

## REMORSE, NOT RACE: ESSENCE OF PAROLE RELEASE?

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### I. INTRODUCTION

“I cannot show remorse because I do not believe I am guilty,” said Lyn Nofziger.<sup>1</sup> Remorse is a sense of responsibility and regret from recognizing the harm one has done.<sup>2</sup> While an inmate’s<sup>3</sup> true remorse may be a traditional basis for the reduction of a sentence, a lack of remorse has been sometimes considered a basis for harsher punishment in the sentencing phase.<sup>4</sup> At parole hearings, the parole board sometimes supports its decision to guarantee parole on whether an inmate takes responsibility and feels regret from the harm or wrongdoing caused.

Remorse is subjective.<sup>5</sup> A prospective parolee’s sense of remorse is likely the most significant factor used in discretionary parole. In New York, a failure to show remorse is commonly seen as a factor weighing against leniency in serious crimes of violence.<sup>6</sup> Asking an inmate if he feels a sense of remorse should not be used at parole hearings. Such a question may lead to unfair outcomes since some petitioners did not commit the wrongdoing convicted of and cannot feel any remorse and thereby refuse to acknowledge remorse. Some petitioners may feign remorse while others may genuinely admit a sense of remorse. Also, parole commissioners who disavow reliance on remorse in punishment decisions are likely influenced by it at an unconscious level.<sup>7</sup> Whether intentional or not, a judge (or parole

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<sup>1</sup> Paul Houston & Eric Lichtblau, *Unrepentant Nofziger Gets 90 Days, Is Fined \$30,000*, L.A. TIMES (April 9, 1988), <https://www.latimes.com/archives/la-xpm-1988-04-09-mn-806-story.html>.

<sup>2</sup> *Id.*

<sup>3</sup> Hereinafter referred to as petitioner.

<sup>4</sup> *Id.*

<sup>5</sup> *People v. Odle*, 128 Ill. 2d 111, 538 N.E.2d 428 (1988).

<sup>6</sup> *See, e.g., Bun v. State*, 769 S.E.2d 381, 384 n.5 (2015) (life without parole sentence did not violate state constitution where sentencing judge properly considered defendant’s offense and lack of remorse).

<sup>7</sup> M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 302 (2018).

*Journal of Race, Gender, and Ethnicity*  
Volume 9 – May 2020

board) considers immeasurable aspects of the defendant (or inmate) standing before the court.<sup>8</sup>

Parole boards generally used remorse to assess character and capacity to change in many cultural narratives about wrongdoing. An inmate who does not display remorse may seem primarily bad or, at the very least, unintelligible to the observer.<sup>9</sup> Remorse affects parole release decisions even though it is usually not a factor listed for consideration in parole statutes or regulations. Anecdotal evidence from parole applicants and their attorneys suggests that parole boards look for "intuitive signs of rehabilitation as repentance, willingness to accept responsibility, and self-understanding."<sup>10</sup> Consequently, petitioners who do not accept responsibility, admit guilt or express remorse have an exceedingly difficult time securing release on parole.<sup>11</sup> Thus, the New York Parole Board should eliminate reliance on remorse at parole hearings because a parole board, susceptible to biases, may not accurately discern or force someone to feel a sense of remorse. The issue is whether parole boards should be required to assess an inmate's potential for recidivism if the inmate has shown remorse after incarceration and wrongdoings when there is no objective test to identify remorse.

Remorse, among other factors such as risk assessment, are tools which contribute to the prison population. There are growing concerns about the increase in incarceration rates in the United States and the disparities in race, gender, and ethnicity of those who are imprisoned and granted early release. The United States hosts approximately 2.3 million people in prisons and jails.<sup>12</sup> The U.S. incarcerates more people per capita than any other country even when adjusting for other factors, such as crime victimization, social service spending, and economic development as of 2017.<sup>13</sup> The expansion of the prison system has a disproportionate effect on African Americans. African Americans comprise about twelve percent of the national population

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<sup>8</sup> Michele H. Kalstein, et al., *Calculating Injustice: The Fixation on Punishment as Crime Control*, 27 HARV. C.R.-C.L.L. REV. 575, 604 (1992).

<sup>9</sup> Hanan, *supra* note 7.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, PRISON POLICY INITIATIVE (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html>; *see also* Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate than Any Other Country*, WASHINGTON POST (July 7, 2015), [https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm\\_term=.fa20661c0aee](https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm_term=.fa20661c0aee).

<sup>13</sup> *Id.*

*Journal of Race, Gender, and Ethnicity*  
Volume 9 – May 2020

but represent close to half of the prison population.<sup>14</sup> To be more specific, 2.3 million or thirty-four percent of African Americans out of the 6.8 million Americans were incarcerated in 2014.<sup>15</sup> In 2015, African Americans and Hispanics comprised approximately thirty-two percent of the population, yet encompassing fifty-six percent of all incarcerated people.<sup>16</sup> Imprisonment of African American men was five times more than White men in 2015 and twice as likely for African American women than White women.<sup>17</sup> According to the National Association for the Advancement of Colored People (NAACP), if African Americans and Hispanics were incarcerated at the same rates as Whites, prison and jail populations would likely decline by nearly forty percent.<sup>18</sup>

## II. WHAT IS PAROLE?

The criminal justice system seeks to reduce mass incarceration by permitting early release for petitioners who served a length of time, maintained good behavior, and are considered rehabilitated to re-enter society through parole, or supervised release.<sup>19</sup> Parole is a conditional release from prison of an inmate who has served part of his or her sentence.<sup>20</sup> Parole allows the inmate to complete his or her term of punishment outside the prison if he or she satisfactorily complies with the terms of the parole.<sup>21</sup> A parole board will grant parole where there is a reasonable probability that the parolee will not violate laws while at liberty.<sup>22</sup> In the alternative, parole is a release from jail or confinement after one has served part of his or her sentence and being in a state of supervised release from prison.<sup>23</sup>

Within this setting, judges, parole officials, and pardon boards across the country weigh the sincerity of the defendants' expressions of remorse as part of their assessment of general character and specific

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<sup>14</sup> Stephanie Hong, *Say Her Name: The Black Woman And Incarceration*, 19 GEO. J. GENDER & L. 619 (2018).

<sup>15</sup> *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/criminal-justice-fact-sheet>.

<sup>16</sup> *Id.*

<sup>17</sup> Hong, *supra* note 14.

<sup>18</sup> *Criminal Justice Fact Sheet*, *supra* note 15.

<sup>19</sup> *Id.*

<sup>20</sup> *Parole*, GILBERT POCKET SIZE LAW DICTIONARY (3d ed. 2014).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

*Journal of Race, Gender, and Ethnicity*  
Volume 9 – May 2020

attitude toward the crime itself.<sup>24</sup> However, the remorseful inmate is viewed as rejecting his or her crime and, thus, less likely to re-offend.<sup>25</sup> But, the remorse assessment is a less reliable facet in granting parole because the decision-maker will unwittingly employ implicit biases to interpret ambiguous expressions of remorse.<sup>26</sup> For instance, African Americans are likely associated with thought of dangerousness and criminality which affects criminal justice decisions at multiple levels from police officers to judges.<sup>27</sup> A judge generally has a broad statutory range of sentencing options for deciding punishment.<sup>28</sup> Meanwhile, parole boards mostly use risk analysis assessments.<sup>29</sup> However, parole boards look for remorse using their discretion in assessing the inmate's potential for rehabilitation.<sup>30</sup> This Note will further explore ways parole may be granted, the relevance of parole in the legal system, consequences of failing to accept responsibility of crime, effects of de facto discrimination and bias on the likelihood of parole release, assessments of remorse and indications or lack remorse.

### III. STATISTICS ON INCARCERATION AND PAROLE GRANTS

The State of New York currently oversees approximately 54,700 prison inmates residing in fifty-two state-operated prisons.<sup>31</sup> The state is also responsible for providing reentry opportunities for inmates who received indeterminate sentencing.<sup>32</sup> Although inmates have a constitutional right against cruel and unusual punishment, the inability to reenter society after serving the minimum number of years does not equate to constitutional guarantee of clemency or parole.<sup>33</sup> Generally, inmates do not have a constitutional right for early release on parole despite good behavior because parole is a privilege, not a right, in that a state may establish a parole system.<sup>34</sup> However, it has

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<sup>24</sup> Hanan, *supra* note 7.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*,

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Fewer Prisoners, Less Crime: A Tale Of Three States*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/wp-content/uploads/2015/11/Fewer-Prisoners-Less-Crime-A-Tale-of-Three-States.pdf>, (last visited Mar. 11, 2021).

<sup>32</sup> *Id.*

<sup>33</sup> U.S. CONST. Amend. VIII.

<sup>34</sup> *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 7 (1979).

*Journal of Race, Gender, and Ethnicity*  
Volume 9 – May 2020

no duty to do so.<sup>35</sup> Release on parole is not a right conferred to an inmate, but merely a privilege which the parole board, in its discretion, may grant or deny and which, once granted, may later be withdrawn.<sup>36</sup> Three reporters at The New York Times examined thousands of decisions made by New York’s parole board and found that black men were “at a marked disadvantage” in 2016.<sup>37</sup> For instance, an analysis of thousands of parole decisions from the past several years unearthed that fewer than one in six black or Hispanic men were released at their first hearing, compared to one in four white men.<sup>38</sup> Approximately 800,000 people are currently under criminal justice supervision following their release from prison throughout the nation.<sup>39</sup> Between 2000 and 2016, disparities were lowest among probation populations and highest among prison and parole populations. The rate for African Americans decreased by thirteen percent between 2000 and 2016, and the Hispanic rate decreased by forty-two percent; the Caucasian population parole rate increased by thirty percent.<sup>40</sup> The increase in the Caucasian parole rate combined with the decrease in the African American rate resulted in a decrease in the African American-Caucasian disparity ratio, from 6.3 to 4.1 indicating that fewer African Americans are granted parole.<sup>41</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *People ex rel. Johnson v. Denna*, 243 N.Y.S.2d 797, 799 (1963).

<sup>37</sup> Michael Winerip, Michael Schwirtz & Robert Gebeloff, *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. TIMES (Dec. 4, 2016), <https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html#:~:text=And%20in%20New%20York%2C%20black,one%20in%20four%20white%20men>.

<sup>38</sup> *Id.*

<sup>39</sup> Peggy McGarry, *New York State Parole Project*, VERA INSTITUTE OF JUSTICE, <https://www.vera.org/projects/new-york-state-parole-project/learn-more>, (last visited Mar. 11, 2021).

<sup>40</sup> William J. Sabiol, et.al, *Trends in Correctional Control by Sex and Race*, COUNCIL ON CRIMINAL JUSTICE (Dec. 2019), [https://cdn.ymaws.com/counciloncj.org/resource/collection/4683B90A-08CF-493F-89ED-A0D7C4BF7551/Trends\\_in\\_Correctional\\_Control\\_-\\_FINAL.pdf](https://cdn.ymaws.com/counciloncj.org/resource/collection/4683B90A-08CF-493F-89ED-A0D7C4BF7551/Trends_in_Correctional_Control_-_FINAL.pdf).

<sup>41</sup> *Id.*

#### IV. ON WHAT GROUNDS IS PAROLE GRANTED?

Parole may be required by law, or it may be discretionary. A parole board consisting of government-appointed decision-makers determines whether the inmate seeking parole should be permitted to re-enter the community under supervision.<sup>42</sup> The discretionary model gives the parole board and judges broad authority to determine who gets parole.<sup>43</sup> Parole decision-making is an administrative procedure. The process applied is guided by balancing the inmate's interest in release against the government's interest in public safety, with the express goal of minimizing erroneous decisions on a case-by-case basis.<sup>44</sup> The standard for governing release is to reasonably and most practically ensure that no inmate is released from prison unless it is satisfied that there is a reasonable probability that those released will pose no further menace to society.<sup>45</sup>

As part of its decision-making duty, the parole board determines the length of time an inmate serving an indeterminate sentence may spend in prison.<sup>46</sup> An indeterminate term is imposed for felony convictions where the conviction is for an "A" felony offense or where no violent felony, drug felony, or sex crime felony is involved with at least a maximum term of 3 years.<sup>47</sup> For a Class A felony, the maximum is life, for a Class B the maximum is 25 years while Class C felony, the maximum must not exceed 15 years; for a D, it must not exceed 7 years; and for a Class E, it must not exceed 4 years.<sup>48</sup> The minimum period of the indeterminate term is directed to be at least 1 year and for an A-I felony (such as drug felonies) must be at least 15 years but not more than 25. For all other non-violent felony offenses, the minimum is deemed to be one third of the maximum imposed.<sup>49</sup>

Setting a maximum of a life sentence in prison gives the petitioner a chance to request parole, but the parole board can choose

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<sup>42</sup> Lauren E. Glaze, et.al, *Bureau of Justice Statistics, Probation and Parole in The U.S.* 2009, U.S. DEP'T OF JUSTICE (Dec. 2010), <https://www.bjs.gov/content/pub/pdf/ppus09.pdf>.

<sup>43</sup> See Carolyn Turpin-Petrosino, *Are Limiting Enactments Effective? An Experimental Test of Decision Making in a Presumptive Parole State*, 27 J. CRIM. JUST. 4, 321 (1999).

<sup>44</sup> Amy Robinson-Oost, *A Celebration Of CUNY School Of Law Scholarship: Note: Evaluation As The Proper Function Of The Parole Board: An Analysis Of New York State's Proposed Safe Parole Act*, 16 CUNY L. REV. 129, 133 (2012).

<sup>45</sup> *Cummings v. Regan*, 45 A.D.2d 415 (1975).

<sup>46</sup> *Id.*

<sup>47</sup> N.Y. Penal Law § 70.70 (Lexis 2020).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

*Journal of Race, Gender, and Ethnicity*  
Volume 9 – May 2020

to keep the petitioner in prison for as long as it determines appropriate.<sup>50</sup> This can mean never granting parole requests to some petitioners who face indeterminate sentencing.<sup>51</sup> The New York State Executive Law governing discretionary release on parole lists a set of factors to be considered,<sup>52</sup> including a recent amendment to the law that requires risk and needs assessment.<sup>53</sup> One of the factors considered during the parole decision-making process is the seriousness of the crime.<sup>54</sup> Parole boards consistently deny release to long termers—those who are consistently denied parole—usually using as a basis the seriousness of the crime for which they were convicted, the very act that they will never be able to change despite having the lowest risk of returning to prison.<sup>55</sup> However, the greater the discretion of the judge or parole commissioner, the more likely she will be influenced by extra-legal, ineffable factors like her subjective impression of the defendant's remorse and general character.<sup>56</sup> Moreover, judges and decision-makers, such as parole and pardon boards, should be aware of the lack of evidentiary support for intuitively sensing sincere remorse and the likelihood that implicit biases will naturally affect remorse assessments.<sup>57</sup> Thus, parole boards should not ask an inmate whether he or she feels remorse, since no evidence suggests an inmate sincerely feels remorse and admitting remorse does not necessarily mean a parolee will not commit the same or similar offense again.

In New York, since inmates do not have a liberty interest in parole and parole, denial is neither arbitrary nor capricious when the parole board relies on the factors defined by state statute.<sup>58</sup> Due process does not require judicial review of a denial of parole where sufficient facts and reasons for such denial are given to the petitioner; and there is no statutory authority for recommending such proceeding.<sup>59</sup> Although the parole board's discretion is absolute and cannot be reviewed by a court, as long as it violates no positive

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<sup>50</sup> N.Y. Penal Law § 70.40 (Lexis 2020).

<sup>51</sup> N.Y. Penal Law § 70.70 (Lexis 2020).

<sup>52</sup> N.Y. Exec. Law § 259-i (2)(c) (McKinney 2018).

<sup>53</sup> N.Y. Exec. Law § 259-c (4) (McKinney 2018).

<sup>54</sup> Kathy Boudin, *Hope, Illusion and Imagination: The Politics of Parole and Reentry in the Era of Mass Incarceration*, 38 N.Y.U. REV. L. & SOC. CHANGE 563, 567 (2014).

<sup>55</sup> *Id.*

<sup>56</sup> Hanan, *supra* note 7.

<sup>57</sup> Hanan, *supra* note 7, at 357.

<sup>58</sup> Siao-Pao v. Connolly, 564 F. Supp. 2d 232 (2008).

<sup>59</sup> Ganci v. Regan, 52 A.D.2d 1055 (1976).

*Journal of Race, Gender, and Ethnicity*  
*Volume 9 – May 2020*

statutory requirement, the board is required to give the petitioner the facts and reasons for denying parole.<sup>60</sup>

Every person confined in an institution of the department of correction or a facility in the department of mental hygiene in NY serving an indeterminate or determinate sentence of imprisonment, except a person serving a sentence with a maximum term of life imprisonment, may receive time allowance against the term or maximum term of his or her sentence imposed by the court.<sup>61</sup> New York Correction Law § 803 further states that such allowances may be granted for good behavior and willing performance of duties assigned.<sup>62</sup> Additionally, the inmate should show progress and achievement in an assigned treatment program.<sup>63</sup> Parole may be withheld, forfeited or canceled in whole or in part for bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned.<sup>64</sup> Good time allowances for both indeterminate and determinate terms are specified in N.Y. Correction Law and applied by Penal Law § 70.40. Under this statute, indeterminate offenders can receive up to one-sixth, and determinate term offenders can receive up to one-seventh time off their term. Drug offenders may receive an additional one-seventh off of a determinate term.<sup>65</sup>

A person serving an indeterminate sentence of imprisonment may receive time allowance against the maximum term of his or her sentence not to exceed one-third of the maximum term imposed by the court while someone serving a determinate sentence of imprisonment may receive time allowance against the term of his or her sentence not to exceed one-seventh of the term imposed by the court.<sup>66</sup> When a court imposes a determinate sentence, it can in each case state the term of imprisonment and an additional period of post-release supervision as determined pursuant to this article.<sup>67</sup>

A defendant is an “eligible defendant” for purposes of a sentence of parole supervision when the defendant is a felony offender convicted, of a specified offense, or offenses<sup>68</sup> who stands convicted of no other

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<sup>60</sup> *Id.*

<sup>61</sup> N.Y. Corr. L. § 803 (Lexis 2020).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> N.Y. Penal Law § 70.45 (Lexis 2020).

<sup>68</sup> NY CLS CPL § 410.9(2) (Lexis 2020).

*Journal of Race, Gender, and Ethnicity*  
Volume 9 – May 2020

felony offense, has not previously been convicted of either a violent felony offense<sup>69</sup>, has not previously been convicted of either a violent felony offense<sup>70</sup>, a class A felony offense (murder in first degree, kidnapping in first degree, arson in first degree, aggravated murder) or a class B felony (an attempt of Class A felony)<sup>71</sup>, and is not subject to an undischarged term of imprisonment.<sup>72</sup>

When an indeterminate or determinate sentence of imprisonment is imposed upon an eligible defendant for a specified offense, the court may direct that such sentence be executed as a sentence of parole supervision if the court finds (i) that the defendant has a history of controlled substance dependence that is a significant contributing factor to such defendant's criminal conduct; (ii) that such defendant's controlled substance dependence could be appropriately addressed by a sentence of parole supervision; and (iii) that imposition of such a sentence would not have an adverse effect on public safety or public confidence in the integrity of the criminal justice system.<sup>73</sup>

A determinate sentence requires a person who is serving one or more than one definite sentence of imprisonment with a term or aggregate term over ninety days and is eligible for release.<sup>74</sup> A petitioner may be conditionally released from the institution in which he or she is confined at any time after service of sixty days of that term, exclusive of credits allowed under subdivisions four and six of section 70.30 of the New York Penal Law.<sup>75</sup> A parole board may have the discretion to grant conditional release from such an institution.<sup>76</sup>

States have created various solutions to the problems caused by determinate sentencing. Many states provide mandatory parole for certain petitioners and discretionary parole for others, depending on the severity of the crime or the date of the conviction.<sup>77</sup> For example, Wisconsin changed its sentencing structure in 2000 to eliminate the option of discretionary parole for all offenses committed after that date whereas in California and Washington, discretionary parole was eliminated for most offenses, except for life and certain other offense or

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<sup>69</sup> N.Y. Penal Law § 70.02 (Lexis 2020).

<sup>70</sup> N.Y. Penal Law § 70.02 (Lexis 2020).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> NY CLS CPL § 410.91(3) (Lexis 2020).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Robinson-Oost, *supra* note 43.

*Journal of Race, Gender, and Ethnicity*  
Volume 9 – May 2020

sentencing types.<sup>78</sup> Discretionary parole is where the parole board, consisting of government-appointed decision-makers, determines whether the inmate seeking parole should be permitted to re-enter the community under supervision.<sup>79</sup> Meanwhile, mandatory parole varies for each state with the recurring theme where a state grants parole at the time of sentencing, and the inmate must serve after completing the sentence.<sup>80</sup> That is, a release is required or presumed once the inmate serves the minimum term set by the judge and reduced by “good time credits” earned while incarcerated.<sup>81</sup> After parolees exit the prison, a majority reenter the prison systems because of violations of the conditions imposed on early release or committing a new offense.

Therefore, these states embrace a heterogeneous approach to determine parole for certain petitioners. New York and other states employ a multi-factor approach to balance the advantages and disadvantages of release.<sup>82</sup> The predominant goal of such a multi-factor approach is to assess whether the petitioner continues to be a risk to the general public. The most determinative factors appear to be the severity of the crime, the type of crime, and the petitioner's criminal history.<sup>83</sup> Consequently, many parole boards, often instructed by state legislatures, have developed risk assessment tools to assist in parole determinations.<sup>84</sup> Nevertheless, requests for parole are denied not just because of an inmate's conviction of a heinous crime but more so due to a failure for the inmate to express remorse to the parole board interviewer.

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<sup>78</sup> Jorge Renuad, *Grading the parole release systems of all 50 states*, PRISON POLICY (Feb. 26, 2019), [https://www.prisonpolicy.org/reports/grading\\_parole.html](https://www.prisonpolicy.org/reports/grading_parole.html).

<sup>79</sup> Glaze, *supra* note 41.

<sup>80</sup> Monica Steiner, *What is Federal Supervised Parole?*, NOLO (Apr. 2020), <https://www.nolo.com/legal-encyclopedia/what-federal-supervised-release.html>.

<sup>81</sup> WAYNE R. LAFAVE, ET. AL., CRIMINAL PROCEDURE (6<sup>th</sup> 2017).

<sup>82</sup> *Id.*

<sup>83</sup> See Turpin-Petrosino, *supra* note 43.

<sup>84</sup> *Id.* at 324.

## V. WHAT IS THE RELEVANCE OF REMORSE TO PAROLE?

In theory, remorse is a sign of moral improvement, acceptance of responsibility or moral blameworthiness<sup>85</sup>, which may indicate that a person has been rehabilitated and no longer poses a threat to public safety.<sup>86</sup> Remorse serves two purposes in the legal system. First, remorse offers a confessional aspect that is generally preconditioned to receiving understanding or forgiveness.<sup>87</sup> Second, remorse may serve as an apology to the victims and restore a measure of dignity that the crime violated.<sup>88</sup>

Admitting remorse does not justify release, but it is a constant factor in denying parole. Generally, an inmate would be ineligible for parole until he served the minimum period of his present sentence.<sup>89</sup> Hence, a petitioner who is unlikely to pose a danger to society and will not benefit from further confinement could be released under the supervision of the Department of Parole if he has complied with the requirements set forth by the institutional authorities.<sup>90</sup>

Besides serving the minimum amount of time in prison, the parole board may consider the petitioner's good behavior while incarcerated. For instance, if a petitioner, who was sentenced to an indeterminate term of two to four years' imprisonment, had a maximum good behavior allowance of sixteen months, then, he had to serve thirty-two months, less prison time, rather than only sixteen months, before becoming eligible for conditional release.<sup>91</sup> Also, a person initially sentenced to reformatory term was entitled to credit for "good time" earned during service of such term. A refusal to allow such credit for good time was unconstitutional as a denial of equal protection of law within meaning of Fourteenth Amendment.<sup>92</sup>

If the parole board fails to forward its reason, in writing, for the disallowance of good behavior time, to the Commissioner, then the petitioner would be deprived of due process and equal protection of the

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<sup>85</sup> Adam Saper, *Juvenile Remorselessness: An Unconstitutional Sentencing Consideration*, 38 N.Y.U. REV. L. & SOC. CHANGE 99 (2014).

<sup>86</sup> *Id.*

<sup>87</sup> Steven Zeidman, *Mass Incarceration and Remorse*, GOTHAM GAZETTE (Oct. 22, 2019), <https://www.gothamgazette.com/opinion/8862-mass-incarceration-prison-prosecution-remorse>.

<sup>88</sup> *Id.*

<sup>89</sup> *McDougal v. Vincent*, 51 A.D.2d 737 (1976).

<sup>90</sup> *People v. Kinney*, 34 A.D.2d 728 (1970).

<sup>91</sup> *People ex rel. Ternaku v. Lefevre*, 58 A.D.2d 932 (1977).

<sup>92</sup> *Hiney v. La Vallee*, 85 Misc. 2d 510 (1975).

*Journal of Race, Gender, and Ethnicity*  
*Volume 9 – May 2020*

laws.<sup>93</sup> In fact, good behavior time credit may not be granted or withheld at the pleasure of the Warden and the Prison Commutation Board and such discretionary reductions cannot be arbitrarily withheld.<sup>94</sup>

Nevertheless, to avoid such hindrance, conditional release by express New York law is based upon the computation of good behavior time, a mandatory grant by its terms and nature if the inmate so behaves.<sup>95</sup> There should be some evidence sufficient to uphold claims for good and bad behavior.

The Board of Parole is authorized to impose special conditions on conditional release, and the board may lawfully delegate its authority to impose special conditions to parole officers.<sup>96</sup> Petitioners who received conditional release are required to abide by their parole officer's instructions as provided in their conditional release agreement.<sup>97</sup> Despite the stringent yet impractical conditional release forms, the state Board of Parole has numerous functions, powers and authorities. Some of the most critical duties listed in the statute that the board must abide by include:

[T]he power and duty of determining which inmates serving an indeterminate or determinate sentence of imprisonment may be released on parole, establish written procedures for its use in making parole decisions as required by law; . . . the power to revoke the community supervision status of any person and to authorize the issuance of a warrant for the re-taking of such persons; when requested by the governor, of reporting to the governor the facts, circumstances, criminal records and social, physical, mental and psychiatric conditions and histories of inmates under consideration by the governor for pardon or commutation of sentence and of applicants for restoration of the rights of citizenship.<sup>98</sup>

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<sup>93</sup> *Rodriguez v McGinnis*, 307 F. Supp. 627, (2d Cir. 1971).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *People ex rel. Prince v. Meloni*, 166 A.D.2d 926 (1990).

<sup>97</sup> *People ex rel. Lent v. McNulty*, 83 Misc. 2d 723, 373 N.Y.S.2d 508, 1975 N.Y. Misc. LEXIS 2971 (N.Y. Sup. Ct. 1975).

<sup>98</sup> NY CLS Exec § 259-c (Lexis 2020).

The Board of Parole committee may deny an inmate's request using its discretion to determine a remorseful manner. For instance, a petitioner serving eight to twenty-five years for kidnapping, robbery and grand larceny was properly denied parole in light of his extensive criminal record, the seriousness of crimes for which he was incarcerated, his failure to accept responsibility for those crimes, and pending warrant against him in Massachusetts for a parole violation.<sup>99</sup>

#### VI. HOW CAN FAILURE TO ACCEPT RESPONSIBILITY OR ACKNOWLEDGEMENT OF A CRIME BE MEASURED?

In another instance, a court ruled that the parole board did not abuse its discretion in denying the request for parole release.<sup>100</sup> The court considered the violent nature of the petitioner's crimes, crimes committed while he was under parole supervision, and his criminal history dating back twenty-five years.<sup>101</sup> The court, in another case, held parole release was denied properly based on the severity of petitioner's crimes—second-degree rape and first-degree sexual abuse perpetrated against his stepdaughter and her 14-year-old friend—and his failure to accept responsibility for his conduct, notwithstanding his receipt of a certificate of earned eligibility.<sup>102</sup> Several implicit bias studies suggest that when decision-makers in the justice system encounter ambiguous evidence, they may unconsciously resort to implicit and racial associations between African Americans and crime to resolve the ambiguity.<sup>103</sup>

For instance, racially disparate sentencing has continued notwithstanding sentencing guidelines, capital sentencing procedures, and the reduction of availability of discretionary parole.<sup>104</sup> This is likely due partially to bias within the justice system. Unless there is a mandatory term-of-years required by statute for a crime committed, the judge's subjective judgment of the defendant's character plays a role in sentencing. Similarly, anyone who influences sentencing decisions, including parole and pardon board members are likely to

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<sup>99</sup> Epps v. Travis, 241 A.D.2d 738 (1997).

<sup>100</sup> People ex rel. Gilmore v. New York State Parole Bd., 241 A.D.2d 793 (1997).

<sup>101</sup> *Id.*

<sup>102</sup> Thomas v. Travis, 257 A.D.2d 812 (1999).

<sup>103</sup> Hanan, *supra* note 7.

<sup>104</sup> See Mona Lynch, *Institutionalizing Bias. The Death Penalty, Federal Drug Prosecutions, and Mechanisms of Disparate Punishment*, 41 AM. J. CRIM. L. 91, 96 (2013).

unintentionally make a subjective judgment about an inmate's character. Arguably, such implicit bias may limit an inmate's second chance at life through parole. The parole board may label that inmate as someone likely to recidivate since he cannot or refuses to show remorse. However, implicit bias may be reduced in remorse assessment if parole boards become aware of their own biases and the associated reduction in confidence in objectivity.<sup>105</sup>

### VII. DOES DE FACTO DISCRIMINATION OR BIAS CONTRIBUTE TO LIKELIHOOD OF DENIED PAROLE RELEASE?

Our upbringing often times reflects our bias, particularly in the legal system. For instance, if a judge believes that the crime is a product of the defendant's intrinsic character, she will predict recidivism, be less interested in life circumstances or external influences, and punish more harshly.<sup>106</sup> However, if the judge sees the crime as inconsistent with her stereotype of people like the defendant, she may search for an external explanation for the defendant's actions and assume that the defendant is not likely to recidivate unless similar external circumstances persist.<sup>107</sup> The RAND Corporation, a global think tank, published a study that found convicted African-Americans were more likely than Whites to go to prison. "This disparity," the study concluded, "suggests that probation officers, judges, and parole boards are exercising discretion in sentencing or release decisions in ways that result in de facto discrimination against blacks."<sup>108</sup> In other words, unintended discrimination and bias exist and extend to our legal processes. For instance, in most jurisdictions, the probation officers often prepare pre-sentencing reports for a judge to help make sentencing decisions. However, those reports include information on the criminal's prior record, family background, education, marital status, and employment history.<sup>109</sup> The demographics of convicted African Americans suggest many grew up in neighborhoods with concentrated poverty-- neighborhoods with limited resources and social networks that are beyond their control. Judges, who may have come from middle-class backgrounds, may overlook concentrated poverty as

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<sup>105</sup> Hanan, *supra* note 7.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *The Color of Justice*, CONSTITUTIONAL RIGHTS FOUNDATION, <https://www.crf-usa.org/brown-v-board-50th-anniversary/the-color-of-justice.html>, (last visited Mar. 11, 2021).

<sup>109</sup> *Id.*

*Journal of Race, Gender, and Ethnicity*  
Volume 9 – May 2020

a socioeconomic issue.<sup>110</sup> Therefore, some judges may treat African Americans more harshly during sentencing based on their upbringing which makes it likely impossible for a judge to credit the defendant's remorse when she already has rap sheet of his past crimes.

Similarly, at a parole hearing, the interviewer would presumptively conclude that an inmate is not fit for parole if his character trait is inherent with the committed crime. The interviewer would assess the inmate's inherent character trait to conclude that the inmate is likely to recidivate, and therefore not eligible for parole. However, if a parole board does not associate an inmate's petition for early release with the nature of the crime he is convicted of, the board is likely to believe an inmate's remorse and use it as a basis to grant parole.

Compared to courtroom assessments of remorse which may be distorted by the belief that defendants have a strong motive to feign remorse to obtain leniency, an inmate seeking parole may be informed that his ticket to early release is feigning remorse to the parole board. In such instances, the judge or parole commissioner will likely ascribe a purely self-interested motive to the defendant and doubt whether he would apologize if he did not have such a high stake in the outcome of the sentencing hearing to discern true remorse, but even a defendant who expresses remorse in a heartfelt manner may be judged to be "merely forensically resourceful" that is, simply deceitful.<sup>111</sup>

### VIII. HOW IS REMORSE EVALUATED?

The parole board generally decides whether to grant parole based on an inmate's characteristics, such as age, mental stability, marital status, and prior criminal record.<sup>112</sup> The board does not grant parole to offenders solely for good behavior while in prison.<sup>113</sup> Moreover, the parole board must consider the nature and severity of the offense committed, the length of sentence served, and the inmate's degree of remorse for the offense.<sup>114</sup> The legal system places great emphasis on remorse. Studies show remorse is the most commonly

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<sup>110</sup> *Id.*

<sup>111</sup> Hanan, *supra* note 7.

<sup>112</sup> *Parole and Probation*, JUSTIA (Apr. 2018), <https://www.justia.com/criminal/parole-and-probation/>.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

*Journal of Race, Gender, and Ethnicity*  
Volume 9 – May 2020

named mitigating factor for a reduced sentence and perceived lack of remorse often leads to an enhanced sentence.<sup>115</sup>

Parole is often denied to people who insist upon their innocence. For instance, Korey Wise, a wrongfully convicted teenage defendant in Central Park Five case, was denied parole when he insisted he was innocent of the crime convicted of.<sup>116</sup> He was denied parole twice when he refused to admit guilt, a sign of remorse, for a crime he had not committed during his parole interviews.<sup>117</sup> “Korey maintained his innocence through and through despite the daily tortures he endured behind bars,” said Niecy Nash, a television entertainer.<sup>118</sup> One of the issues commonly considered in parole hearings is whether the person has developed a sense of remorse over the crime for which they were convicted. Hence, if a petitioner shows no sign of being remorseful, parole may be denied even if the petitioner is innocent, which certainly sounds like a parole paradox; the paradox of having to accept further ramifications because the petitioner refused to acknowledge remorse for a crime that he or she did not commit, or where no crime occurred and for those who simply have a disability and cannot understand or demonstrate the meaning of remorse. Typically, authenticity of remorse is determined by judges and parole boards who lack training or special competence in assessing the complexities of human emotions. The crux of the problem with remorse is that some people are better at verbalizing their feelings than others, and in addition, cultural differences influence evaluations of remorse. More so, judges and members of parole boards have their own definition or characterization of what constitutes remorse as they often believe they know remorse when they see it, but the term itself is rarely defined in legal proceedings and there is no legal consensus to identify remorse.<sup>119</sup>

Remorse may be evaluated by words, non-verbal cues, attitude and demeanor that demonstrate acceptance of responsibility. Remorse may also be evaluated through actions and deeds while incarcerated such as obeying orders and attending counseling workshops. In

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<sup>115</sup> Zeidman, *supra* note 87.

<sup>116</sup> Niecy Nash, *Niecy Nash: “When They See Us” changed my life*, INNOCENCE PROJECT (June 4, 2019), <https://www.innocenceproject.org/niecy-nash-when-they-see-us-changed-my-life/>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Susan A. Bandes, *Remorse and Criminal Justice*, DEPAUL UNIVERSITY COLLEGE OF LAW (Nov. 2, 2015), <http://www.susanbandes.com/wp-content/uploads/2017/03/remorsebandesER-3.pdf>.

*Journal of Race, Gender, and Ethnicity*  
Volume 9 – May 2020

essence, parole boards can look to whether “[t]he prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or the prisoner has given indications that he understands the nature and magnitude of the offense.”<sup>120</sup> The court in *In re Shaputis* wrote, “[w]e note that expressions of insight and remorse will vary from prisoner to prisoner and that there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior.”<sup>121</sup>

Robert Dennison, who was appointed to the parole board by Governor George Pataki, in 2000 stated to the *New Yorker*:

We’re supposed to measure remorse, but it’s kind of hard to do that. So you try to see if they’re really sorry for what they did, or if they just think they’re a victim being caught up in the system, or they just want to tell you what they think you want to hear. It’s certainly not a science. It’s very subjective, and sometimes we make mistakes. But, from my experience, the longer the person’s been in, the better the parole risk they’re going to be when they get out. If someone has been in for a long period of time, usually they got a terrible taste in their mouth of what prison is like, and they don’t want to do anything to put themselves back in prison.<sup>122</sup>

For now, the only guidelines in determining remorse is through language and action of each petitioner and whichever judge or parole board member the petitioner draws. Thus, it is safe to say there is an inherently uneven assessment of remorse throughout the legal system in this country.

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<sup>120</sup> Lillian Paratore, “*Insight*” Into Life Crimes: The Rhetoric of Remorse and Rehabilitation in California Parole Precedent and Practice, 21 BERKELEY J. CRIM. L. 1 (2016).

<sup>121</sup> *In re Shaputis*, 190 P.3d 573, 574 (Cal. 2008).

<sup>122</sup> Jennifer Gonnerman, *Prepping for Parole*, THE NEW YORKER (Nov. 25, 2019), <https://www.newyorker.com/magazine/2019/12/02/prepping-for-parole>.

## IX. CAN EVERYONE SHOW REMORSE?

The ability to show remorse is an indication that responsibility has been accepted. Showing remorse is a major factor to getting a lesser sentence.<sup>123</sup> “If somebody is severely mentally ill, then their thought processes might be skewed, and their judgment, ability to understand, and differentiate from reality and non-reality might be impaired.”<sup>124</sup> The role remorse plays raise questions regarding the evaluation of genuine versus feigned remorse and the possible effect of mental illness on defendants’ ability to experience and express it. Remorse helps proliferate racial inequities, but it also fails to consider mental illness. “Somebody with a serious mental illness, like schizophrenia or major depressive disorder, or a neural developmental problem like autism or intellectual disability, may show remorse very differently as compared to how someone in the general population might show remorse,” says Rocksheng Zhong, a lecturer in psychiatry at Yale.<sup>125</sup> The irony with the whole idea of being able to spot genuine remorse in offenders, is that sociopaths and people with antisocial personality disorders are often very effective at feigning emotion which overshadows the purpose of petitioners genuinely accepting responsibility for the crimes they committed.<sup>126</sup> Notably, it is often assumed that remorseful offenders are less likely to recidivate and may likely require less punishment, but there is no empirical evidence to support a correlation between remorse and decreased recidivism.<sup>127</sup>

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<sup>123</sup> Andrew Fiouzi, *Remorse Is A Terrible Way To Decide How Long Someone Should Go To Jail*, MEL MAGAZINE (Apr. 23, 2020), <https://melmagazine.com/en-us/story/guilt-remorse-sentencing-cosby> (says Susan Bandes, a scholar in the areas of federal jurisdiction, criminal procedure and civil rights, and more recently, a pioneer in the emerging study of the role of emotion in law).

<sup>124</sup> Rocksheng Zhong, et.al, *So You’re Sorry? The Role of Remorse In Criminal Law*, J. AM. ACAD. PSYCHIATRY LAW (Jan. 2013),

<https://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=1852&context=ymtldl>.

<sup>125</sup> Fiouzi, *supra* note 123 (says Susan Bandes, a scholar in the areas of federal jurisdiction, criminal procedure and civil rights, and more recently, a pioneer in the emerging study of the role of emotion in law).

<sup>126</sup> Zhong, *supra* note 124.

<sup>127</sup> *Id.*

## X. CONCLUSION

Remorse is highly valued when determining parole release decisions even though it is usually not a factor listed for consideration in parole statutes or regulations.<sup>128</sup> It is used as a discretionary tool by judges and parole board members to determine likelihood of recidivism. However, there is no uniformed, objective standard used to determine whether a petitioner genuinely accepts responsibility for his wrongdoing. Instead, remorse is a subjective standard which leads to higher levels of inequality in the legal systems particularly with people of color, many of whom already have existing criminal records.

Remorse should not be used as a discretionary tool by parole board members because it is not a reliable method to determine someone's future behavior when conditionally released into society. Petitioners who demonstrate remorse by taking actions such as writing apology notes to victims or attending counseling workshops should be given credit for good behavior during parole assessment. All in all, it is impermissible for parole board members to ask whether a petitioner her or she feels a sense of remorse, shame, guilt or repentance, after serving time in prison for a crime sentenced for a period of time since remorse is a subjective standard. There is no conclusive data indicating those who feel a sense guilt or apologize for committing a wrongdoing will less likely recommit the offense.

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<sup>128</sup> *Id.*