# "Insight" Into Life Crimes: The Rhetoric of Remorse and Rehabilitation in California Parole Precedent and Practice

Lilliana Paratore∗

*Between 2002 and 2011, the California Supreme Court decided a series of cases that profoundly altered the ability of people convicted of indeterminate life sentences to be found suitable for parole. An inmate's vocalization of "insight" – in this Note taken to mean remorse, guilt, and/or shame – has become the lynchpin to freedom. This Note explores the California Supreme Court's judicial evolution on determining parole suitability, how the Court's assessment of "insight" can be understood through the framework of the field of law and emotion, the empirical basis for granting parole based on a positive finding of "insight," and how discretionary bodies such as the California Board of Parole Hearings make assessments of "insight." Ultimately, this Notes endeavors to discern whether the rhetoric of remorse and rehabilitation that "insight" attempts to encapsulate provides inmates with a full or a false promise for release.*



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∗ J.D. Candidate 2017, University of California, Berkeley, School of Law; B.A. 2013, Reed College. Special thanks to the *Berkeley Journal of Criminal Law* editors and Board for all their hard work throughout the editing process, Professor Simon for his initial encouragement on this piece, and Keith Wattley for his mentorship in counseling those most impacted by these cases.

## I. INTRODUCTION

As of 2010, approximately one-fifth of California's prison population were inmates serving life sentences with the possibility of parole under indeterminate sentencing principles, most often for a conviction of first- or second-degree murder.[1] Commonly known as "lifers," these inmates only have a six percent probability of being found suitable for parole by the Board of Parole Hearings and the California Governor, even though they are less likely to reoffend than non-lifer parolees.[2] Released lifers receive far fewer new convictions three years post release than non-lifers, 4.8 percent compared to 51.5 percent.[3] Furthermore, lifers have markedly lower recidivism rates after being released on parole than non-lifer parolees, 13.3 percent compared to 65.1 percent.[4] These statistics are sobering and staggering. However, from 2002 to 2011, the California Supreme Court decided a series of cases describing the appropriate, and perhaps encouraging, new grounds

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[1] ROBERT WEISBERG ET AL., STAN. CRIM. JUST. CTR., LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA 3 (2011).

[2] *Id.* at 4. Put even more starkly by Jonathan Simon: "Recent governors have rejected more than 98 percent of parole releases approved by the board. Thus, a mere fraction of 1 percent of the thousands of eligible lifers gets an approved release date in a typical year. In other words, while more than one thousand new life prisoners arrive in California prisons every year, and more than ten thousand are eligible for parole each year, only an average of about twenty-three actually get released. There are now more than thirty-seven thousand life prisoners in California." Jonathan Simon, *Drugs are not the (Only) Problem: Structural Racism, Mass Imprisonment, and the Overpunishment of Violent Crime*, *in* RACE, CRIME AND PUNISHMENT: BREAKING THE CONNECTION IN AMERICA 133, 138 (Keith O. Lawrence ed., 2011). *See also* JOHN IRWIN, LIFERS: SEEKING REDEMPTION IN PRISON (2009).

[3] California Department of Corrections & Rehabilitation Representatives, *Lifer Parolee Recidivism Report*, CDCR'S LIFER REPORT SERIES 9 (2013).

[4] *Id.* at 8.

upon which the Board of Parole Hearings must base lifers' parole grants: a positive finding of "insight."[5] Despite these cases' initial promise, the term "insight" lacks clear definition, and Justice Goodwin Liu of the California Supreme Court has called it a potentially new "talisman[ic]" basis for denying parole.[6] As such, the term represents an uneasy tension between the California Supreme Court's belief in criminal essentialism[7] and in the possibility of redemption and transformation.

Departing from these California Supreme Court decisions, this note explores the discretionary power of the Board of Parole Hearings and the Governor of California in finding lifers suitable for parole and the ways in which risk assessment by these parties may or may not accurately reflect an inmates' potential dangerousness to society based on a finding of "insight." Ultimately, it addresses whether the rhetoric of remorse and rehabilitation [8] that "insight" attempts to encapsulate provides inmates with a full or a false promise for release. Is the vocalization of "insight" a good metric for predicting recidivism? If so, do the relevant decision-making bodies properly deploy the notion or has it become a false justification for denial of parole, as Justice Liu appreciates? Lastly, are the members of the Board of Parole Hearings in a position to make an accurate assessment of such "insight"?

Section Two outlines the doctrinal grounds upon which the Board of Parole Hearings and the Governor are to make their

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[5] Throughout this note I refer to "insight" and "lack of insight" in quotation marks. This is an intentional stylistic decision meant to highlight the constructed and ambiguous nature of the term. As this note attempts to confront the term's sincerity and authenticity (or lack thereof), it is my hope that this convention will remind readers of the tenuousness of the term and its recent invention by the California Supreme Court.

[6] *In re* Shaputis, 265 P.3d 253, 275 (Cal. 2011) [hereinafter *Shaputis II*].

[7] *See* SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES 5-6 (2001). By the term "criminal essentialism," I mean the belief that once an individual has partaken in and been convicted of a criminal act, they are an irredeemable deviant, "permanently and fundamentally" unable to reenter "mainstream society." *Id.* at 5.

[8] While the term "rehabilitation" is common throughout this paper, I wish to acknowledge the term's problematic paternalism and the presumption that offenders, rather than society and the criminal justice system, are responsible for their deviation. In addition, in this paper I adopt Mona Lynch's definition of rehabilitation. She writes: "[A]ny discourse or practices that speak to transforming or normalizing the criminal into a socially defined non-deviant citizen" which can include psychological programs, drug treatment programs, educational and work training programs, work and housing placement assistance, and half-way houses. Mona Lynch, *Rehabilitation as Rhetoric: The Ideal of Reformation in Contemporary Parole Discourse and Practice*, 2 PUNISHMENT & SOC'Y 40, 45 (2000).

assessments of inmates' suitability for parole. The California Penal Code and the California Code of Regulations govern the parole process and highlight factors tending to show suitability and unsuitability, including the presence of remorse and the egregiousness of the commitment offense.[9] The California Supreme Court decisions *In re Rosenkrantz*,[10] *In re Lawrence*,[11] and *In re Shaputis*[12] provide the modern framework to evaluate these factors. Notably, the most recent of these cases held that an inmate's current threat to society as evidenced by the inmate's ability to vocalize their "insight" into the commitment offense, rather than the nature of the commitment offense itself, must be the main basis for granting or denying parole.[13] Thus, the central question for the Board of Parole Hearings and the Governor is a predictive one, requiring them to assess an inmate's potential for recidivism based on their vocalization of "insight," which this paper takes to mean remorse, guilt, and/or shame. This definition of "insight" is forwarded for the purpose of providing a baseline of what this term might encompass. However, "insight" is a concept that has not been concretely defined by the Court and defies a simple articulation. Much of the difficulty explored in this paper is precisely the result of the term's ambiguity.

Section Three analyzes the frameworks of the field of law and emotions, and the scientific basis for tying recidivism to "insight." While the term itself is vague and may be abused, some clinical psychologists have found that an inmate's propensity to experience guilt and shame can accurately predict future criminal behavior.[14] Despite these findings, parole boards constantly weigh emotions evidencing "insight" against those evidencing psychopathy and the ingrained belief that criminal characteristics are immutable. As a result, there is a tension between dominant notions of the inmate as intrinsically criminal and as having the potential be rehabilitated and reformed.

Against this backdrop, Section Four seeks to understand how the

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[9] CAL. PENAL CODE § 3041(b) (2016); CAL. CODE REGS. tit.15, §§ 2402(b)-(d), 2281(b)-(d) (2001).

[10] *In re* Rosenkrantz, 59 P.3d 174, 201 (Cal. 2002).

[11] *In re* Lawrence, 190 P.3d 535, 546 (Cal. 2008).

[12] *In re* Shaputis, 190 P.3d 573, 580 (Cal. 2008).

[13] *Shaputis II*, 265 P.3d 253, 270 (Cal. 2011).

[14] *See generally* June Price Tangney, Jeff Stuewig & Logaina Hafez, *Shame, Guilt and Remorse: Implications for Offender Populations*, 22 J. FORENSIC PSYCHIATRY PSYCHOL. 706 (2011); June P. Tangney, Jeffrey Stuewig & Andres G. Martinez, *Two Faces of Shame: The Roles of Shame and Guilt in Predicting Recidivism*, 25 ASS'N FOR PSYCHOL. SCI. 799 (2014).

Board of Parole Hearings looks for and assesses "insight," what factors in practice are actually used to determine grants or denials of parole, and whether or not the abstract idea gains actual traction and accurate assessment by the Board of Parole Hearings. Empirical data is scarce, and as such, Section Four also calls for future research into the ways that members of the Board of Parole Hearings, largely individuals with backgrounds in correctional control, overlay their own folk understandings of how people express remorse and "insight" onto the inmate before them.

Section Five offers concluding thoughts.

## II. LEGAL BACKGROUND

Part A of this section outlines the statutory language dictating when lifers are entitled to parole in California. Specifically, it addresses California Penal Code Section 3041 and California Code of Regulations, Title 15, Section 2281. Based on this statutory foundation, Part B of this section details the evolution of the California Supreme Court's interpretation of these statutes in *In re Rosenkrantz, In re Lawrence*, and *In re Shaputis*. *Lawrence* and *Shaputis* constitute the modern framework for parole evaluations in California and mark the emergence of the language of "insight."

### A. Statutory Foundations

The California Penal Code sets the parameters outlining when inmates are entitled to parole hearings[15] by using mandatory language, which "creates a constitutionally protected liberty interest in parole."[16] Section 3041(a) states that the Board of Parole Hearings[17] "shall normally" grant parole at the first hearing.[18] However, Section 3041(b) dictates that parole will not be granted if "the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this

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[15] CAL. PENAL CODE § 3041 (2016).

[16] Keith Wattley, *Insight Into California's Life Sentences*, 25 FED. SENT'G REP. 271, 271 (2013).

[17] I will refer to the Board of Parole Hearings as the Board, parole board(s), and the BPH, interchangeably.

[18] PENAL § 3041(a).

meeting."[19] If an inmate is denied parole, further consideration is deferred for three, five, seven, ten or fifteen years. However, inmates may petition the Board once every three years to advance their hearings.[20] If a convicted murderer is found suitable for parole, the Governor has the power to reverse the Board's decision on public safety grounds.[21]

A series of administrative regulations govern the determination of California Penal Code Section 3041(b) for inmates serving life sentences for attempted murder or murder.[22] The California Code of Regulations, Title 15, Section 2281 applies to all life crimes with the exception of attempted murder and dictates that parole should be denied, regardless of time served, if the parole board determines that "the prisoner will pose an unreasonable risk of danger to society if released from prison."[23] Factors tending to show unsuitability for parole include: (1) the commitment offense, (2) a previous record of violence, (3) an unstable social history, (4) sadistic sexual offenses, (5) psychological factors, and (6) institutional behavior.[24] Of particular importance and the site of much judicial discord is the commitment offense. Penal Code Section 2281 states that an inmate should be found unsuitable for parole if "[t]he prisoner committed the offense in an especially heinous, atrocious or cruel manner."[25] To determine the heinousness of the crime, parole boards can consider the number of victims, whether the crime was carried out in a "dispassionate and calculated manner," the motive, and whether the "offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering."[26]

Factors tending to show suitability for parole include: (1) no juvenile record, (2) a stable social history, (3) signs of remorse, (4) motivation for crime, (5) Battered Woman Syndrome, (6) lack of criminal history, (7) age, (8) understanding and plans for future, and (9) institutional behavior.[27] Here, of particular importance and the site of much judicial expansion are signs of remorse. In determining whether the inmate has demonstrated signs of remorse, parole boards can look to

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[19] *Id.* at § 3041(b)(1).
[20] *Id.* at §§ 3041.5(b)(3)(A)-(C), (d)(1)-(3) (2016).
[21] CAL. CONST. ART. 5, § 8; *see also In re* Lawrence, 190 P.3d 535, 546 (Cal. 2008).
[22] CAL. CODE REGS. tit. 15, § 2402, 2281 (2001).
[23] *Id.* at § 2281(a).
[24] *Id.* at § 2281(c)(1)-(6).
[25] *Id.* at § 2281(c)(1).
[26] *Id.* at § 2281(c)(1)(A)-(E).
[27] *Id.* at § 2281(d)(1)-(9).

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."[28] Section 2281 provides no rubric or system of weight for any of these factors. Rather, it states that the factors tending to show suitability or unsuitability are "general guidelines" and that the Board has the discretion and judgment to determine the "importance attached to any circumstance or combination of circumstances in a particular case."[29]

### B. Judicial Evolution

California courts have clarified the factors for determining parole as early as 1914;[30] however, what one post-conviction attorney terms the "modern era of California parole law" began in the early 2000s with the California Supreme Court's decision in *In re Rosenkrantz* which set out the "some evidence" standard.[31] The California Supreme Court's subsequent decisions *In re Lawrence*[32] and *In re Shaputis*[33] further illuminated the "some evidence" standard for determining parole, leading to a significant shift in the law, "clarifying that the core inquiry in parole hearings is rehabilitation, not retribution."[34] *Lawrence* and *Shaputis* mark a significant departure from *Rosenkrantz* in that parole boards and the Governor are now no longer able to rely solely on the heinousness of the commitment offense in denying parole, but rather must grant parole unless an inmate presents a current danger to society or "lacks insight" into the life crime.[35] Thus, the California Supreme

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[28] *Id.* at § 2281(d)(3).

[29] *Id.* at § 2281(c).

[30] *See* Roberts v. Duffy, 140 P. 260, 264 (Cal. 1914) (holding that whether an inmate should be released on parole should be "left to the judgment and discretion of the board to be exercised as it might be satisfied that justice in the case of any particular prisoner is required").

[31] *See* WEISBERG ET AL., *supra* note 1, at 9; Wattley, *supra* note 16, at 272.

[32] *In re* Lawrence, 190 P.3d 535 (Cal. 2008).

[33] *In re* Shaputis, 190 P.3d 573 (Cal. 2008).

[34] Carrie Hempel, Lawrence *and* Shaputis *and Their Impact on Parole Decisions in California*, 22 FED. SENT'G REP. 176, 176 (2010).

[35] As one study notes, "For some time, the Board had relied heavily and primarily on the commitment offense itself in making its decision, labeling nearly all offenses 'heinous, atrocious, and cruel' and using that as the basis for denying inmates parole. But the Court has now clarified that the Board must grant parole unless it concludes that the inmate is still dangerous, and the Board cannot use the circumstances of the crime,

Court defined the contours and weight of the factors set out in Section 2281, resulting in a significant shift in the way parole boards determine the suitability of inmates seeking parole.

*1. In re Rosenkrantz*

In 1986, Robert Rosenkrantz was convicted of second-degree murder and sentenced to 15 years to life imprisonment for the murder of seventeen-year-old Steven Redman.[36] Rosenkrantz was eighteen years old and living in Los Angeles, California at the time of the commitment offense. The killing was spurred by Redman's revelation to Rosenkrantz's father that Rosenkrantz was homosexual.[37] Rosenkrantz "idolized" his father, and when Redman refused to recant his story about Rosenkrantz's sexuality, Rosenkrantz lay in wait for Redman outside of his condominium complex with a newly purchased gun. When Redman emerged, Rosenkrantz shot him at least ten times, including six wounds to his head.[38] In the month following the shooting, Rosenkrantz's emotions ranged from remorseful to defiant as he fled to Northern California and Oregon.[39] Ultimately, Rosenkrantz surrendered and a jury found him guilty of second-degree murder.[40]

On six occasions between 1994 and 1999, Rosenkrantz was denied parole by the Board or granted parole that was subsequently reversed by the Governor based on the egregiousness of his commitment offense, despite his "exceptional" conduct in prison.[41] In particular, the Governor stated that, "the gravity of [Rosenkrantz's] offense and his repeated attempts to minimize his culpability evidence a continued threat to the public requiring that he remain incarcerated."[42]

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standing alone, as a basis to deny parole." WEISBERG ET AL., *supra* note 1, at 9-10. *See also* Charlie Sarosy, *Parole Denial Habeas Corpus Petitions: Why the California Supreme Court Needs to Provide More Clarity on the Scope of Judicial Review,* 61 UCLA L. REV. 1134, 1184 (2014) (arguing that the California Supreme Court should adopt a model of the "some evidence" standard that is less deferential to the Board of Parole Hearings, akin to that in *In re* Lawrence and *In re* Shaputis, to "ensure due process for inmates" as well as "a proper checks-and-balances system for a decisionmaking process that is naturally imbedded with political calculations and emotional appeals").

36 *In re* Rosenkrantz, 59 P.3d 174, 184-85 (Cal. 2002).

37 *Id.*

38 *Id.* at 185-86.

39 *Id.* at 186.

40 *Id.*

41 *Id.* at 186-87.

42 *Id.* at 216.

After protracted litigation, Rosenkrantz's case reached the California Supreme Court. The issue before the Court in 2002 was whether the judiciary had authority to review the merits of a gubernatorial reversal. In deciding the issue, the Court also considered "the proper extent of judicial review of the Board's decisions granting or denying parole."[43] The Court held that it had the authority to review gubernatorial reversals. However, that authority is "limited" in scope, with deference given to the Governor's findings.[44] With regard to the appropriate standard of review, the Court held the "some evidence" test applicable. In defining the standard, the Court stated that the reviewing court must simply inquire "whether some evidence in the record…supports the decision to deny parole, based on factors specified by statute and regulation."[45] Thus, the Court held that, while courts are at liberty to review reversals by the Governor and denials of parole by the Board of Parole Hearings, review is limited to whether or not there is "some evidence" in the record that justifies the grant or denial of parole.[46]

In considering the Governor's contention that Rosenkrantz minimized his culpability and responsibility in the commitment offense, the Court discussed the propriety of the Governor's reliance on the egregious nature of the crime in reversing the Board's grant of parole. The Court confronted whether or not the egregiousness of the underlying offense is alone "some evidence" sufficient to deny parole. The answer the Court reached, quite simply, was yes. The Court held that the nature of the commitment offense alone "can constitute a sufficient basis for denying parole."[47]

While the Court retreated from adopting a "blanket rule" that would automatically exclude certain offenders from being granted parole based on the type of offense, it held that the deciding body "may weigh heavily the degree of violence used and the amount of viciousness shown by a defendant."[48] Thus, the Court held that parole boards could deny parole based on the egregiousness of the commitment offense, provided there is "some evidence" that supports such a finding. Conspicuously absent from the *Rosenkrantz* decision is any mention of

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43 *Id.* at 201 (emphasis omitted).
44 *Id.*
45 *Id.* at 205.
46 *Id.*
47 *Id.* at 222 (citations omitted).
48 *Id.* (citations omitted).

the inmates' current or future danger to society.[49]

In the years following *Rosenkrantz*, parole boards and the Governor "based virtually all parole denials primarily, if not solely, on the 'aggravated' circumstances of the commitment offense."[50] Thus, *Rosenkrantz* allowed parole boards to deny parole based on a classification and characterization of the historical circumstances surrounding the commitment offense as "especially heinous, atrocious or cruel" without serious consideration of the inmates' current threat to society or rehabilitative efforts. Indeed, one court noted after reviewing over 3,000 parole hearing transcripts that parole boards applied the label "heinous, atrocious or cruel" to 100 percent of cases.[51]

### *2. In re Lawrence and In re Shaputis*

*Lawrence* and *Shaputis* mark a significant departure from *Rosenkrantz's* standard. The California Supreme Court took up *Lawrence* because of a divide in the lower California courts regarding how to interpret *Rosenkrantz*.[52] Decided on the same day in 2008, the Court in *Lawrence* and *Shaputis* clarified the standard set forth in *Rosenkrantz*, dictating that current dangerousness to society should be the main criteria for judging inmates seeking parole. However, *Shaputis* cut back on the space that *Lawrence* created, holding that "lack of insight"—a term absent from any statutory framework—is a sufficient ground upon which to deny parole.

In 1983, Sandra Lawrence was convicted of first-degree murder and sentenced to life imprisonment for the murder of her lover's wife, Rubye Williams.[53] The killing was spurred by Dr. Robert Williams's promise, and subsequent retraction, that he would leave his wife for Lawrence.[54] Enraged at his decision, and believing Rubye Williams to be the only obstacle to their relationship, Lawrence confronted Rubye

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[49] Roger S. Hanson, *The Convolutions, Evolutions, Resolutions, and Revolutions of the California State Parole Process*, 32 WHITTIER L. REV. 273, 279 (2011).

[50] Hempel, *supra* note 34, at 177.

[51] Wattley, *supra* note 16, at 272 n.20 (citing Order dated August 30, 2007, *In re* Criscione, Santa Clara County Super. Ct., Case No. 71614 (2007)).

[52] *Id.* at 272 (arguing that "[s]ome courts interpreted the opinion to say that as long as the Board or Governor could point to any evidence in the record that might support their factual findings. . ., then the parole decision had to stand. Other courts opined that such a strict view could prevent many lifers from ever being released because the parole decisions were being based on historical factors that would never change").

[53] *In re* Lawrence, 190 P.3d 535, 538 (Cal. 2008).

[54] *Id.* at 540.

Williams with a potato peeler and pistol.[55] After a physical tussle, Lawrence fired "wildly" at Rubye Williams and repeatedly stabbed her with the potato peeler.[56] Lawrence committed the act in 1971, but was a fugitive until 1982 when she turned herself into the authorities.[57] The case went to trial in 1983 and the jury found Lawrence guilty of first-degree murder.[58]

On four occasions between 1993 and 2005, Lawrence was found suitable for parole.[59] In their decisions, the Board "emphasized the…petitioner's exemplary record of rehabilitation, her acceptance of responsibility for the crime, her realistic parole plans, and her close ties to her family, who would offer her support in reintegrating into the community."[60] However, the Governor reversed each finding, citing the egregiousness of the commitment offense, despite the fact that Lawrence was a "model inmate" by all accounts.[61] After the fourth reversal, Lawrence filed a writ of habeas corpus seeking judicial review of the Governor's decisions.[62] The Second District Court of Appeal found in favor of Lawrence, and ordered her release. However, the Attorney General appealed the decision.[63]

In affirming the decision, the California Supreme Court emphasized that the statutory framework of parole makes public safety the "fundamental consideration" in determining whether or not to grant or deny parole.[64] To that end, the Court further held that "[t]he relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense."[65] There must be an "articulation of a rational nexus between [the facts of the egregiousness of the crime] and current dangerousness."[66] Thus, the Board's central inquiry must revolve

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55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.*
59 *Id.* at 542-43.
60 *Id.* at 538.
61 *Id.* at 542-43.
62 *Id.* at 545.
63 *Id.* at 538-39.
64 *Id.* at 549.
65 *Id.* at 570 (citations omitted).
66 *Id.* at 564. For example, a parole board might find there is a "rational nexus" between a lifer's commitment offense and their current dangerousness where the commitment offense was a murder motivated by a white, supremacist ideology that has

around determining whether or not the inmate represents a current danger to society. Such determinations cannot be based on intuitions or hunches. Rather, parole grants or denials must be supported by evidence in the record.[67] As one scholar notes, "rather than imitating *Rosenkrantz*, *Lawrence* sharpened the 'some evidence' analysis into a new 'current dangerousness' inquiry, which exhibits less deference and greatly expands the power of the judiciary to overrule the Board and governor while better protecting the due process rights of prisoners."[68]

However, the Court's decision did not completely erode the Governor or parole boards' ability to deny parole based on the egregiousness of the facts of the crime. If the parole board or the Governor determines that the egregiousness of the commitment offense does, in fact, predict the inmates' current and future dangerousness, the inmate can be denied parole on that basis. Thus, the Court summarized:

> [T]he Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor.[69]

The Court further noted that in cases where the inmate has failed to take adequate steps towards rehabilitation, has engaged in criminal activity during their incarceration, and/or has inadequately vocalized their "insight" into the life crime, "the aggravated circumstances of the commitment offense may well continue to provide 'some evidence' of current dangerousness even decades after commission of the offense."[70]

Thus, while *Lawrence* clarified that the central question for the Governor and parole boards revolves around the inmate's current level of danger to society, if the egregiousness of the life crime provides "some evidence" and indication of an inmate's current and future

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not subsequently been renounced.

67 *Id.* at 554.

68 Joey Hipolito, In re Lawrence*: Preserving the Possibility of Parole for California Prisoners*, 97 CAL. L. REV. 1887, 1892 (2009).

69 *Lawrence*, 190 P.3d at 560 (citations omitted).

70 *Id.* at 565.

dangerousness, the heinousness of the original commitment offense can be taken into account. Despite this opening, *Lawrence* was hailed as a significant turning point for the rights of prisoners seeking parole, preserving the possibility of parole for prisoners within a regime that previously seemed to offer little recourse for release.[71]

*In re Shaputis I*, decided on the same day as *Lawrence*, provides clarity regarding the notion of "insight," which the Court mentions in passing in *Lawrence.* Richard Shaputis was convicted of second-degree murder and sentenced to 15 years to life imprisonment for the murder of his wife of 23 years, Erma Shaputis.[72] Shaputis shot his wife at close range after a domestic fight and surrendered without incident to the police, though he maintained that the shooting was an accident.[73] Shaputis had a violent and criminal history, and his relationships were often the site of domestic abuse, beatings, and threats.[74]

On three occasions between 1997 and 2004, Shaputis was denied parole by the Board, despite his exemplary, discipline-free prison record, and participation in various self-help and therapy programs.[75] In its review of the Governor's reversal of a Board's grant of parole as the result of an appellate court ordered renewed parole hearing, the California Supreme Court restated its holding in the companion case, *Lawrence.*[76] However, the Court also upheld the Governor's parole reversal decision, which relied upon the aggravated nature of the crime and the fact that the "petitioner had not fully accepted responsibility for, and lacked sufficient "insight" concerning, his conduct toward the victim."[77] Thus, the Court held that failure to "gain insight into his previous violent behavior," despite "years of rehabilitative programming and participation in substance abuse programs," was an adequate ground upon which to deny parole.[78]

While the Court agreed with the Governor's assessment of Shaputis' "lack of insight," the Court noted that the vocalization of such "insight" and remorse has the potential to take various forms. In a footnote, the Court wrote, "[w]e note that expressions of insight and

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71 Hipolito, *supra* note 68, at 1893.
72 *In re* Shaputis, 190 P.3d 573, 574 (Cal. 2008).
73 *Id.* at 576.
74 *Id.*
75 *Id.* at 577-78.
76 *Id.* at 581.
77 *Id.* at 580.
78 *Id.* at 575.

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."[79] Self-awareness and the ability to characterize the commitment offense without minimizing personal responsibility are critical factors that parole boards should take into account when assessing a potential parolee's level of "insight."[80] Despite this acknowledgment regarding the potential difficulty in assessing "insight," in the year after *Shaputis* was decided, appellate decisions cited "lack of insight" twice as many times as in the thirty-one proceeding years.[81] Moreover, the Governor cited "lack of insight" in seventy-eight percent of his parole grant reversals in the year after *Shaputis* was decided as opposed to twelve percent of the time in the years proceeding.[82] Such evidence supports one scholar's worry that "the Parole Board and the Governor will routinely attempt to evade the *Lawrence* ruling that rehabilitated prisoners must be released by recharacterizing the reason for denying parole."[83] As such, "lack of insight" may, and likely already has, become a new mechanistic ground for parole denials.

In 2011, Shaputis's case reached the California Supreme Court for the second time. In *In re Shaputis II*, the Court further clarified the "some evidence" standard and the requirement of "insight," holding that "the presence or absence of insight is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety." [84] Thus, not only in some instances can the nature of the commitment offense itself be an indicator of the inmate's current dangerousness to

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[79] *Id.* at 585 n.18.

[80] *See* Wattley, *supra* note 16, at 272-73 (arguing that "[b]eginning around 2006, the Board developed a new protocol in which its own team of psychologists evaluates lifers, assessing their insight and remorse and predicting their risk of future violence. The Board's commissioners then use these reports as a primary basis for their parole decisions. Critics complained that the Board made this move solely to insulate its decisions from judicial review, that the Board made this change immediately after admitting that psychologists are incapable of assessing a prisoner's insight or remorse, and that the risk assessment tools the Board's psychologists utilize rely too heavily on unchanging historical factors that produce elevated predictions of dangerousness").

[81] *Id.*

[82] The Governor also "cited the Board's psychological evaluations in nearly 90 percent of his decisions to block parole between 2009 and 2011." *Id.*

[83] Hempel, *supra* note 34, at 179.

[84] *Shaputis II*, 263 P.3d 253, 270 (Cal. 2011).

society, but also an inmate's "lack of insight" into the life crime may elucidate whether or not that nexus is rationally drawn. The Court further clarified that though the term "insight" cannot be found within the governing parole regulations, the consideration of "insight" is well within their scope.[85] "Insight" is within the regulatory scope because the applicable regulations "direct the Board to consider the inmate's 'past and present attitude toward the crime' and 'the presence of remorse,' expressly including indications that the inmate 'understands the nature and magnitude of the offense,'" concepts themselves encompassed within the category of "insight."[86]

Perhaps most importantly in *Shaputis II*, a concurring opinion by Justice Liu speaks to the emergence of the language of "insight," its ability to predict recidivism, and its potential for abuse. Justice Liu defines what "lack of insight" appears to mean in the parole context, a definition absent clear articulation in *Lawrence* and the *Shaputis I* majority. Justice Liu argues that "lack of insight" refers to two broad categories of "deficiency" in inmates.[87] First, inmates may lack "insight" if they "deny committing the crime for which they were convicted or deny the official version of the crime."[88] Second, inmates may lack "insight" if they "admit their crime but are regarded as having an insufficient understanding of the causes of their criminal conduct."[89] Regardless of which category an inmate's lack of "insight" falls into, the concurrence appreciates the complexity regarding whether or not "insight" can accurately predict future dangerousness and recidivism. Justice Liu states:

> Although the social science literature does not identify lack of insight per se as one of the predictors of criminal recidivism, the term "lack of insight" as used by the Board and the Governor may encompass a number of attitudes or behaviors associated with criminal recidivism. For example, lack of remorse or failure to accept responsibility for past criminal activity may be indicative of an antisocial, psychopathic personality that is correlated with greater recidivism. At the same time, however, the social science literature does not support a generalization that an inmate's lack of insight into the causes of past criminal activity or failure to admit the official version of the

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85 *Id.*

86 *Id.* (citations omitted).

87 *Id.* at 275-76.

88 *Id.* at 276.

89 *Id.*

> commitment offense is itself a reliable predictor of future dangerousness.[90]

With such a broad and flexible definition of "lack of insight," and its potentially tenuous relationship to recidivism, Justice Liu acknowledges the term's potential for abuse. Indeed, "precisely because lack of insight is such a readily available diagnosis, its significance as an indicator of current dangerousness must be rationally articulated under the individual circumstances of each case—lest 'lack of insight' become, impermissibly, a new talisman with the potential to render almost all life inmates unsuitable for parole."[91]

### *3. Current State of the Law*

Since 2002, the California Supreme Court has defined the contours of the statutes and regulations governing parole for lifers. In reaching its decision in *Shaputis* in 2008, the Court firmly articulated the "some evidence" test and clarified that inmates' suitability for parole must be determined based on their current level of threat to society and their ability to articulate "insight" into their commitment offense. While at least one justice on the Court has vocalized the potential tenuousness of the concept of "insight" and its ability for abuse, the Court's holdings are firm and remain the accepted precedent upon which lifers are judged. And despite Justice Liu's concerns, the decisions in *Lawrence* and *Shaputis* appear to have resulted in increased chances of parole for lifers. While such increases may be attributable to other factors, from 2008 to 2012, parole grants by parole boards increased from four percent to fourteen percent.[92] In absolute numbers during the same period, the number of parole grants increased from 293 grants to 670 grants, while the number of scheduled hearings decreased.[93] Despite this seeming victory, it is important to note that the Governor still plays a significant

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[90] *Id.* at 277 (citations omitted).

[91] *Id.* at 278.

[92] *Suitability Hearing Summary*, CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION, http://www.cdcr.ca.gov/BOPH/docs/BPH_Hearing_Results_CY_1978_to_2012.pdf (last visited Mar. 4, 2016). Other potential factors leading to the increase of parole grants are: the composition of the parole board, the identity of the governor, and external pressures regarding the increasing costs of incarceration. *See generally* WEISBERG ET AL., *supra* note 1 at 4.

[93] The decrease in number of scheduled hearings might be due to Marsy's Law and the fact that Commissioners are now denying parole for 3-5 years rather than 1-2 as was prevalent in the past. *See id.*; WEISBERG ET AL., *supra* note 1, at 13.

role in parole and has the power to reverse findings of parole suitability, as is often the case.[94]

## III. LAW AND THE EMOTIONS FRAMEWORKS AND THE EMPIRICAL BACKING OF "INSIGHT"

The central inquiry for the Board of Parole Hearings and the Governor when evaluating an inmate's suitability for parole, as elucidated by *Lawrence* and *Shaputis*, requires the deciding body to determine whether or not the inmate poses a current risk to society, most often based on their "insight" into the life crime. The California Supreme Court's decisions regarding "insight" indicate that "insight" can be found based on "the presence of remorse," "past and present attitude toward the crime," and whether or not the inmate "understands the nature and magnitude of the offense."[95] These decisions require parole boards to ask a fundamentally predictive question: Does an inmate's ability to vocalize their remorse accurately reflect their potential for recidivism? Thus, parole boards seek to make a rational calculation about an inmate's current level of threat through the assessment of emotions, traditionally characterized as irrational. This move implicates the nascent legal field of law and emotions, which explores how the law can responsibly and productively engage with emotions to facilitate socially desirable outcomes.[96]

Part A of this Section argues that the frameworks of the field of law and emotions provide a rationale through which to understand the motives underlying the decisions of the California Supreme Court and parole boards. Though perhaps unintentionally, the California Supreme Court and parole boards are engaged in an evaluative understanding of emotion that seeks to shape emotions, particularly those of remorse,

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[94] For example, Governor Pete Wilson (1991-1999) reversed twenty-seven percent of grants while Governor Gray Davis (1999-2003) reversed virtually all grants during his term. Governor Schwarzenegger (2003-2011) reversed about sixty percent of grants. Currently, Governor Jerry Brown (2011-present) reverses only twenty percent of grants. WEISBERG ET AL., *supra* note 1, at 13-14; David Siders, *Jerry Brown's parole reversal rate holds steady*, SACRAMENTO BEE (Feb. 20, 2015), http://www.sacbee.com/news/politics-government/capitol-alert/article10783583.html.

[95] *Shaputis II*, 265 P.3d at 270 (citations omitted).

[96] *See generally* Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010); Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CAL. L. REV. 319 (2007);
Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119 (2006).

guilt, and shame, via moral education in order to determine parole suitability.[97] Part B of this Section seeks to understand the scientific basis behind hinging "insight" and its cultivation in inmates to a decreased likelihood for recidivism.[98] If "insight" is taken to mean remorse, as the California Supreme Court's interpretation of the applicable statute seems to imply, how predictive is it of recidivism? Research in clinical psychology indicates that guilt and shame may be accurate predictors of rehabilitation and recidivism. Thus, "insight" may be a reliable indicator of an inmates' future dangerousness for parole boards and may be a socially desirable emotion to facilitate in inmates. However, these emotions are constantly weighed against an inmate's perceived level of psychopathy—a diagnosis that inmates must guard against or else their chances of being found suitable for parole decrease drastically. Thus, in the search for both "insight" and psychopathy, a tension emerges between dominant notions of the inmate as intrinsically criminal and as having the potential for regenerative rehabilitation.

### A. Law and Emotions Frameworks

While the law has always taken emotion into account to some extent, the relationship between them has been a thorny one.[99] As one scholar notes, "[a] core presumption underlying modern legality is that reason and emotion are different beasts entirely: they belong to separate spheres of human existence; the sphere of law admits only of reason; and vigilant policing is required to keep emotion for creeping where it does not belong."[100] It wasn't until the 1980s that law and emotions scholarship emerged as a distinct and separate field, deliberately focusing on the "role of emotion *per se* . . . self-consciously reckon[ing] with the myriad ways in which the law reflects or furthers conceptions of how humans *are*, or *ought to be*, as emotional creatures."[101] Thus, the field's central premise is a refusal to "privilege rationality or prioritize the objectivist epistemologies that have become cornerstones of mainstream legal thought."[102]

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[97] Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 350-71 (1996).

[98] *See generally* Tangney, Stuewig & Hafez, *Shame, Guilt and Remorse: Implications for Offender Populations*, *supra* note 14; Tangney, Stuewig & Martinez, *Two Faces of Shame: The Roles of Shame and Guilt in Predicting Recidivism*, *supra* note 14.

[99] Maroney, *supra* note 96, at 120.

[100] *Id.*

[101] *Id.* at 121 (emphasis added).

[102] Abrams & Keren, *Who's Afraid of Law and the Emotions?*, *supra* note 96, at 1999.

Scholars of law and emotions aim to show how the law can use emotions to facilitate socially desirable outcomes and behaviors. Kathryn Abrams and Hila Keren in particular conceive of the law as facilitative, focusing on "the role of law in cultivating, or facilitating, the emergence of particular emotions" or "emotion-states."[103] They argue that laws can encourage certain emotions and conduct, amounting to a social good.[104] Other scholars of the field of law and emotions have focused specifically on criminal law and the negative emotions that criminal law engenders and at times perpetuates.[105]

For example, Dan Kahan and Martha Nussbaum argue that criminal law in Western culture traditionally conceptualizes emotions as either mechanistic or evaluative.[106] As the authors explain:

> The mechanistic conception sees emotions as forces that do not contain or respond to thought; it is correspondingly skeptical about both the coherence of morally assessing emotions and the possibility of shaping and reshaping persons' emotional lives. The evaluative conception, in contrast, holds that emotions express cognitive appraisals, that these appraisals can themselves be morally evaluated, and that persons (individual and collectively) can and should shape their emotions through moral education.[107]

Kahan and Nussbaum argue that the evaluative model is superior because it better serves the purposes of criminal law, facilitates the expression of society's moral condemnation for an offender's emotional motivations, and renders desirable emotional dispositions teachable.[108] The authors also argue that the evaluative conception is "brutally and unsurprisingly honest," further elevating it above the mechanistic model.[109]

The ideas put forth by Abrams and Keren, as well Kahan and Nussbaum, provide an analytical framework to understand what parole boards might be seeking to achieve through the assessment of inmate "insight." These ideas also provide a basis for examining parole boards' potentially uncomfortable use of rational calculations to assess irrational emotional responses. For example, in assessing an inmate's "insight,"

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[103] Abrams & Keren, *Law in the Cultivation of Hope*, *supra* note 96, at 320-21.
[104] *Id.* at 321.
[105] *See generally* Kahan & Nussbaum, *supra* note 97.
[106] *Id.* at 273.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 274.

parole boards commonly look to see if the inmate has participated in programs like Alcoholics Anonymous and Narcotics Anonymous, which are thought to be helpful in cultivating "emotion-states" consistent with "insight," such as guilt, remorse and/or shame.[110] While parole boards themselves are not the particular bodies attempting to create these feelings, parole boards often look to the rehabilitative programming and training that an inmate has participated in to evaluate the presence or absence of emotions the programs attempted to cultivate in the inmate. One study found that "whether an inmate [was] participating in a 'twelve-steps' program (that is, Alcoholics Anonymous, Narcotics Anonymous, or some similar program), and whether he or she [could] correctly answer questions about those steps" was "highly associated" with grants of parole.[111] The Twelve-Steps of Alcoholics Anonymous, and Steps Four through Ten in particular, emphasize acknowledging moral shortcomings, wrongs, and defects in character, seeking forgiveness, and making amends to those harmed.[112] As such, parole boards see participation in Alcoholics Anonymous and similar programs as indicative of an inmate's attempt to develop feelings of guilt, redemption, and forgiveness. While the availability of such programming varies widely from prison to prison and waitlists are typically over a year long, parole boards expect inmates seeking parole to have completed some level of self-help and rehabilitative training in order to prompt the expected "emotion-state."[113]

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[110] Abrams & Keren, *Law in the Cultivation of Hope*, *supra* note 96, at 321.

[111] WEISBERG ET AL., *supra* note 1, at 24.

[112] Steps Four though Ten are: 4. Made a searching and fearless moral inventory of ourselves; 5. Admitted to God, to ourselves, and to another human being the exact nature of our wrongs; 6. Were entirely ready to have God remove all these defects of character; 7. Humbly asked Him to remove our shortcomings; 8. Made a list of all persons we had harmed, and became willing to make amends to them all; 9. Made direct amends to such people wherever possible, except when to do so would injure them or others; and 10. Continued to take personal inventory, and when we were wrong, promptly admitted it. *See* BILL W., ALCOHOLICS ANONYMOUS: THE STORY OF HOW MANY MILLIONS OF MEN AND WOMEN HAVE RECOVERED FROM ALCOHOLISM 59 (2d ed. 1955).

[113] San Quentin, for example, which is regarded as one of the "best" prisons in California for rehabilitative and self-help programming, as of 2010, had approximately 60 programs available for inmates to enroll in. *See Volunteer, Inmate Leisure Time & Self-Help Program Inventory 2010*, CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION. Copy on file with the author. *See also* Michelle Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33, 59 (2011) (arguing "that for the decade following the decline of the rehabilitative idea, very little changed inside of prisons in terms of rehabilitative

Approaching the Board of Parole Hearings from the perspective of Kahan and Nussbaum, it appears that parole boards subscribe to an evaluative conception of emotion, as the requirement of "insight" necessitates that inmates cognitively appraise and reshape their own emotions to come to a more "insightful" understanding of the magnitude and causes of their commitment offense. As opposed to the mechanistic model that sees emotions as sweeping, overpowering, and unable to be controlled, parole boards and the evaluative model underscore that emotions can be learned.[114] As such, parole boards assume that inmates can shape their emotions through moral and emotional education, as illustrated by the weight given to participation in self-help and rehabilitation programming.[115] For example, during a 2014 parole hearing in which parole was denied, a Commissioner at San Quentin stated that, "I'm wondering is there any other way through programming in prison that you might be able to develop more insight into what it was that caused [your life crime]."[116] In encouraging the inmate to complete more self-help and rehabilitative work before their next hearing, the Commission stated, "I think that [self-help and rehabilitative work] would solidify your understanding and then be able to actually come to the Panel and talk about these insights, because it's important [sic] that we know that you understand why you do things so you can be released comfortably to the community."[117] These comments illustrate both the ways in which the Board emphasizes that inmates must develop a certain "emotion-state" and how that "emotion-state" is presumed to be learnable via the available programming in prison.[118]

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programming, in spite of large increases in the incarcerated population. Only after 1990. . .did programming rates show substantial change, and even in this instance, the date suggest that this was more of a shift from academic programs to reentry-related general counseling programs rather than uniform decline."). *But see* Mary Bosworth, *Creating the Responsible Prisoner: Federal Admission and Orientation Packs*, 9 PUNISHMENT & SOC'Y 67, 81-82 (2007) (arguing that penal institutions in 2001, by contrast to those in the 1970s, placed responsibility on the individual inmate to behave well and seek out opportunities for self-development rather than look to the institution itself for support in such growth).

[114] Kahan & Nussbaum, *supra* note 97, at 279.

[115] *Id.* at 298.

[116] TRANSCRIPT OF SUBSEQUENT PAROLE CONSIDERATION HEARING, IN THE MATTER OF THE LIFE TERM PAROLE CONSIDERATION HEARING OF: HAROLD PHILLIPS, CDC NO. C-20212, at 96 (2014). Copy of transcript on file with the author.

[117] *Id.* at 158-59.

[118] These requirements and expectations are extended to inmates' post-release time on parole. *See* Lynch, *supra* note 8, at 60 (arguing that "parole. . .continues to speak of the

Thus, the analytic frameworks of the scholarship of law and emotions elucidate a possible rationale of the California Supreme Court and parole boards in their mandate to assess inmate "insight." These bodies can engage in an "evaluative" understanding of emotion that seeks to shape emotions, and particularly those of remorse, guilt, and shame, via moral and educational education—specifically self-help, recovery, and rehabilitative programming—in order to determine parole suitability.[119]

### B. Empirical Backings in Clinical Psychology[120]

But are the "emotion-states" of remorse, guilt, and shame, if actually cultivated and accurately assessed, a viable metric for determining an inmate's level of dangerousness to society?

Research in clinical psychology suggests that feelings of guilt and shame may indeed be accurate predictors of rehabilitation and recidivism. For example, clinical psychiatrists June Price Tangney, Jeff Stuewig, and Logaina Hafez argue that "shame and guilt may represent a critical stepping stone in the rehabilitation process."[121] Employing the term "guilt" as an umbrella term that includes remorse, the authors distinguish guilt and shame and analyze the potential for each emotion's predictive capacity based on a survey of recent empirical work in the field. [122] The authors find guilt to be associated with "moral transgressions," public reconciliation, and a focus on adaptive behavior.[123] Shame, by contrast, is associated with a "broader range of situations including both 'moral' and 'non-moral' failures," private reconciliation, and a negative focus on the self.[124] As the authors note, "from this perspective, shame arises from a negative focus on the self—one's core identity" while "guilt arises from a negative focus on a

reformable individual, although the essence of this individual appears to have changed. Although he is known for his particular flaws and held against a normative ideal, by the agents, he is no longer in need of extensive, individualized treatment because his problems stem from dispositional maladjustments that only he can truly fix").

[119] Kahan & Nussbaum, *supra* note 97.

[120] More broadly, empirical work in economics and law has shown that an inmates' institutional behavior, including their participation in rehabilitative programs, does help to predict future parole success. *See, e.g.*, Dan Bernhardt et al., *Rehabilitated or Not: An Informational Theory of Parole Decisions*, 28 J.L. ECON. & ORG. 186 (2010).

[121] Tangney, Stuewig & Hafez, *Shame, Guilt and Remorse: Implications for Offender Populations*, *supra* note 14, at 706.

[122] *Id.*

[123] *Id.* at 706-07.

[124] *Id.*

specific behavior."[125] They argue that "shame and guilt refer to related but distinct negative 'self-conscious' emotions. Although both are unpleasant, shame is the more painful self-focused emotion linked to hiding or escaping. Guilt, in contrast, focuses on the behavior and is linked to making amends."[126]

To this end, the authors review five lines of research that illustrate the "adaptive" functions of guilt and the "hidden costs" of shame.[127] They find that "guilt is the more adaptive moral emotion, while shame is a moral emotion that can easily go awry."[128] However, they call for further research regarding the implications of such a finding for the criminal justice system, as they are unsatisfied with the clarity and depth of the current studies.[129] Taking up their own call for research in a subsequent study, the same authors find that guilt motivates reparative action, whereas shame exacerbates feelings of diminishment, worthlessness, and exposure.[130] Specifically, they find that "guilt proneness assessed at incarceration negatively predicted criminal recidivism in the 1st year after release. In contrast, shame proneness did not predict postrelease [sic] criminal behavior."[131]

In particular, the study examined inmates convicted of felony charges who were held in a county jail[132] in the suburbs of Washington D.C. between 2002 and 2007.[133] An ethnically and racially diverse

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[125] *Id.* at 707. In a subsequent study the authors further clarify the distinction by stating "Feelings of shame involve a painful focus on the self—"I am a bad person"— whereas feelings of guilt involve a focus on a specific behavior—"I did a bad thing." Tangney, Stuewig & Martinez, *Two Faces of Shame: The Roles of Shame and Guilt in Predicting Recidivism*, *supra* note 14, at 799.

[126] Tangney, Stuewig & Hafez, *Shame, Guilt and Remorse: Implications for Offender Populations*, *supra* note 14, at 707.

[127] The five lines of research noted are: hiding v. amending, other-oriented empathy v. self-oriented distress, externalization of blame, anger and aggression, and psychological symptoms and substance abuse. *Id.* at 709.

[128] *Id.* at 709 (citing Roy F. Baumeister, Arlene M. Stillwell & Todd F. Heatherton, *Guilt: An Interpersonal Approach*, 115 PSYCHOL. BULL. 243 (1994); June Price Tangney, *Moral Affect: The Good, the Bad, and the Ugly*, 61 J. PERSONALITY AND SOC. PSYCHOL. 598 (1991); JUNE PRICE TANGNEY & RHONDA L. DEARING, SHAME AND GUILT (2002)).

[129] *Id.* at 716-18.

[130] *See* Tangney, Stuewig & Martinez, *Two Faces of Shame: The Roles of Shame and Guilt in Predicting Recidivism*, *supra* note 14, at 799.

[131] *Id.* at 801.

[132] *Id.* at 800. While this study concerns jail as opposed to prison populations, it is indicative of the responses that feelings of guilt and shame elicit in offenders.

[133] *Id*.

group of 482 inmates voluntarily completed full, valid baseline assessments.[134] One year after their release, 332 (70%) of them were assessed again.[135] The initial assessment of shame proneness, guilt proneness, and externalization of blame were made based on the Test of Self-Conscious Affect—Socially Deviant Version (TOSCA-SD).[136] TOSCA employs a "scenario-based approach in which respondents are asked to imagine themselves in a series of situations they have probably encountered in everyday life"[137] and in which each scenario "is followed by plausible responses that describe shame, guilt, and externalization-of-blame experiences with respect to the specific context."[138] The follow-up assessment was made via a telephone interview.[139] Based on the responses to these two assessments, the authors of the study found that "inmates' propensity to experience guilt, assessed shortly after incarceration, negatively predicted criminal recidivism during the 1st year after release."[140] This decreased likelihood for re-offense, the authors argue, is based on guilt's adaptive function.[141]

The results of the study regarding shame were decidedly mixed. By contrast to guilt, "shame proneness did not predict postrelease [sic] criminal behavior" but rather had the potential to be an asset or a liability for re-offense depending on the individual. The authors write:

> On the one hand, shame proneness is a liability in the sense that it prompts people to blame other people rather than taking responsibility for their failures and transgressions, and this externalization of blame is a risk factor for recidivism. By failing to take responsibility and blaming others, ex-offenders are apt to continue doing the same thing—in this case, commit crime. On the other hand, shame had a direct negative effect on recidivism. Therefore, another, more-adaptive process is also at play.[142]

The authors note that this divergence may be the result of "the motivation to hide associated with shame" and the fact that shame "prompts both defensive and prosocial motives."[143] Thus, shame, though less clearly than guilt, can indicate a decreased likelihood for re-offense

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134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.* at 801.
140 *Id.* at 802.
141 *Id.* at 802-03.
142 *Id.* at 803.
143 *Id.*

dependent on the particular inmate. While the "possibility that shame could be harnessed for social good is tantalizing," future research is needed to more completely assess the complexity of the emotion's ability to predict recidivism.[144] Regardless of this, guilt proneness is decidedly a positive indicator of a reduced likelihood of re-offense.

Based on this research, if "insight" is taken to mean guilt and/or shame and deciding bodies are able to accurately assess and determine when such emotions are present, "insight," though potentially vague and malleable, may be a potentially fruitful metric upon which inmates' future dangerousness and potential recidivism can be assessed in the parole context. However, while guilt and shame are correlated with reduced rates of recidivism, and parole boards look favorably on inmates' vocalization of such emotions and "insight," these emotions are continually brokered against those indicating psychopathy. Beginning in 2006, the Board of Parole Hearings created its own Forensic Assessment Division (FAD) staffed with clinicians who assess lifers seeking parole based on three metrics: the Psychopathy Checklist-Revised, the 20-item Historical, Clinical, Risk Management tool, and the Level of Service/Case Management Inventory.[145] In the past, clinicians who worked in the prison and were familiar with the inmates administered these tests. However, with the creation of the FAD, the Board of Parole Hearings created an insulated group of clinicians who they hoped would give less favorable assessments of inmates' predicted dangerousness.[146]

The factors of the Psychopathy Checklist-Revised (PCL-R), in particular, are in tension with, and often overshadow, inmates' ability to express remorse and guilt. The PCL-R originated in the 1970s with Canadian psychologist Robert Hare and in the following decades became an immensely popular tool in the criminal justice system for predicting future criminal behavior.[147] Advocates of the test argue that it accurately predicts future dangerousness, while others believe that rather than being a monolithic diagnosis of immutable characteristics, the PCL-R catches a series of heterogeneous personality disorders that do not all

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[144] *Id*.

[145] Johnson v. Shaffer, No. 2:12-CV-1059 KJM AC, 2014 WL 6834019, at 6 (E.D. Cal. 2014).

[146] *Id.* at 7.

[147] Jennifer L. Skeem et al., *Psychopathic Personality: Bridging the Gap Between Scientific Evidence and Public Policy*, 12 PSYCHOL. SCI. IN THE PUB. INTEREST 95, 100 (2011).

necessarily amount to psychopathy.[148] As such, the test is of questionable value in that while it can be predictive of future dangerousness, individuals who do not actually bear all of the characteristics of psychopaths may be labeled psychopaths. The test's originator himself has spoken out about its possible abuse in the hands of the criminal justice system based on the mechanistic and stereotypical ways in which it is applied.[149]

The PCL-R assesses psychopathy based on two factors.[150] The first factor looks to traits that indicate interpersonal and affective deficits, including whether the inmate exhibits glibness and superficial charm, a grandiose sense of self-worth, is a pathological liar, cons and manipulates, lacks remorse or guilt, has a shallow affect, is callous and lacks empathy, and fails to accept responsibility for their own actions.[151] The second factor looks to traits that indicate antisocial behavior, including whether the inmate needs stimulation and is prone to boredom, has a parasitic lifestyle, lacks realistic long-term goals, is impulsive and irresponsible, has poor behavioral controls, had early behavioral problems, and was a juvenile delinquent.[152] Clinicians ideally make assessments during a face-to-face interview. Individuals can be scored between zero and two in each of the 20 categories: zero indicating the category does not apply at all while two indicating there is a reasonably good match to the offender. The maximum score is 40 points. Any score over 30 indicates psychopathy.

In the context of parole, FAD clinicians in California rate inmates as posing a low, moderate, and high risk based on this test. A rating of high most often forecloses the possibility of parole while a rating of low or moderate provides more space for a finding of suitability by the Board of Parole Hearings. Based on the factors above, one can readily imagine how a lifer could amass a number of points, regardless of the fact that they are able to vocalize their "insight" and

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[148] *See id.* at 142 (arguing that various configurations of multiple, heterogeneous personality traits, for example, disinhibition, boldness, and meanness, can lead to a diagnosis of "psychopath," but that not all configurations that might lead to that diagnosis are the same). *But see* Grant T. Harris et al., *The Construct of Psychopathy*, 28 CRIME & JUST. 197 (2001).

[149] Alix Spiegel, *Creator of Psychopathy Test Worries About Its Use*, NAT. PUB. RADIO (May 27, 2011), *available at* http://www.npr.org/2011/05/27/136723357/creator-of-psychopathy-test-worries-about-its-use.

[150] Skeem et al., *supra* note 147, at 101.

[151] *Id.*

[152] *Id.*

remorse into their life crime and had a clean record while in prison, as many of the factors correlate to pre-existing, unchanging conditions, such as being a juvenile delinquent. Advocates of those seeking parole have begun to challenge the use of clinicians hired by the Board of Parole Hearings, and the seemingly arbitrary nature in which they make assessments of psychopathy, based on due process grounds.[153] While these challenges have yet to be resolved, they offer a glimmer of hope that rather than relying on the questionable expertise and tests, the Board of Parole Hearings will instead seek accurate and unbiased assessments of guilt and remorse, emotions that in and of themselves may be a reliable metric upon which inmates' future dangerousness and potential recidivism can be assessed in the parole context. Thus, in parole boards' search for factors indicating both "insight" and psychopathy in inmates seeking parole, the inmate is conceived of as simultaneously both intrinsically criminal and as having the potential for change. This move reflects the tension inherent in the precedent of *Rosenkrantz*, *Lawrence*, and *Shaputis*, all struggling with reconciling the weight of a criminal past with the potential for a redemptive future.

## IV. THE BOARD OF PAROLE HEARINGS ASSESSMENTS AND UNDERSTANDINGS OF "INSIGHT" IN PRACTICE: A CALL FOR RESEARCH

Cultivating and assessing "insight," however promising such an emotional process might be for predicting recidivism, depends on the Board of Parole Hearings accurately determining whether it is present in the inmate seeking parole and actually basing their determination for parole suitability on it. Current empirical work addressing this question is scarce. Much of the research closely, or even tangentially, related to the topic of parole board decision-making in practice dates from the 1980s and 90s.[154] This is problematic, not only because the data provides little relevant current assessment, but also because the structures and precedent governing parole has changed in the intervening years.[155] Though more recent studies have examined the role

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[153] See Johnson v. Shaffer, No. 2:12-CV-1059 KJM AC, 2014 WL 6834019, at 3 (E.D. Cal. Dec. 3, 2014) (plaintiff arguing that the Board of Parole Hearings' creation of the Forensic Assessment Division and the invalid policies employed by them make parole a virtual impossibility for inmates thereby violating the Due Process Clause).

[154] Joel Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROB. 16, 16 (2007).

[155] *Id.*

of gender, race, and ethnicity in parole decisions, these articles too acknowledge the scarcity in current empirical work to understand the practices of parole boards in their decision-making.[156] Aside from deficits in research regarding parole decision-making broadly, no research has been done that specifically addresses how California parole boards, in light of the decisions of *Lawrence* and *Shaputis*, assess, understand, and determine the slippery concept of "insight."[157]

Despite this void, the methods and explorations of past studies are beneficial in that they can provide understanding about at least some factors that are relevant for future study. For example, one study examined the decision-making processes of California parole boards and sought to understand whether parole hearings resulted in a finding of suitability, based on a decision grounded upon information covered in the hearings or merely a justification for the deciding commissioners' preconceived notion of the inmate based on a cursory examination of their file.[158] The study found that while "the hearing officers made their own psychological assessments of the prisoners, even though they lacked knowledge and training in this diagnostic skill," "the parole decision-making process appears to be a reliable one, but nevertheless its validity is questionable."[159]

Here, the backgrounds and training of parole commissioners and their ability to precisely assess inmates' mental and emotion states calls for further research. Though commissioners have increasingly turned to the reports and evaluations of psychologists employed by the institution for guidance, commissioners still regularly make their own assessments of inmates' during hearings. In California, the Governor appoints 12 full-time commissioners who serve three-year terms.[160] As of this publication, four of the commissioners have a background in law enforcement, five have a background in corrections, one has a background in the military, one is a former state deputy attorney general, and one comes from private legal practice.[161] None of the commissioners are professionally trained in psychology and risk and/or

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[156] *See, e.g.*, Beth M. Huebner & Timothy S. Bynum, *The Role of Race and Ethnicity in Parole Decisions*, 46 CRIMINOLOGY 907, 907 (2008).

[157] At least nothing that this author could find after extensive investigation.

[158] Robert M. Garber & Christina Maslach, *The Parole Hearing: Decision or Justification?*, 1 LAW & HUM. BEHAV. 261, 275 (1977).

[159] *Id.* at 261.

[160] *Commissioners*, CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION, http://www.cdcr.ca.gov/BOPH/commissioners.html (last visited Mar. 4, 2016).

[161] *Id.*

mental health assessment. To the contrary, the commissioners' backgrounds in criminal correction, prosecution, and control surely influence the ways in which they assess and understand inmates' vocalizations of "insight." Research should be conducted to understand how these backgrounds affect the parole decision-making context.

A more recent study from 1999 surveyed 351 parole officers across the United States in an effort to provide greater insight into understanding parole board decision-making from the perspective of the parole board members themselves.[162] The survey questions asked participants to rank the importance of various factors and standards used to grant and revoke parole.[163] The questions asked what participants thought "the most important purpose of corrections" was, what "primary rationale [participants] used to justify parole as an early release mechanism" was, and the importance of various criteria in granting parole.[164] Based on their finding that participants ranked incapacitation and rehabilitation as the most important purposes of corrections, the authors of the study argue that "it appears that the parole board members . . . believe that correctional practices should be designed to protect society and rehabilitate offenders, as opposed to punishing offenders."[165] This sentiment is reflected in the central question that

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[162] The study notes the parole officers' demographics: "The median age for the respondent group was 52 with a range of 35 to 78. Approximately 70 percent of the respondents were male and 30 percent were female. Approximately 80 percent of the respondents were Caucasian. Twelve percent had no more than a high school diploma, 35 percent had a bachelor's degree, and 53 percent had an advanced degree. Approximately 65 percent identified themselves as politically conservative and 35 percent identified themselves as politically liberal. The median number of years of experience in the criminal justice system was 19 and the median number of years in parole was 7." Ronald Burns et al., *Perspectives on Parole: The Board Members' Viewpoint*, 63 FED. PROB. 16, 17 (1999).

[163] *Id.* at 18.

[164] *Id.* at 18-19.

[165] "Of the five options, incapacitation was most often ranked as the first or second most important purpose (71.8 percent). In order of perceived importance, the other options were rehabilitation (63.4 percent), deterrence (47.7 percent), and restitution (22.7 percent). Retribution was ranked a distant fifth, with only 12.4 percent noting it as their first or second most important purpose." *Id.* at 18, 20. The authors elaborate stating: "[I]t appears that parole board members have a concern for the well-being of both individual offenders and the general public. In a period when punishment and punitiveness are becoming more the norm than the exception in the criminal justice system, some may find comfort in the finding that parole board members would rather 'correct' than punish offenders. As we gravitate toward punishment as our correctional philosophy, it will be interesting to see what impact, if any, this concern has on policy

California parole boards must address: whether the inmate has vocalized enough "insight" into their life crime to indicate that they no longer pose a significant risk to society. Here, the safety of society is balanced against the inmates' rehabilitative efforts, consistent with the findings of the study. While "insight" may be a new term in parole boards' linguistic toolboxes, the impetus behind the evaluative effort may not represent an entire break with past practices. Moreover, such a sentiment might represent parole board members' increased willingness to leave punitive justifications for parole at the door.

In addition, the study also found that:

> In general, it appears that parole board members feel that the nature of the inmate's offense, as well as the inmate's prior criminal record, attitude toward the victim, institutional adjustment (as measured by the inmate's participation in prison programs), and insight into the causes of past criminal conduct are the most important factors in the decision to grant parole. In contrast, the board members appear to feel as though the inmate's physical health and age, prison conditions, and the public notoriety of the case are of lesser importance in the decision to grant parole.[166]

These findings are largely supported by more recent research,[167] though quite clearly the reliance on the nature of the inmate's commitment offense, under the California regime, would no longer be a viable option upon which to deny parole.

These empirical works, while illustrative of the potential continuities and disruptions between past and current parole decision-making practice, do not adequately and satisfactorily address how parole boards understand and interpret emotions, specifically "insight," in their decision-making. Moreover, they do little to elucidate the potential folk understandings of guilt, remorse, and shame that parole board members bring with them to their determinations from their largely correctional backgrounds. More empirical work in this field should be completed so that inmates and parole board members alike are better able to assess and identify factors that should be properly taken into account, and specifically, how the concept of "insight" is practically deployed so that inmates seeking parole are better able to understand the complex emotional workings that are expected of them.

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or decisionmaking in the parole process." *Id.* at 22.

[166] *Id.* at 19.

[167] *See generally* WEISBERG ET AL., *supra* note 1.

## V. CONCLUSION

While the California precedent regarding the factors that the Board of Parole Hearings must take into account during parole hearings has arguably shifted in a positive direction for lifers seeking parole, and the Court and the Board's central question for determining parole appears to be backed by empirical data, future research is required to determine whether the rhetoric of "insight" is deployed with accuracy and without bias. As such, the rhetoric of remorse and rehabilitation is an elusive, though potentially promising, avenue for inmates to pursue when seeking parole, regardless of the authenticity of the language itself.

Troublingly, however, the requirement of "insight" appears to be more about an inmate's ability to create a particular artificial narrative about him or herself rather than about providing an objective insight into the truth underlying the causes of their criminal history or fostering genuine self-reflection and change. As Shadd Maruna argues, to successfully abstain from crime, ex-offenders must "make sense" of their lives through coherent narratives of the self.[168] These narratives must account for a deviant and disorderly past while simultaneously allowing for a redemptive future.[169] While "insight" is a potential narrative with which inmates can grapple to define themselves as desisting from crime, based on its questionable authenticity, parole boards' imposition of the narrative may leave inmates still struggling to find resolve. Moreover, "not only are there few change stories readily available to ex-offenders . . ., there may not even be a language or discourse available for describing the change" that they undergo.[170]

As such, the language of "insight" may work simply to circumscribe inmates within a particular rehabilitative and rhetorical frame. Such a frame has the potential to be abused, as Justice Liu articulates in his concurrence in *Shaputis II*, and moreover, carries serious due process implications, based on the fact that arguably biased and arbitrary decisions are continually being made regarding the freedom and liberty of countless lifers in California's prisons. For the rhetoric of remorse and rehabilitation to become more than an elusive promise, the Board of Parole Hearings must take more seriously the presumption of release and be willing to accept vocalizations of remorse and guilt that may not fit into the narrative structures they seek.

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[168] SHADD MARUNA, *supra* note 7, at 7.
[169] *Id.* at 9-10.
[170] *Id.* at 167.