of a criminal case. See Cheryl G. Bader, "Forgive Me Victim for I Have Sinned": *Why Repentance and the Criminal Justice System Do Not Mix—A Lesson from Jewish Law*, 31 FORDHAM URB. L.J. 69, 86–93 (2003) (explaining the rationale behind the prohibition on confessions in Jewish law).

206. John Celichowski, *Bringing Penance Back to the Penitentiary: Using the Sacrament of Reconciliation as a Model for Restoring Rehabilitation as a Priority in the Criminal Justice System*, 40 CATH. LAW. 239, 249 (2001).

207. See THEODORE L. DORPAT, DENIAL AND DEFENSE IN THE THERAPEUTIC SITUATION 2 (1985) ("Denial covers situations in which individuals in words, fantasies, or overt actions attempt to avoid painful reality.").

208. See *id.* at 21–32 (discussing Freud's contributions to the development of the topic).

209. See Martin Wangh, *The Evolution of Psychoanalytic Thought on Negation and Denial*, in DENIAL: A CLARIFICATION OF CONCEPTS AND RESEARCH 5, 7–8 (E.L. Edelstein et al. eds., 1989) (describing how a key precept of Freud's work on negation entails ignoring a patient's initial negative response or judgment with respect to a suggestion or inquiry).

experience a positive mental and spiritual transformation.<sup>210</sup> As a key corollary, neglecting to admit past mistakes purportedly renders the attainment of this goal elusive.<sup>211</sup>

Traditional religious views and psychological theories about the significance of apology and denial in human well-being have infiltrated various aspects of American legal doctrine.<sup>212</sup> For instance, academics and state legislators have recently engaged in heated debates regarding whether and how apologies should be utilized in the civil litigation process and the extent to which admissions of sympathy should be treated differently from admissions of fault.<sup>213</sup> Furthermore, several academic studies highlight the importance of apologies in resolving civil disputes. Many American victims of medical malpractice admit they would not have sued but for their physicians' reluctance to apologize,<sup>214</sup> and Japan's meager lawsuit rate is often chalked up to the country's custom of expressing regret for causing injury.<sup>215</sup> In an effort to encourage citizens to apologize for injuring others and to nip tort lawsuits in the bud, a handful of states in the past decade have proposed legislation that would make fault-based apologies at the site of an accident inadmissible in court.<sup>216</sup> Similarly, scholars have insisted that apologies serve a vital social function in validating the tort victim's experience and in helping both injured and injurer with the restorative

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210. See *supra* notes 26–27, 88–90, 204 and accompanying text; see also Roy F. Baumeister et al., *Personal Narratives About Guilt: Role in Action Control and Interpersonal Relationships*, 17 BASIC & APPLIED SOC. PSYCHOL. 173, 195 (1995) (studying guilt in the context of interpersonal relationships and describing “some findings that point to the relevance of guilt for action control . . . link guilt to learning lessons and altering subsequent behavior”).

211. See *supra* note 210; see also Gad Czudner & Ruth Mueller, *The Role of Guilt and Its Implication in the Treatment of Criminals*, 31 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 71 (1987) (presenting case studies to suggest that the willingness and readiness of convicted criminals to change hinges on their capacity to experience guilt and empathy); W.L. Marshall, *Treatment Effect on Denial and Minimization in Incarcerated Sex Offenders*, 32 BEHAV. RES. THERAPY 559, 559 (1994) (stating as an underlying assumption that, in sex offenders, “the treatment of other issues cannot proceed until denial is overcome and minimization has at least been significantly changed”).

212. Several scholars have promoted the concept of atonement as a theory to justify criminal punishment and imprisonment in general. See, e.g., Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1804 (1999) (“Atonement is both a goal and a process. As a goal, atonement seeks the reconciliation of the wrongdoer and the victim . . . . As a process, atonement has several steps . . . [that] lead to atonement-the-goal. Following Richard Swinburne, I suggest that the process of atonement has two basic stages: expiation and reconciliation.”).

213. See generally FED. R. EVID. 409 (deeming offers to pay medical expenses inadmissible at trial to prove liability); Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819 (2002).

214. See Cohen, *supra* note 213, at 821.

215. *Id.* at 850–52.

216. See *id.* at 820.

process.<sup>217</sup> In the field of criminal law, the burgeoning victims' rights movement likewise has treated apologies and admissions of guilt by perpetrators as instrumental components of healing for victims.<sup>218</sup> On a grander scale, the most common method of settling criminal cases in recent decades—plea bargaining—hinges upon a defendant's acceptance of responsibility and almost universally requires a public admission of guilt as part of the plea allocution.<sup>219</sup> The Federal Sentencing Guidelines themselves reflect an institutional appreciation for defendant admissions of guilt by allowing downward sentencing adjustments for, among other factors, acceptance of responsibility.<sup>220</sup>

In contrast, denials of guilt, if superficially sanctioned as viable litigation strategies, are treated with underlying condemnation in many fields of law. This condemnation occasionally manifests itself in punitive measures to the party resistant to admissions of guilt. Observers of the criminal justice system have commented on the "trial tax," a colloquial phrase used to describe the penalty imposed on criminal defendants who refuse to plead guilty and, instead, assert their constitutionally provided right to a trial.<sup>221</sup> Such

217. See, e.g., Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 68–71 (1994).

218. See, e.g., Michael M. O'Hear, *Victims and Criminal Justice: What's Next?*, 19 FED. SENT'G REP. 83, 85 (2006) (discussing some of the recent victims' rights scholarship in which Benji McMurray and Erin Ann O'Hara have recommended, respectively, that "an offender's apology and voluntary efforts" at crime reduction should warrant a reduced sentence and that victims should directly control a portion (ten percent) of an offender's sentence in order to encourage apology and reconciliation). Notably, at least one criminal defense organization, Georgia Justice Project ("GJP"), has formally incorporated its religious beliefs surrounding remorse and responsibility into its practice. Bader, *supra* note 205, at 69. Devoted to aiding its clients in obtaining moral and religious redemption, GJP encourages its clients to confess to their victims through written correspondence prior to the adjudication of their cases in the hopes of receiving forgiveness. *Id.*; see also LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 39 (1993) (noting how "[c]onfession and repentance were crucial aims of the criminal process" in colonial times and describing one Maryland case in which a woman falsely accused a man of fathering her child and, as a punishment, was ordered to ask forgiveness in open court and on "bended knees").

219. See, e.g., KATE E. BLOCH & KEVIN C. McMUNIGAL, CRIMINAL LAW: A CONTEMPORARY APPROACH 9 (2005) ("Figures vary somewhat, but commonly more than 90 percent of state convictions in criminal cases are based on defendants' pleas of guilty. Similarly, statistics from the year 2000 indicate that, on the federal level, guilty pleas represented approximately 95 percent of federal convictions."). One striking exception to the idea that one must admit factual guilt as a condition of a guilty plea is the concept of the Alford plea. See *supra* note 7 and accompanying text (discussing Alford pleas).

220. See BLOCH & McMUNIGAL, *supra* note 219, at 72; see also John Tasioulas, *Repentance and the Liberal State*, 4 OHIO ST. J. CRIM. L. 487, 487 (2007) (arguing that repentance is a valuable factor in weighing criminal punishment and that the justice system should facilitate repentance).

221. See, e.g., STEVE BOGIRA, COURTROOM 302 (2005) (mentioning how the term "trial tax" is used frequently through the Chicago criminal courts to describe the ramifications of refusing a plea offer and, instead, exercising one's right to proceed to trial); DAVID FEIGE, INDEFENSIBLE 104 (2006) (noting that in New York City's courthouses "a trial loss will almost inevitably result

defendants tend to receive a much harsher sentence upon a guilty verdict after trial than had the case been resolved through a guilty plea at the outset.<sup>222</sup> A defendant may even be explicitly punished at sentencing for persisting in his innocence.<sup>223</sup> In the civil arena, moreover, scholars have pressed for changes to the legal system in order to rid it of any dormant incentives for parties to deny fault. Jonathan Cohen, who has been at the forefront of the legal scholarship concerning apology, recently derided civil defense lawyers and clients for advancing a “culture of denial.”<sup>224</sup> Touting the healing and redemptive benefits of admitting guilt, Cohen has urged for a reconception of civil litigation tactics in order to lessen the economic advantages of continuing to deny guilt in the hopes of eventually reaping a favorable civil settlement, while bolstering the incentive to accept responsibility for one’s actions.<sup>225</sup>

With respect to the specific question of parole, however, the actual value of factoring inmate admissions of guilt into the release decision may be minimal. As a threshold matter, the conventional wisdom that inmates who accept responsibility display a greater amount of rehabilitation and thus pose a lower risk of future criminal conduct than those who deny their past missteps is of dubious merit.<sup>226</sup> Indeed, a 2002 study of 144 inmates

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in a much longer sentence[,] known in many courthouses as ‘the trial tax[,]’ than a guilty plea in the same case (parentheses omitted)). Academics have confirmed the anecdotal sense that courts are notorious for imposing, or threatening to impose, a stiffer sentence in the aftermath of a guilty verdict than they would have imposed had the case been resolved through a plea bargain. *See, e.g.,* Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1372 (2000); Rosen, *supra* note 5, at 282 (“Before conviction, the defendant who insists on innocence loses the advantage of a plea bargain. . . . [I]t is worth noting that a system relying on plea bargains inevitably punishes those who claim innocence with longer sentences.”); Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2013 (1992).

222. *See supra* note 221 and accompanying text.

223. *See, e.g.,* Jules Epstein, *Silence: Insolubly Ambiguous and Deadly: The Constitutional, Evidentiary and Moral Reasons for Excluding “Lack of Remorse” Testimony and Argument in Capital Sentencing Proceedings*, 14 TEMP. POL. & CIV. RTS. L. REV. 45, 49 (2004) (evaluating the impact of the lack of remorse in capital sentencing); Michael M. O’Hear, *Remorse, Cooperation, and “Acceptance of Responsibility”: The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1523–24 (1997) (discussing the effect of remorse in federal sentencing); Hon. Larry S. Vandersnick, *Lack of Remorse Versus Persistence in Innocence*, 86 ILL. B.J. 692, 692–93 (1998) (citing two Illinois cases in which defendants were penalized at sentencing for their proclamations of innocence).

224. *See generally* Cohen, *supra* note 213; Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903 (2005).

225. *See supra* note 224 and accompanying text.

226. Speculating about how a person will act prospectively is generally a hazardous endeavor, with some research suggesting that psychiatrists err over forty percent of the time when forecasting an offender’s future dangerousness. *See* DEAN J. CHAMPION, *CORRECTIONS IN THE UNITED STATES: A CONTEMPORARY PERSPECTIVE* 401 (2d ed. 1998).

convicted of sex offenses in England<sup>227</sup> determined that, whereas offenders perceived to be “in denial” by the parole board (about one-third of the sample) were much more likely to be rated as “high risk” than those who accepted responsibility for their offense, only one of these “high-risk deniers” was subsequently reconvicted of a sex crime, as compared with seventeen of the ninety-seven “non-deniers.”<sup>228</sup>

Regardless of the possibly tenuous link to recidivism rates, a perpetrator’s acceptance of responsibility and demonstration of remorse through the parole process ideally can have therapeutic benefits for both the perpetrator and the victim. Victims, who normally have a right to attend or submit statements at parole hearings,<sup>229</sup> stand to gain emotionally and psychologically from such acknowledgements by perpetrators.<sup>230</sup> Defendants too may profit from this endeavor in terms of their mental well-being and effort to adjust to noncriminal modalities of behavior.<sup>231</sup> For their part, parole boards are justifiably interested in releasing only those inmates who

227. See Roger Hood et al., *Sex Offenders Emerging from Long-Term Imprisonment: A Study of Their Long-term Reconviction Rates and of Parole Board Members’ Judgments of Their Risk*, 42 BRIT. J. CRIMINOLOGY 371, 387 n.5 (2002) (noting that the researchers confined their study of the question of denial to the “144 prisoners who could be followed-up for at least four years and for whom the [Parole] Board had made an assessment of risk”).

228. *Id.*; see also Stephen Shute, *Does Parole Work? The Empirical Evidence from England and Wales*, 2 OHIO ST. J. CRIM. L. 315, 324 (2002) (discussing the study).

229. See, e.g., UTAH CODE ANN. § 77-27-9.5(2) (a) (2005) (providing that, in general, when a parole hearing “is held regarding any offense committed by the defendant that involved the victim, the victim may attend the hearing to present his views concerning the decisions to be made regarding the defendant”); see also ABADINSKY, *supra* note 24, at 234 (“More than 30 states permit victims or next of kin to appear before the parole board, and about a dozen others permit written statements to be considered at the parole hearing.”); COHEN, *supra* note 1, § 6:16, at 6-25 to 6-26 (summarizing the various state laws regarding victim notification). Furthermore, “[m]any states include a ‘victim impact statement’ as part of the documentation” reviewed by the parole board. ABADINSKY, *supra* note 24, at 235. Research indicates that some state parole boards put tremendous stock in such victim testimony in rendering release decisions. See, e.g., William Parsonage et al., *Victim Impact Testimony and Pennsylvania’s Parole Decision-making Process: A Pilot Study*, 6 CRIM. JUST. POL’Y REV. 187, 187 (1994) (comparing parole release decisions by the Pennsylvania Board of Probation and Parole in 1989 in cases with victim impact testimony against those lacking such testimony and finding “higher refusal rates . . . in the victim testimony group despite comparable parole objective guidelines predictions, offender demographics, and offenses”).

230. It should be noted, however, that the increasingly ubiquitous nature of apologies as part of the litigation process in recent years may generally undermine the value of any individual apology for a victim, merely affording what some theologians have termed “cheap grace.” Jeffrie G. Murphy, *Well Excuse Me! Remorse, Apology, and Criminal Sentencing*, 38 ARIZ. ST. L.J. 371, 372 (2006). See generally Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000) (expressing doubts about the use of apology in civil litigation).

231. The act of apologizing itself can be therapeutic for an offender. See, e.g., Taft, *supra* note 230, at 1137–38 (“Apology leads to healing because through apologetic discourse there is a restoration of moral balance—more specifically, a restoration of an equality of regard. Understood this way, apology is valuable because it offers the offender a vehicle for expressing repentance and the offended an opportunity to forgive.”).

seem to have cultivated the maturity and self-awareness so often required to combat the temptations that will certainly challenge them on the streets.

Still, in order for these benefits to be achieved, the prisoner's acceptance of responsibility must be *sincere*, not calculated mainly to appease the parole board. Rumors of parole board decision-making processes run rampant in state prisons and inmates are often (1) keenly aware of the criteria parole commissioners utilize and (2) likely willing to tailor their appearances at parole hearings around these criteria by evincing guilt, contrition, and maturity.<sup>232</sup> As Carol Sanger noted, "[T]he players [in the parole hearing drama] understand the 'proper' emotional response and each can act accordingly."<sup>233</sup> Likewise, Danielle Lavin-Loucks, a sociologist who studied the linguistic patterns and strategies inmates use to build a case for release at parole hearings, concluded that many prisoners consciously structure their oral presentations to convince board members of their rehabilitated status.<sup>234</sup> Individual prisoners adept at manipulating people in general may be particularly skilled at convincing parole commissioners of their sincerity, and scholarly research confirms that parole boards often fall prey to such manipulations.<sup>235</sup> In fact, one study of the Georgia parole system concluded that parole officers "erred" more frequently in their decisions made after prisoner participation at parole hearings—with errors measured by the number of parole revocations and disciplinary infractions later attained by the candidates—than those made before personally interviewing the applicant.<sup>236</sup> In other words, parole board members (along

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232. See Sanger, *supra* note 17, at 111 (noting that "a convicted and guilty defendant can put on a great show of remorse and be rewarded for the display").

233. *Id.*; see also Murphy, *supra* note 230, at 372 ("Bad people are . . . often quick studies of social trends that can be used to their advantage, and so it is now not uncommon to find such phrases as . . . 'let's not play the blame game' shamelessly and almost instantly on the lips of wrongdoers—often those in high political office.").

234. See generally Lavin-Loucks, *supra* note 18, at 115–16.

235. See, e.g., Stephen Porter et al., *Truth, Lies and Videotape: An Investigation of the Ability of Federal Parole Officers to Detect Deception*, 24 LAW & HUM. BEHAV. 643, 643–46 (2000) (examining the deception detection ability of parole officers); R. Barry Ruback & Charles H. Hopper, *Decision-making by Parole Interviewers: The Effect of Case and Interview Factors*, 10 LAW & HUM. BEHAV. 203, 211–13 (1986) (exploring parole officers' accuracy of predicting inmates' success on parole). Surveying the policies of state parole boards demonstrates awareness on the part of certain parole commissioners about the dangers of relying too heavily on inmate statements when reaching the parole release decision. For instance, the State of Washington's Indeterminate Sentencing Review Board, in describing the amalgam of factors that enter into the parole release assessment, specifies publicly that "[s]elf-report is the least reliable source of data, so any information relying, at its core, on self-report must be weighed carefully." Washington's Parole System Summarized, <http://www.srb.wa.gov/summary.html> (last visited Sept. 25, 2007).

236. See Ruback & Hopper, *supra* note 235, at 211 ("[I]t is interesting to note that interviewers were less accurate in predicting parole failures after than before the interview.").



with most other humans) are far less proficient at detecting deception than many of us would like to believe.<sup>237</sup>

More troubling than the prospect of factually guilty inmates duping parole commissioners into accepting their false claims of repentance is the existence of prisoners whose proclamations of innocence land on deaf ears. To be clear, some inmates who maintain their innocence at parole hearings may be in the throes of psychological denial. Legal scholars and social scientists have observed that people typically make choices that maximize or accentuate their "positive self-image."<sup>238</sup> Individuals are often reluctant to acquire or divulge information that negates the affirmative view they tend to hold of themselves.<sup>239</sup> Consequently, guilty prisoners may be wary of admitting guilt for fear of undercutting their own self-perception of themselves as "good" actors. Inmates may also have a practical basis for refusing to acknowledge guilt, for instance, sex offenders who worry that publicly admitting culpability could imperil them within the prison population.<sup>240</sup> But it is dangerous to underestimate the possibility that many prisoner assertions of innocence reflect the truth and demonstrate a wealth of personal integrity rather than cowardice or psychological deficit.<sup>241</sup> And

237. See COHEN, *supra* note 1, § 4:31, at 53 ("[A]n accurate assessment of a person's psychological makeup is difficult, given even unlimited resources, and parole boards often operate under the handicap of inadequate staff and time."); Robert W. Kastenmeier & Howard C. Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, in *PAROLE* 76, 81 (William E. Amos & Charles L. Newman eds., 1975) (noting that parole board members "are constantly concerned with being conned by the inmate, who may, for example, purposefully cause disruption . . . , and then follow this with a period of model behavior so as to demonstrate his reformation, or who may initiate other deceptive activities to demonstrate that he has been rehabilitated"). See generally Porter et al., *supra* note 235 (discussing the ability of parole officers to detect deception in parole interviews).

238. Behavioral decision-making theorists have also shaped the understanding of denial in recent years. See Manuel Utset, *A Theory of Self-Control Problems and Incomplete Contracting: The Case of Shareholder Contracts*, 2003 UTAH L. REV. 1329, 1368 n.143.

239. *Id.*

240. See, e.g., Mary Sigler, *Just Deserts, Prison Rape, and the Pleasing Fiction of Guideline Sentencing*, 38 ARIZ. ST. L.J. 561, 567 (2006) ("Certain categories of offenders are known to be more vulnerable [to prison rape], including sex offenders, especially those who have victimized children."); cf. Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 146–61 (2006) (providing a fascinating analysis of the multifaceted aspects of sex in prison and suggesting that the environment is highly sexualized, and not solely for sex offenders). In addition, there may be other disincentives for sex offenders to admit guilt, including the imposition of onerous requirements as a condition of parole. See, e.g., Erica Beecher-Monas & Edgar Garcia-Rill, *Genetic Predictions of Future Dangerousness: Is There a Blueprint for Violence?*, 69 LAW & CONTEMP. PROBS. 301, 305 n.20 (2006) ("[A] voluntary sterilization statute mandating castration as a condition of parole for repeat sex offenders was enacted in California in 1996. Florida, Georgia, and Montana have similar statutes." (internal citations omitted)).

241. See Sanger, *supra* note 17, at 111 ("[T]he 'hardened criminal' who will not demonstrate remorse may, in some cases, simply have immense integrity."); see also Friedman, *supra* note 7, at 187 ("While the failure to admit responsibility for committing an offense may signal the lack of emotional growth, there are times when such refusal may signal the exact

even more dangerous is the chance that an innocent prisoner's persistence in his innocence may flag over the years and over the course of recurring, disappointing appearances before the parole board—that the enticement to succumb and “admit” guilt may eventually prove irresistible, as occurred in Bruce Dallas Goodman's case.

The reality of innocent prisoners “admitting” guilt during the parole process should be a matter of grave concern. Granted, this form of deception is understandable in light of current norms at parole release hearings. Deception by innocent prisoners at parole hearings arguably acts as a form of “self-defense,” a necessary maneuver in the battle for survival.<sup>242</sup> For the innocent inmate facing the parole board, false cries of remorse and responsibility are also justified on basic utilitarian grounds given that the direct results of lying (possible liberty) largely trump those of telling the truth (continued incarceration).<sup>243</sup> Parole hearing officers themselves may suffer limited tangible harm from these fabrications, as prisoners' admissions of guilt reinforce and validate the institutional presumption that the individuals appearing before parole boards are factually guilty.<sup>244</sup>

Even so, the effects of such deception by innocent inmates are not entirely neutral, let alone positive. In order for expressions of remorse and acceptance of responsibility by an injurer to have the greatest constructive impact on the injured, those statements should be genuine.<sup>245</sup> Where a crime victim is deluded into thinking an innocent person was the wrongdoer, any benefits achieved by fraudulent statements of remorse and responsibility would be dashed in the event the actual perpetrator is ever apprehended.<sup>246</sup> Additionally, while the incentive to admit guilt before parole boards may lead to exchanges at release hearings that confirm the belief that all inmates are guilty, such a belief is erroneous, as indicated by the hundreds of post-conviction exonerations of inmates since 1989.<sup>247</sup>

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opposite. History has shown that despite the criminal justice system's best efforts, a certain number of innocent criminal defendants do get convicted.”).

242. The philosopher Sissela Bok has explored the question of deception and noted that, like violence, deception “can be used also in self-defense, even for sheer survival.” SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 19 (1978).

243. *See id.* at 50–59.

244. *See supra* notes 6–7 and accompanying text.

245. *See supra* notes 17–18 and accompanying text; *cf. Bibas, supra* note 88, at 171 (“Even insincere admissions of guilt involve lowering denial mechanisms, opening the path to reform, and bringing closure to victims and the community.”).

246. In addition, rewarding false claims of remorse and repentance undermines the strength and impact of *legitimate* expressions of contrition. *See, e.g.,* Murphy, *supra* note 230, at 379 (“[T]o the degree that we hand out rewards to those who fake repentance and remorse, then to that same degree do we cheapen the currency of repentance and remorse—making us less likely to treat the real article with the respect it deserves.”).

247. *See supra* notes 12–13 and accompanying text. Moreover, the perception that inmates lie at parole hearings—whether it is the guilty feigning contrition or the innocent falsely

Improperly certifying this view therefore provides a disservice to all involved. The pursuit of “truth” is a normative value in and of itself, and one that ought to be fostered, where possible, throughout the criminal justice system.<sup>248</sup>

Finally, on a practical level, the reason why admitting guilt before a parole board can be devastating in the long-run for an innocent prisoner relates to the collateral consequences of that admission. Even if in the best-case scenario the admission of guilt inspires the parole board to release the inmate, the confession now belongs in the inmate’s official parole file and is accessible by prosecutors. Should the defendant subsequently seek to prove innocence through a post-conviction remedy, prosecutors may rely on the inculpatory statement in formulating their response, potentially spoiling any attempt at exoneration.<sup>249</sup>

#### IV. SUGGESTIONS FOR REFORM

Overall, the value placed on prisoners’ admissions of guilt in the parole release decision has some deleterious consequences, not the least of which is that it penalizes innocent prisoners for failing to accept responsibility for crimes they did not commit. A portion of those innocent inmates undoubtedly falter over time, worn down by a parole system demanding an acknowledgment of guilt, and they give the parole board what it seeks. To the extent that those admissions of guilt are disclosed to prosecutors and judges, the price paid by the inmate may be inordinately high—the long-term opportunity for exoneration through litigation sacrificed at the short-term altar of an increased chance of parole.

What, then, should parole commissioners do? Put aside all issues of guilt or innocence at the parole release hearing and dismiss any prisoner’s claim to accept responsibility for the underlying act as a factor in the decision? The answer to this last question is quite possibly yes. The aforementioned empirical study from a comparable foreign jurisdiction, Great Britain, shows no significant correlation between denials of guilt in the parole process and future recidivism.<sup>250</sup> Moreover, the oft-cited inability of people to detect deception both generally and at parole hearings in particular signifies that parole hearing examiners are ill-equipped to evaluate the authenticity of inmate admissions of guilt and that manipulative prisoners may easily fool them into reaching imprudent release decisions.<sup>251</sup> As Queen Elizabeth I declared during an era of religious unrest in England,

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confessing—might adversely affect parole commissioners, spurring them to become even more cynical about the merits of the population they are required to serve.

248. As Aristotle observed, “Falsehood is in itself mean and culpable, and truth noble and full of praise.” BOK, *supra* note 242, at 24.

249. See *supra* II.B (discussing the Bruce Dallas Goodman case).

250. See *supra* notes 227–28 and accompanying text.

251. See *supra* notes 232–37 and accompanying text.

“I would not open windows into men’s souls.”<sup>252</sup> This warning appears fitting for parole commissioners who, in opening windows into inmates’ souls, may dislike what they find or, worse, become blinded by deceit.

It may be unrealistic, however, to propose that parole boards completely ignore prisoner statements on the topic of guilt or innocence. The concepts of remorse and responsibility are too deep-seated within the fabric of American culture (and entrenched throughout the criminal justice system) to expect parole boards to disregard those matters altogether. The reform proposals advanced below instead aim to stop the bleeding and heal the most severe wound spawned by the current regime—the catch-22 faced by innocent prisoners.

A. *LIMITATIONS ON THE SUBSEQUENT USE OF STATEMENTS FROM PAROLE HEARINGS*

As mentioned throughout this Article, innocent prisoners face a daunting dilemma when confronting parole boards. Refusing to acknowledge guilt will likely hinder an inmate’s chance for parole, whereas taking responsibility for the underlying criminal act may paradoxically enhance the prospect of release and impair any future attempt at exoneration given that the contents of the parole file are often readily available to prosecutors.<sup>253</sup> Merely expressing remorse for the victim’s predicament—short of taking individual responsibility for the crime—could damage a prisoner’s subsequent efforts to clear his name through the courts, depending upon the prosecutorial interpretation (or characterization) of the statement.

One potentially beneficial reform might consist of restricting prosecutorial access to inmate statements regarding guilt or innocence at parole hearings. On the one hand, limiting prosecutorial access in this manner could promote several desirable goals. First, it might remove any latent disincentive for innocent prisoners to convey empathy for the victim or even just sadness about the underlying incident for fear that the statement would be construed as an admission of guilt and used against him in later post-conviction litigation. Second, innocent prisoners would no longer suffer a penalty in the post-conviction arena for caving in to the temptation to admit guilt at the parole hearing solely in order to raise the odds of a favorable outcome. Third, considering the acute pressure on all prisoners (whether innocent or not) to “admit” guilt to mollify parole officials, these statements themselves may lack credibility and possess minimal evidentiary value at a post-conviction proceeding.

On the other hand, curbing the subsequent use of these statements at post-conviction proceedings could, at the extreme, produce a further

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252. See Murphy, *supra* note 230, at 376 (quoting this statement made by Queen Elizabeth I after stabilizing the Church of England through the imposition of the Settlement).

253. See *supra* notes 180–81 and accompanying text.

incentive for inmates to lie. After implementation of this reform, an innocent prisoner could “admit” guilt at a parole hearing with few if any resulting costs. Creating additional incentives—or at least eradicating disincentives—for inmates to tell the parole board what it wishes to hear, irrespective of the truth, could serve to intensify the pressure on innocent prisoners to accept responsibility. This, in turn, might undermine the integrity of the parole hearing to the extent that the event is concerned with plumbing the depths of the inmate’s state of mind and unearthing the perceived truth about his readiness to live again in the free world. That being said, the “truth” about guilt or innocence, as well as about remorse or the lack thereof, is already inherently compromised in the contemporary parole decision-making process, a scheme where crocodile tears by the guilty are rewarded and steadfast assertions of innocence engender reprimand.<sup>254</sup>

*B. DISENTANGLING ADMISSIONS OF GUILT FROM EXPRESSIONS OF EMPATHY*

Although it may be problematic to rely on a prisoner’s admission of guilt as a condition to release on parole given the pressure inflicted by this practice on the actually innocent, encouraging inmates to communicate empathy to crime victims as part of this process has much to recommend it. In this Article, I have referred to the concepts of acceptance of responsibility and expressions of remorse without necessarily emphasizing the distinctions between them. I have done so, largely, because parole boards often conflate these two ideas and allocate them in tandem to the broad category of rehabilitation.<sup>255</sup> Likewise, scholars seldom separate the two concepts, frequently collapsing responsibility and remorse together.<sup>256</sup>

Admittedly, there are good reasons for exploring remorse and responsibility through the same theoretical lens in the context of parole. Responsibility and remorse at first blush point to the same core goal in the parole release assessment—the hope that the aspiring parolee shows maturity and humanity. In other words, we as a society expect a certain

254. To draw upon J.L. Austen, truth for the aspiring parolee under current conditions is “an illusory ideal.” J.L. AUSTEN, *Truth*, in *PHILOSOPHICAL PAPERS* 98 (2d ed. 1961).

255. See *supra* notes 26–27 and accompanying text.

256. See, e.g., Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. INT’L L. 433, 438 (2006) (discussing the components of an apology and noting that these elements often include “(1) admitting . . . fault or blameworthiness and accepting responsibility for a specific injury to another or others, . . . ; (2) expressing sincere remorse and regret for the injurious action or inaction and the other’s injury; and (3) offering appropriate reparation and promising that the wrong done will not recur in the future”); Susan J. Szmania & Daniel E. Mangis, *Finding the Right Time and Place: A Case Study Comparison of the Expression of Offender Remorse in Traditional Justice and Restorative Justice Contexts*, 89 MARQ. L. REV. 335, 338 (2005) (“We focus on offender remorse as a combination of several communicative elements including apology, regret, and sorrow.”); cf. Murphy, *supra* note 230, at 383 (“[A]pology is something *quite different* from remorse and repentance. Remorse is an internal mental state and repentance is an internal mental act, both aspects of character that often have external manifestations but are not themselves external. Apology is, however, a purely external performance . . .”).

amount of awareness on the part of our citizens, an appreciation for one's own frailties paired with empathy for the suffering of others. Even more, responsibility and remorse seem to build upon one another; it could be alleged that in order to be genuinely remorseful about an underlying act, a person must first admit the degree to which he participated in the event and caused any harm.<sup>257</sup>

Yet responsibility and remorse can and should be subject to different analytical frameworks, for they are not intrinsically codependent concepts, nor do they possess equivalent relative values in the parole release decision-making equation. That is, if one views remorse as encompassing general notions of sorrow or regret,<sup>258</sup> then one may arguably feel and articulate remorse (or, more accurately, empathy) about a person's plight without acknowledging culpability or even objectively being at fault. As a crude example, assume that one of my first-year students fares poorly on a final examination. Suppose further that I respect his diligence and dedication to the study of law. I may display sincere remorse about his performance on a test that I designed and administered while also honestly believing that I crafted a fair exam and devoted ample time to scoring each student paper accurately. The fact that I have not accepted responsibility in any way whatsoever for the student's performance may be a source of disappointment for the student, but that does not diminish the possibility that my regret about the outcome and overall compassion can have a potent therapeutic impact and aid the student in overcoming the blow to his self-confidence.

Similarly, expressions of sorrow and empathy can help victims tremendously throughout the criminal justice process, including during parole hearings.<sup>259</sup> In recent years, much has been written about the need to integrate the wishes and interests of victims more overtly into the criminal

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257. See, e.g., Szmania & Mangis, *supra* note 256, at 340 ("Remorse can be expressed through the emotion of sorrow. Sorrow is a component part—the energizing force—of an apology.").

258. This is by no means a universally accepted vision of remorse. Scholars often link a person's ability to display remorse to some underlying wrongdoing by that person. See, e.g., Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 OHIO J. CRIM. L. 423, 438 (2007). Murphy notes:

Remorse . . . is . . . often best understood as the painful combination of guilt and shame that arises in a person when [he] accepts that he has been responsible for seriously wronging another human being—guilt over the wrong itself, and shame over being forced to see himself as a flawed . . . human being.

*Id.*

259. See, e.g., Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 87 (2004) ("Victims and victimized communities have long viewed remorse and apology as essential elements of justice for crimes. For example, one victim who was sexually abused by a priest demanded expressions of remorse to help him find closure and heal.").

justice system.<sup>260</sup> Victims' rights advocates have clamored for, among other things, legislation expanding notification to victims about court proceedings and creating a greater role for victims at sentencing.<sup>261</sup> Proponents of the "Restorative Justice" movement have put a premium on encouraging offenders to make amends to their victims and strive to "restore" the moral equilibrium toppled by their indiscretions through remorse and apology.<sup>262</sup>

Permitting, even encouraging, prisoners to communicate sorrow and empathy about the underlying crime at parole hearings without compelling prisoners to admit guilt would retain many of the restorative virtues served by empathy to a victim, yet this would not unduly hurt innocent inmates. Specifically, disentangling statements of remorse from those of responsibility (and valuing the former over the latter) could both promote the interests of victims and prevent the potential catch-22 faced by an innocent prisoner when asked, point blank, to comment on whether he is guilty. Conceptually separating remorse from responsibility is one thing; practically doing so as part of the parole release decision and development of a record for the file is something else. Branding remorse/empathy and responsibility as separate categories in the parole file may be a step in the right direction,<sup>263</sup> as would be training parole officers to steer their inquiries toward the issue of remorse as opposed to responsibility.

It must be conceded that, even assuming remorse and responsibility could be segregated in the parole release assessment, this proposed reform

260. See, e.g., Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 257 ("The crime victims' rights movement worked to enact rights in two waves. The first wave provided victims with statutory rights . . . . The second wave resulted in thirty-three state constitutional amendments that contain some kind of victims' rights provision.").

261. Victims often have the right to attend criminal trials and sentencing hearings. See generally DOUGLAS E. BELOOF, *VICTIMS IN CRIMINAL PROCEDURE* (1st ed. 1998); Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005). Some states have even amended their constitutions to explicitly acknowledge the importance of victims' rights. See, e.g., Parsonage et al., *supra* note 229, at 188 ("By 1989, Arizona, California, Florida, Michigan, Rhode Island, and Washington had amended their state constitutions to provide for restitution, and the right to be treated with integrity and be heard in the criminal justice process.").

262. See Bibas & Bierschbach, *supra* note 259, at 103 ("Restorativists consider apology and remorse important as part of a holistic process. They hope that offenders will recognize the wrongfulness of their conduct, make amends with their victims and the community, and try to restore the moral balance by making actual or symbolic reparations."); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 206 (examining how restorative justice may represent a holistic process that can blend various punishment theories and resolve particular cases favorably). For a more skeptical view of restorative justice, see Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385, 1404–11 (2007).

263. For example, the Utah Board of Pardons and Parole seemingly distinguishes between acceptance of responsibility and expressions of remorse in its parole release decision. See Rationale Sheet, *supra* note 95 (listing "[e]xtent of remorse and apparent motivation to rehabilitate" as a factor).

is far from perfect. For one thing, incentives would remain for inmates to feign empathy to increase the likelihood of a favorable decision.<sup>264</sup> Also, victims might not wholly welcome this change. Crime victims stand to benefit from admissions of guilt by wrongdoers—perhaps to a greater extent than from generalized expressions of regret. All the same, allowing parole officials to credit prospective parolees for showing empathy for the victim without accepting responsibility for the crime, if not ideal, would represent a vast improvement over the current practice by directly eliminating the penalty imposed on the factually innocent.

C. ALTERING THE APPROACH OF PAROLE BOARDS TO MATTERS OF  
GUILT OR INNOCENCE

Instead of neglecting prisoner statements regarding criminal responsibility altogether in the parole release decision, which might be naïve to recommend in today's criminal justice landscape, parole boards could take the opposite approach and view them essentially as issues worthy of further scrutiny.<sup>265</sup> Parole boards could be exhorted—and empowered—to undertake more thorough searches, taking neither admissions of guilt at face value nor assertions of innocence as delusional thinking per se, provided, however, that such inquiries are limited solely to the question of suitability for release on parole rather than any formal determination of guilt or innocence. To facilitate parole boards in digging deeper into claims of innocence for the objective of assisting in release decisions, three possible reforms come to the fore: (1) expanding the scope and duration of parole release hearings where innocence is at issue, (2) enhancing the investigative authority and resources of parole boards with respect to assessing innocence claims, and (3) advising parole boards to refer potentially meritorious innocence claims to agencies or organizations better equipped to subject them to rigorous evaluation.

To clarify, this proposed expansion of parole board authority would serve only the narrow purpose of helping to discern whether claims of innocence at parole hearings have credence and thus whether such assertions should be held against the prospective parolee in the release decision. In no way would this alteration usurp or undermine the role of the court system in resolving legal questions of guilt or innocence.

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264. See, e.g., Murphy, *supra* note 230, at 378–79 (describing the problems with creating systemic incentives for wrongdoers to fake remorse); Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131, 131–33 (2006) (arguing that remorse should not be a factor in criminal sentencing for a variety of reasons, including the subjectivity involved in assessing remorse and the risk of inmates feigning remorse).

265. See, e.g., Godsey, *supra* note 100 (indicating that the parole board in Ohio “has on some occasions, unlike some other parole boards, shown a willingness to . . . recognize that sometimes wrongful convictions occur”).



### 1. Modifying the Structure of Parole Release Hearings

Parole release hearings are normally brief affairs, as indicated by the aforementioned study of Colorado's swift processing of parole board appearances by inmates.<sup>266</sup> Some states allow parole hearings and release decisions to occur without any live appearance by the inmate.<sup>267</sup> Prisoners in most states, though, have a statutory right to participate at parole release hearings, even if they are only allocated a few minutes to present a case.<sup>268</sup> Infamously, the Attica Commission that studied prison conditions in New York State revealed that the average amount of time expended by the parole board panel to read a prisoner's file, interview the applicant, and render a decision was 5.9 minutes.<sup>269</sup> A report on the Kansas parole system depicted a similar scene, finding that parole officials in that state devoted an average of two to three minutes per release hearing and handled as many as 135 hearings in a single day.<sup>270</sup> Without a doubt, this is insufficient time for an inmate to develop a plausible theory of innocence, much less convince parole commissioners of that theory's merit.<sup>271</sup> After a prisoner appears before the parole board, the prosecution and the victim or victim's family often have the right to put forward their position and may refer to hearsay and other potentially unreliable evidence in this presentation.<sup>272</sup> Inmates in numerous jurisdictions are not even afforded the opportunity to rebut this evidence.<sup>273</sup> What is more, although prisoners at state parole hearings may be entitled to present documentary evidence on their behalf, such as affidavits from witnesses, they are typically denied the chance to call live witnesses.<sup>274</sup>

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266. See *supra* note 74 and accompanying text.

267. See, e.g., *Mahaney v. State*, 610 A.2d 738, 742 (Me. 1992) (finding that a state statute requiring a parole board hearing prior to denying an inmate parole does not entitle an inmate to a personal appearance and that such a rule fails to violate due process).

268. See COHEN, *supra* note 1, § 6:18, at 6-27 to 6-30 (discussing variations in the state statutory rights regarding individual appearances before parole boards); Godsey, *supra* note 100 (noting that inmates typically only receive a few minutes to present a case before parole boards).

269. N.Y. STATE SPECIAL COMM'N ON ATTICA, ATTICA, THE OFFICIAL REPORT OF THE N.Y. STATE SPECIAL COMM'N ON ATTICA 96 (1972); see Garber & Maslach, *supra* note 71, at 269 (finding that parole officers in 100 randomly selected California release hearings deliberated for an average of 1.5 minutes per case in reaching their decisions).

270. Julio A. Thompson, Note, *A Board Does Not a Bench Make: Denying Quasi-Judicial Immunity to Parole Board Members in Section 1983 Damages Actions*, 87 MICH. L. REV. 241, 251 n.61 (1988). Thompson acknowledges, however, that "[a]verages vary from state to state. Two states with more thorough systems, Michigan and Wisconsin, have been known to spend an average of 10-20 minutes per hearing." *Id.*; see also ROTHMAN, *supra* note 34, at 164-65 (citing some examples of how quickly state parole boards disposed of parole applications in the 1930s).

271. Godsey, *supra* note 100.

272. *Id.*

273. *Id.*

274. See, e.g., COHEN, *supra* note 1, § 6:18, at 6-30 n.25.

The streamlined procedures that cabin a prisoner's ability to develop a case of innocence at state parole hearings reflect the institutional disdain for the idea of relitigating factual questions of guilt or innocence in this forum.<sup>275</sup> Nonetheless, this principle deserves reconsideration for the reasons stated throughout this Article—in particular, to avoid punishing the actually innocent and, rather, to facilitate their potential release. To elaborate, parole boards should contemplate modifying the structure of release hearings in cases where a prisoner intends to claim actual innocence. For instance, states could allow inmates who wish to claim innocence to provide notice to authorities beforehand. With such advance notice, parole boards could adjust their hearing calendar to accommodate those inmates' needs for additional time, and prisoners might enjoy a new or expanded right to rebut the prosecution's case, call live witnesses, or request the assistance of counsel at those particular hearings.<sup>276</sup>

Skeptics of this proposal might contend that altering the format of parole release hearings in this fashion would spur virtually all prisoners to assert innocence given that they would apparently have little to lose and much to gain. On the contrary, a built-in incentive exists for only the actually innocent to pursue this option; presumably, inmates with unsubstantiated innocence claims would jeopardize their chances for release by failing to set forth convincing evidence of innocence. The factually guilty, in effect, would be "better off" under the traditional parole hearing structure in which admissions of guilt are treated more favorably than pleas of innocence.

The chief downside with adjusting parole release hearings in the manner proposed above is that the change might be perceived as intruding upon the activities of the entities whose customary duties revolve around debating and determining factual questions of guilt or innocence: courts and juries.<sup>277</sup> A state executive agency re-evaluating previously adjudicated factual issues may be seen as usurping judicial power, generating a sea change in the parole board's place within the criminal justice system, not to mention a smattering of ill will. This shift in the function of parole boards might transform them into more active parts of the adversarial process than they are at present and than may be politically and institutionally tolerable. But as long as this modified parole hearing structure were restricted to the narrow question of whether a prisoner claiming innocence deserves release

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275. *Id.*

276. Calls for the general expansion of procedural protections for inmates at parole release hearings have reverberated for decades. *See, e.g.*, Garber & Maslach, *supra* note 71, at 263 (noting a 1975 recommendation by the California State Bar Association for parole "release review hearings in which the prisoner was entitled to procedural due process, representation by counsel, and the right to call and cross-examine relevant witnesses").

277. *See supra* notes 6–7 and accompanying text (noting the argument that guilt or innocence should always rest with the courts).

on parole—with no other significance attached to the result of any particular hearing—then any concerns about undermining jurors and judges could largely be thwarted.

## 2. Enhancing Factual Investigative Powers

Boosting the investigative capability of parole boards in the criminal justice system could not only inject valuable information into the parole assessment process but also assist with targeting viable post-conviction innocence claims. Many state parole boards already possess subpoena power to compel testimony and obtain written materials,<sup>278</sup> and a logical extension of that power, presupposing adequate funding, might include permitting the agency to conduct more comprehensive field investigations. This would enable a parole board to investigate an inmate's innocence claim after the parole hearing yet prior to issuing a final release decision.<sup>279</sup> Armed with this mandate (and commensurate resources), these investigations would ideally reach beyond mere background checks into the applicant's employment prospects and the like and, instead, comprise a fact-intensive exploration of the basic criminal case. If the purported claim of innocence appeared to be potentially legitimate, then the parole board would likely not hold the prisoner's refusal to accept responsibility against him in choosing whether to grant or deny parole.<sup>280</sup>

Again, the major counterarguments to this reform lie in institutional concerns about the ability of parole boards to conduct effective investigations and the possible reluctance of courts and legislatures to accept an expanded role for parole boards in delving into factual questions of guilt or innocence.<sup>281</sup> As noted above in regard to altering the structure of certain parole hearings, however, such fears could be alleviated by restricting this power to the limited issue of parole release decisions as opposed to any legal determination of guilt or innocence.

## 3. Encouraging Parole Boards to Refer Innocence Cases to Other Agencies or Organizations

In addition to—or in lieu of—modifying the structure of parole hearings or bolstering the investigative powers of parole boards to allow

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278. See UTAH CODE ANN. § 77-27-9(3) (2007); see also COHEN, *supra* note 1, § 4:9, at 4-18 (“Parole boards often will be accorded the power to subpoena relevant records and witnesses.”).

279. See, e.g., Friedman, *supra* note 7, at 187 (finding it “troubling” that the Michigan Parole Board relies on the presentence report from the case and “does not make its determination of the offense’s facts by examining the official court record or by independently investigating the offense”).

280. See *id.* (observing that, while no one should expect state parole boards to make determinations of innocence, a prisoner's claim of innocence “should not preclude the Board from determining when a person may be safely reintegrated in the community. Many individuals who have continuously claimed innocence have gone on to lead productive lives”).

281. See *supra* notes 6–7, 275 and accompanying text.

them to explore factual assertions of innocence, another promising reform might involve encouraging parole boards to refer innocence claims to entities better-positioned and better-able to explore these claims. These entities include innocence projects,<sup>282</sup> prosecutorial “innocence” units,<sup>283</sup> and freestanding, state-specific innocence commissions.<sup>284</sup> Whether based on the fruits of a full-fledged parole board investigation or simply the events and materials contained in the prisoner’s file and presented at the parole hearing alone, parole board referrals of potentially valid innocence claims would contribute to the release of the actually innocent and offer much-needed support for those organizations. Innocence projects, in particular, normally receive legions of requests for assistance in any given year and rarely have the resources to screen those inquiries with the requisite thoroughness and timeliness.<sup>285</sup>

*a. Innocence Projects*

The Second Look Program at Brooklyn Law School and the Rocky Mountain Innocence Center are but two of approximately forty nonprofit organizations in the United States dedicated to overturning wrongful convictions.<sup>286</sup> Dispersed throughout the country, the organizational structures, goals, and characteristics of the various innocence projects are as diffuse as their locations.<sup>287</sup> Some are aligned with law schools and serve as clinics in which students participate in the investigation and litigation of innocence claims in exchange for academic credit.<sup>288</sup> Others belong to journalism schools and focus on exposing and publicizing an inmate’s claim

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282. See *infra* Part IV.C.3.a.

283. See *infra* Part IV.C.3.b.

284. See *infra* Part IV.C.3.c.

285. See, e.g., Medwed, *supra* note 98, at 1102 (“Due to meager resources, innocence projects must find the most promising cases in an efficient manner and not waste inordinate time investigating baseless claims.”).

286. For a listing of the innocence projects in the United States and abroad, see Innocence Project Homepage, *supra* note 12.

287. See *id.* Founded by Barry Scheck and Peter Neufeld in 1992, the Innocence Project in New York City represents the largest and most renowned individual organization in the field, recognized for having freed over one hundred prisoners through DNA testing nationwide and standing at the vanguard of policy and public relations efforts to rectify the problem of wrongful convictions. See Jan Stiglitz et al., *The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education*, 38 CAL. W. L. REV. 413, 421 (2002) (“Cardozo Law School started the first innocence project law school clinic in 1992. . . . The Cardozo clinical program was, and continues to be, a tremendous success. Since its inception, the clinic has assisted in more than one hundred cases that have led to the exoneration of an innocent person.”).

288. For a discussion of the law school innocence project model, see generally Medwed, *supra* note 98; Stiglitz et al., *supra* note 287.

rather than litigating the matter,<sup>289</sup> and still others constitute independent, public interest organizations.<sup>290</sup> Predictably, the matters handled by these organizations also differ widely, as some projects concentrate solely on regional cases and others on discrete types of cases, e.g., those with long sentences or DNA evidence.<sup>291</sup> The common link between these disparate entities is a mutual commitment to aiding innocent prisoners—a link that recently has been solidified by the formation of an umbrella organization, the Innocence Network, devoted to pooling resources, coordinating legislative initiatives, and sharing knowledge about litigation strategies and techniques.<sup>292</sup>

Many innocence projects welcome pro bono assistance from other lawyers and private investigators.<sup>293</sup> Aside from direct assistance, innocence projects may benefit by receiving referrals from reputable organizations about cases of innocence.<sup>294</sup> This process serves an important vouching function and helps with a fundamental aspect of innocence project activity—finding meritorious cases.<sup>295</sup> The labor-intensive case screening process can be debilitating for an innocence project, siphoning off precious financial resources and time.<sup>296</sup> Anything that accelerates this process, such as a referral, is greatly appreciated. Also, referrals from parole boards would likely add institutional gravitas to those innocence claims, in that a state executive agency has already labeled those cases theoretically noteworthy,

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289. For a discussion of the role that journalists might play in the criminal justice system, see generally Warden, *supra* note 156. David Protess and his students from the Medill School for Journalism at Northwestern University were instrumental in exonerating Anthony Porter, a man wrongfully convicted of murder in Illinois. For a description of the Porter case, see Medwed, *supra* note 56, at 165–68.

290. One of the most successful freestanding innocence projects is Centurion Ministries in New Jersey, which was founded in 1983, making it the first innocence project in the country. See Centurion Ministries, <http://centurionministries.org/aboutus.html> (last visited Dec. 11, 2007) (describing the organization).

291. See Medwed, *supra* note 98, at 1103–09 (analyzing how and why innocence projects may choose to impose an array of substantive restrictions on the types of cases they handle).

292. See Innocence Network Home Page, <http://www.innocencenetwork.org> (last visited Sept. 25, 2007) (stating the Innocence Network's mission and listing member organizations).

293. In fact, some innocence projects—such as the Mid-Atlantic Innocence Project in Washington, D.C.—depend almost exclusively on the assistance of pro bono lawyers in litigating their cases. See, e.g., Mid-Atlantic Innocence Project: About the Innocence Project, <http://www.exonerate.org/about-2/> (last visited Sept. 25, 2007) (asserting that the Mid-Atlantic Innocence Project is “run through a network of [pro bono] attorneys and law students”).

294. Medwed, *supra* note 98, at 1115 (mentioning the importance of innocence projects receiving referrals from well-regarded individuals or organizations).

295. *Id.*

296. *Id.* at 1114–23 (analyzing the case screening process of innocence projects).

and thereby help innocence projects in later presenting those cases to prosecutors and judges.<sup>297</sup>

Urging parole boards to refer potentially valid cases to innocence projects may, to be sure, run afoul of the traditional division of power in the criminal justice system.<sup>298</sup> In essence, prodding a state agency to recommend cases to an innocence project would seemingly fuse the activities of law enforcement and defense counsel in an unusual, and perhaps controversial, fashion. This concern withers, however, in the face of further examination. Advocating the use of referrals hardly represents a commingling of interests and fails to impinge on the jurisdiction of other parties (courts and juries) that might occur if, as previously suggested, the factual investigative powers of parole boards were vastly expanded.<sup>299</sup> More significantly, it is difficult to refute the normative argument that the ends justify the admittedly odd means; no one “wins” through the continued incarceration of an innocent person, and society as a whole, including the government, gains from exposing and overturning those cases whether through the parole process or through the courts.<sup>300</sup>

b. *Prosecutorial “Innocence” Departments*

Along the lines of encouraging parole boards to recommend cases to innocence projects that may decide to represent the individual prisoner in litigation, prosecutors’ offices themselves are another possible repository for parole board referrals—and a forum that lacks any attendant perceived conflict of interests. In recent years, a number of prosecutorial offices have opened internal “innocence” units or “backlog” projects designed to review pre-existing cases in order to unearth viable claims of innocence in their

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297. *Id.* at 1115 (discussing the significant “vouching function” served by referrals because “[a] lawyer, presumably a respected and experienced one, has already reviewed the claim and determined it may be worth pursuing”).

298. *See supra* notes 6–7 and accompanying text (discussing the role parole boards play and the processes they employ in making their decisions).

299. *See supra* notes 275–77 and accompanying text (suggesting changes in parole hearing procedures when the prisoner claims innocence).

300. As I have written regarding the need for collaboration between prosecutors and defense attorneys:

A dialogue between these traditional adversaries may help to show that, despite any differences between the two camps generally, they stand on common ground when it comes to post-conviction innocence claims: no one wins when an innocent person remains in prison. Instead of the “zeal deal,” the real deal for prosecutors and defense attorneys operating in the domain of post-conviction innocence claims should be a willingness to work together, on occasion, and a mutual recognition that actually innocent people are languishing in our prison system.

Medwed, *supra* note 56, at 183.

jurisdictions.<sup>301</sup> Some of these efforts have been successful. In 2002, the Ramsey County District Attorney's Office in St. Paul, Minnesota, spearheaded the first prosecutor-initiated exoneration in the country, asking a state trial judge to vacate a 1985 rape conviction after a DNA test verified the defendant's innocence.<sup>302</sup> Similar inquiries led by prosecutors in Houston and New York City have produced reversals of wrongful convictions.<sup>303</sup> Provided that the popularity of forming prosecutorial innocence wings grows over time,<sup>304</sup> active participation by law enforcement in overturning wrongful convictions will become even more pronounced. Notifying prosecutors in charge of handling post-conviction matters about potentially legitimate innocence claims would allow parole boards to foster the pursuit of justice without exceeding the parameters of their authority.

*c. Innocence Commissions*

Cognizant of the wave of post-conviction exonerations of innocent prisoners since the late 1980s, groups of scholars and activists have advocated the creation of state-specific "Innocence Commissions" to review those cases with the twin goals of understanding the factors that led to the miscarriages of justice in the first place and proposing changes to prevent those factors from causing more errors in the future.<sup>305</sup> This vision of an innocence commission is entirely retrospective; it aims to study wrongful convictions after they have been overturned in a manner akin to that of the National Transportation Safety Board, the federal agency that assesses "what

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301. See, e.g., Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 394 n.21 (2002) (mentioning sources listing prosecutor-initiated reviews); Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 557-60 (2002) (noting prosecutor reviews in Minnesota as well as San Diego and Orange County, California); Medwed, *supra* note 56, at 125-26 & n.3 (discussing prosecutor-initiated reviews of DNA evidence); Peter Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 NEW ENG. L. REV. 639, 641 (2001) ("Increasingly, progressive-minded prosecutors around the country are setting up their own 'innocence projects.'").

302. See Medwed, *supra* note 56, at 125-26 & nn.1-4 (discussing the exoneration); see also Paul Gustafson, *DNA Exonerates Man Convicted of '85 Rape*, STAR TRIB. (Minneapolis), Nov. 14, 2002, at 1A (same); Jodi Wilgoren, *Prosecutors Use DNA Test to Clear Man in '85 Rape*, N.Y. TIMES, Nov. 14, 2002, at A22 (same).

303. Medwed, *supra* note 56, at 126 n.3; see also Adam Liptak, *Houston DNA Review Clears Convicted Rapist, and Ripples in Texas Could Be Vast*, N.Y. TIMES, Mar. 11, 2003, at A14 (discussing an exoneration in Houston); Nick Madigan, *Houston's Troubled DNA Crime Lab Faces Growing Scrutiny*, N.Y. TIMES, Feb. 9, 2003, at A20 (same); Robert D. McFadden, *DNA Clears Rape Convict After 12 Years*, N.Y. TIMES, May 20, 2003, at B1 (discussing an exoneration in New York City).

304. See Medwed, *supra* note 56, at 175-77 (discussing the benefits of internal prosecutorial innocence units).

305. See, e.g., Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 351-53 (2002) (arguing for the use of such commissions); Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98, 98-105 (2002) (same).

went wrong” after an airplane crash.<sup>306</sup> During the past decade, twelve states have formed innocence commissions of this nature.<sup>307</sup> Most of these organizations are bipartisan associations of law enforcement specialists, academics, retired judges, politicians, and community activists charged with conducting post-mortem reviews of previously overturned wrongful convictions, isolating the flaws in those cases, and recommending systemic changes.<sup>308</sup> The suggestions put forth by state innocence commissions thus far include measures to revamp the manner in which eyewitness identification procedures are conducted.<sup>309</sup>

Several other observers have lobbied for a different conception of innocence commissions: organizations with authority to behave proactively to uncover existing wrongful convictions in the jurisdiction.<sup>310</sup> Under this model, independent, quasi-judicial bodies investigate claims of innocence and refer the most meritorious of them to the courts.<sup>311</sup> Many supporters of this model wish to emulate the example of Great Britain’s Criminal Cases Review Commission (“CCRC”). The British Parliament established the CCRC in 1995 as “an independent body investigating suspected miscarriages of justice in England, Wales and Northern Ireland.”<sup>312</sup> Of the first forty-nine cases that the CCRC investigated and found worthy of referral to the Court of Appeal, the appropriate court for post-conviction review in the country, thirty-eight of them resulted in quashed convictions.<sup>313</sup> This

306. See Scheck & Neufeld, *supra* note 305, at 98–99 (contrasting investigations into airplane crashes with investigations into the criminal justice system).

307. See Robert C. Schehr, *The Criminal Cases Review Commission as a State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289, 1299 (2005) (listing the twelve states).

308. *Id.*; see also *Statewide Panel to Study Ways to Prevent Wrongful Convictions*, TRIB. REV. (Greensburg, Pa.), Nov. 28, 2006, available at 2006 WLNR 20575319 (discussing the announcement of an advisory committee designed to study wrongful convictions in Pennsylvania and noting that “[t]he commission of about 30 members is to be drawn from the state’s prosecutors, defense lawyers, judges, corrections officials, police, victim advocates and others”).

309. See Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 271, 316 (2006) (describing states’ efforts at reform); see also Jon B. Gould, *After Further Review: A New Wave of Innocence Commissions*, 88 JUDICATURE 126, 126–28 (2004) (discussing the reports completed by the Illinois, North Carolina, and Virginia commissions).

310. See, e.g., Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT’L L. REV. 1241, 1302 (2001) (arguing that the organization should “receive credible new evidence of innocence, regardless of when it is discovered”); David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91, 110 (2000) (explaining that “the system should have a safety net or a fail-safe to catch wrongful convictions without relying on elected officials or the overburdened courts”).

311. See *supra* note 310 and accompanying text.

312. Horan, *supra* note 310, at 92 (quoting Criminal Appeal Act, 1995, c. 35, §§ 8–25 (Eng.)).

313. See Griffin, *supra* note 310, at 1275–92. As of the end of April 2004, the Commission had reviewed 6095 applications and referred 228 of them to an appellate court. David Kyle, *Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission*, 52 DRAKE L. REV.



high rate of exoneration implies both that the CCRC is adept at ferreting out legitimate cases and that the judiciary holds its recommendations in high regard.

Although several of the state innocence commissions operating in the United States today have some degree of investigative power, none of them truly resembles the CCRC.<sup>314</sup> North Carolina appears on the cusp of forming a commission comparable to the CCRC in its ability to investigate potential wrongful convictions and refer cases to the courts.<sup>315</sup> The North Carolina Innocence Inquiry Commission, which received legislative and gubernatorial approval in the summer of 2006, is entrusted with the duty of assessing claims of innocence predicated on new evidence unavailable at the time of trial.<sup>316</sup> If a majority of the proposed eight-member committee (consisting of, *inter alia*, a judge, prosecutor, and defense lawyer) considers a case sufficiently credible, the state's chief justice would be obligated to appoint three judges to review it.<sup>317</sup> Only a unanimous finding of "clear and convincing evidence" of innocence by those three judges would generate a reversal of the conviction.<sup>318</sup> It remains to be seen whether the North Carolina initiative will produce outcomes analogous to those in Great Britain, but to the extent that it prospers—and spawns offspring in other jurisdictions—innocence commissions might represent appropriate organizations for parole commissioners to contact when presented with potentially legitimate innocence claims at parole hearings.<sup>319</sup>

#### CONCLUSION

The proliferation of post-conviction exonerations of innocent prisoners since the late 1980s has revealed many of the criminal justice system's procedural and substantive warts. This Article has focused on one such flaw:

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657, 673 (2004). Kyle, a member of the CCRC since 1997, observed that some critics of the Commission have expressed "concerns about what they see as a low rate of referral, coupled with the suggestion that the Commission is worried about irritating the Court of Appeal." *Id.* at 674.

314. See generally Schehr, *supra* note 307 (comparing the CCRC and its U.S. counterparts).

315. See, e.g., Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 *DRAKE L. REV.* 647, 652–54 (2004) (discussing the unique accomplishments of the Commission); Andrea Weigl, *Innocence Panel Closer to Reality After Senate Vote*, *NEWS & OBSERVER* (Raleigh, N.C.), July 11, 2006, at A1 ("The only similar entity exists in England.").

316. See, e.g., Andrea Weigl et al., *Easley Signs Law Creating Innocence Panel*, *NEWS & OBSERVER* (Raleigh, N.C.), Aug. 4, 2006, at B5.

317. *Id.*

318. *Id.*

319. See Jerome M. Maiatico, *All Eyes on Us: A Comparative Critique of the North Carolina Inquiry Commission*, 56 *DUKE L.J.* 1345, 1346 (2007) (comparing the North Carolina Innocence Inquiry Commission with the successful CCRC and suggesting that "[f]rom a comparative perspective, the North Carolina innocence inquiry commission should be able to match that success if it can avoid budget and resource pitfalls").

the reliance of many state parole boards on prisoner admissions of guilt as a key variable in granting release. Given the barriers that state and federal post-conviction procedures impose on litigating innocence claims through the courts, especially in cases lacking biological evidence capable of DNA testing, it is likely that a sizable number of innocent prisoners remain incarcerated; for many of them, release on parole comprises the best opportunity for procuring their freedom. As a result, discounting the legitimacy of prisoner assertions of innocence at parole hearings and overvaluing acknowledgments of responsibility, as appears to be the modus operandi for state parole boards, punishes an unknown and possibly substantial group of inmates. Even more, it produces a true “innocent prisoner’s dilemma.” Inmates must select between admitting guilt and improving the chances for parole—with potentially disastrous effects on any post-conviction innocence claim in the courts—and maintaining innocence and essentially ruining any possibility of parole.

Restricting the use of statements from parole hearings at subsequent post-conviction proceedings could defuse much of the impact generated by the current catch-22. Furthermore, urging parole boards to recognize that expressions of remorse or empathy are distinct from statements of criminal responsibility and that the former have greater relative value in the parole release calculus than the latter would be a beneficial development. Finally, in situations where a prospective parolee claims innocence, merely modifying the structure of parole release hearings, requiring parole boards to investigate claims of innocence by prisoners more thoroughly for purposes of the release decision, and urging parole commissioners to refer seemingly meritorious cases to innocence projects, prosecutorial innocence units, or state innocence commissions might partly ameliorate the dangers in the present regime. Even if states fail to adopt those reforms, at a minimum parole boards should be aware of the likelihood that some claims of innocence at parole release hearings stem not from psychological denial, but instead from a genuine and laudable reluctance to take responsibility for a crime that one did not commit. With such awareness in place, parole boards would presumably cease treating denials of guilt as negative factors in the parole release decision. This would enable innocent prisoners, in turn, to participate in the parole process with far less trepidation about the risks of simply telling the truth.

At a fundamental level, explicit and implicit biases operate to marginalize potentially innocent prisoners throughout the parole process. The explicit bias derives from the institutional refusal to weigh innocence-based arguments at parole hearings; the implicit bias originates from society’s general disapproval of criminal activity and distrust of an inmate

once the presumption of guilt has attached after conviction.<sup>320</sup> A pivotal step in improving the fate of innocent prisoners when encountering parole boards entails tackling these biases directly—aiming to remove the explicit barriers to considering innocence in the parole release decision and to lessen the implicit conceptual obstacles by educating parole officials that the criminal adjudicatory system, like all systems devised by humans, is fallible.<sup>321</sup>

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320. See generally Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006) (discussing how most people have implicit biases against traditionally disadvantaged groups).

321. See, e.g., FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN* 108 (1927) (“All systems of law, however wise, are administered through men, and therefore may occasionally disclose the frailties of men. Perfection may not be demanded of law, but the capacity to correct errors of inevitable frailty is the mark of a civilized legal mechanism.”).