

# The Discourse of Remorse:

## An Economic Approach to Parole Determinations

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### Abstract

The criminal justice system favours remorseful offenders. While this is most apparent in sentencing, it is also evident in the conditional release of offenders from prison. This paper focuses on remorse as a risk indicator and relies on economic theory to assess whether the Parole Board of Canada should consider an offender's remorse (or lack thereof) when making a release decision.

Under the *Corrections and Conditional Release Act*, the Board is required to consider various factors when deciding whether or not to release an offender on some type of parole. An economic model of conditional release presumes that, like other rational actors, Board members weigh the costs and benefits of release in each case and make decisions that aim to achieve an optimal outcome. This paper differs from the traditional economic approach to criminal law in two respects: first, it focuses on non-criminal decision makers, namely Parole Board members who make release decisions and second, it relies on incapacitation and rehabilitation as possible justifications for incarceration and release, rather than the more dominant theory of deterrence.

The author relies on judicial review decisions, empirical studies and personal observations of parole hearings to argue that the Board does consider remorse when making release decisions and that it is not an efficient indicator of risk. This is because of its dubious connection to recidivism, the difficulty of separating remorseful from unremorseful offenders, and the various cognitive factors that may prevent Board Members from acting rationally.

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**Introduction**

The criminal justice system favours remorseful offenders. While this is most apparent in sentencing, it is also evident in the conditional release of offenders from prison. Parole decision makers may value remorse because they believe that it indicates a lower risk of recidivism. Specifically, they may believe that an unremorseful offender is too risky to release since he will have no internal moral checks on his behaviour and may re-offend as long as he thinks he can avoid getting caught.

An economic approach to criminal law assumes that both potential criminals and other participants in the criminal justice system, like people who grant parole, make rational decisions that maximize utility.<sup>1</sup> Utility will depend on the decision maker’s preferences. It may mean maximizing one’s own utility, either through financial or

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<sup>1</sup> See generally Richard H McAdams & Thomas S Ulen, “Behavioral Criminal Law and Economics” (2008) John M Olin Law & Economics Working Paper No 440 (2d Series), online: <ssrn.com/abstract=1299963> [McAdams & Ulen] (the authors apply behavioural economics to other participants in the criminal justice system including potential victims, legislators, lawyers, judges and juries).

psychological gains; but it could also mean achieving a socially optimal outcome. A socially optimal outcome is one that balances society's goals with its resources in order to achieve the most benefits at the lowest cost. In the context of conditional release decisions, an optimal outcome will balance the costs and benefits of release, such as an offender's potential for rehabilitation in the community and his or her (in this paper, his) potential risk of reoffending.<sup>2</sup>

I use economic theory to describe the release decision-making process of the Parole Board of Canada (the "PBC" or "Board"). In making a release decision Board members are essentially calculating risk—a concept that is inherently amenable to economic analysis, since in its simplest form, risk is about balancing expected gains with expected losses. Economic theory is normative in the sense that it prescribes what a rational economic actor should or should not do.<sup>3</sup> In this paper, I ask whether a rational Board member who is making a risk assessment should consider whether an offender is remorseful. By "remorse" I mean the feeling that one has done something wrong, is responsible for this action and is changed in a significant way as a result. It may be accompanied by internal turmoil and a desire to atone, make reparation and behave differently in the future.<sup>4</sup>

Despite the fact that remorse is not explicitly mentioned in any of the PBC's official guidelines for conditional release, or its governing statute, I argue that it does play a role in parole decisions and that, from an economic perspective, it is an inefficient way to balance the expected costs and benefits of release. This is because of its dubious connection to recidivism, the difficulty of separating remorseful from unremorseful offenders, and

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<sup>2</sup> I use the masculine pronoun since my opportunities to observe parole hearings have been confined to male penitentiaries, and because the vast majority of the literature I refer to relies on studies of male offenders.

<sup>3</sup> Uri Gneezy, "Deception: The Role of Consequences" (2005) 95:1 *The American Economic Review* 384 at 385.

<sup>4</sup> Michael Proeve & Steven Tudor, *Remorse* (Surrey, UK: Ashgate Publishing, 2010) at 48.

because of various cognitive factors that may prevent Board members from acting rationally.

In Part I of this paper I review the statutory framework for conditional release decision making in Canada. Conditional release means that an offender may serve the remainder of his sentence in the community under supervision and subject to certain conditions. Part II describes the classic economic approach to criminal law and explains how this approach must be modified to explain the Board's assessment of risk when making release decisions. Part III incorporates remorse into this economic model and Part IV draws on insights from behavioural studies to explain some of the potential hazards of considering remorse in conditional release decision making.

## **I. Conditional Release in Canada**

The framework for conditional release from federal penitentiaries in Canada is governed by the *Corrections and Conditional Release Act (CCRA)*.<sup>5</sup> The Board is a quasi-judicial administrative tribunal and the *CCRA* gives it exclusive authority to grant, deny, cancel, terminate or revoke day and full parole as well as the authority to order that certain offenders be held in prison beyond their statutory release date.<sup>6</sup> According to the *CCRA*, the overarching purpose of conditional release is:

100. The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decision on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

100.1 The protection of society is the paramount consideration for the Board and the provincial parole boards in the determination of all cases.<sup>7</sup>

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<sup>5</sup> SC 1992, c 20 [*CCRA*].

<sup>6</sup> *Ibid*, s 107. The Parole Board also handles record suspensions and clemency, but conditional release accounts for 90% of its annual expenditures. See Parole Board of Canada, "2012-13: Report on Plans and Priorities" at 14, online: <[www.pbc.gc.ca](http://www.pbc.gc.ca)>.

<sup>7</sup> *CCRA*, *supra* note 5, ss 100, 100.1.

The Board may conduct conditional release reviews for both federal and provincial offenders.<sup>8</sup> This paper focuses exclusively on federal offenders since some provinces have their own conditional release legislation. In the 2010-2011 term, the Board completed 17,000 conditional release reviews.<sup>9</sup>

There are several types of conditional release. The first stage is typically either an escorted or unescorted temporary absence (ETAs and UTAs respectively). ETAs do not usually require a hearing and a correctional institution can grant an ETA at any point during the offender's sentence for medical needs, family responsibilities, and rehabilitative or employment purposes.<sup>10</sup> An offender is typically eligible for a UTA after serving six months or one-sixth of his sentence, whichever is longer.<sup>11</sup> For instance, an offender who is serving a six-year sentence would be eligible for a UTA one year into his sentence. UTAs can be granted by the institution (without a PBC hearing), unless the offender is serving a life sentence for murder or has been designated a dangerous offender, in which case a UTA can only be granted by the Board.<sup>12</sup>

Generally an offender's first in-person hearing with the PBC will be for day or full parole. An offender is eligible for full parole after serving one-third of his sentence and eligible for day parole six months before that date. Drawing on the previous example, an offender serving a six-year sentence would be eligible for day parole after one-and-a-half

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<sup>8</sup> Offenders who are sentenced to less than two years are non-federal inmates and are governed by the relevant provincial or territorial legislation.

<sup>9</sup> Parole Board of Canada, "2010-2011: Departmental Performance Report" at 26, online: <[www.pbc.gc.ca](http://www.pbc.gc.ca)> [PBC "2010-2011 Departmental"].

<sup>10</sup> *CCRA*, *supra* note 5, s 17. ETAs are much more likely to be granted from a minimum security penitentiary than from a maximum security penitentiary.

<sup>11</sup> *Ibid*, s 115(1)(c). This is subject to various exceptions for certain offences listed in s 115(1). Offenders in maximum security penitentiaries are not eligible for UTAs (*ibid*, s 115(3)).

<sup>12</sup> *Ibid*, s 116(2). Individuals convicted of certain violent or sexual offences may be designated as dangerous or long-term offenders, which could lead to an indeterminate sentence (*Criminal Code*, RSC 1985 c C-46, Part XXIV).

years and full parole at two years. The main difference is that day parole requires the offender to return to a half-way house each evening, while full parole typically allows the offender to serve the rest of his sentence in the community.<sup>13</sup> Both types of release can be accompanied by standard and special conditions that may continue until the sentence expires. These conditions are designed to manage the offender's risk and may include prohibiting the offender from attending certain locations, associating with certain people, or possessing certain items such as cell phones. Breach of a condition can lead to a parole suspension and re-incarceration, despite the fact that no criminal offence has been committed. Until December 1, 2012 the Board was obligated by statute to conduct an in-person post-suspension hearing within 30 days after the suspension. After the hearing, the Board would either cancel the offender's suspension (allowing him to continue on parole) or revoke parole.<sup>14</sup>

An offender may also come before the Board for a detention hearing at which the Board has jurisdiction to deny statutory release. Statutory release occurs after two-thirds of a sentence has been served and requires offenders to serve the last third of their sentence under supervision in the community. Like parole, offenders may still be subject to certain conditions and may be returned to custody if these conditions are breached. Since 1986, the correctional institution can refer an inmate for detention, which means that he will go before the Board for a detention hearing. An offender will be detained past his statutory

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<sup>13</sup> *CCRA*, *supra* note 5, s 99(1).

<sup>14</sup> Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2012, cl 527 (amended subsection 140(1)(d) of the *CCRA* so that an offender is no longer entitled to an in-person review after his or her parole has been suspended). This amendment came into force on December 1, 2012 (Order in Council, SI/2012-88, (2012) C Gaz II, 2519). For criticisms of this reform see the Canadian Bar Association's submissions on the issue: Letter from Dan MacRury, Chair of National Criminal Justice Section to James Rajotte, Chair of Standing Committee on Finance & Joseph A Day, Chair of Senate Committee on National Finance (29 May 2012), online: Canadian Bar Association <[www.cba.org](http://www.cba.org)>.

release date if the Board is satisfied that if released, the offender will commit an offence causing death or serious harm to another person, a sexual offence involving a child, or a serious drug offence before the expiration of his or her sentence.<sup>15</sup> The main difference between parole and statutory release is the operating presumption. The presumption is that an offender will remain in prison until his statutory release date and release on parole before this date is a privilege. At the statutory release date, release is mandated and the offender will only be detained if he satisfies the legal test for detention.

All types of conditional release depend on the Board making some kind of risk assessment. The following section uses an economic approach to explain the *CCRA*'s framework for conditional release and the Board's decision-making process. An economic model is helpful because it allows us to assess indicators of risk on the basis of whether they result in optimal release decisions.

## **II. An Economic Model for Conditional Release**

### ***A. Costs, Benefits and Optimal Outcomes***

The classic economic approach to criminal law is based on the idea that a potential criminal, like everyone else, seeks to make decisions that maximize his utility.<sup>16</sup> For many, utility means financial gain and may also include psychological pleasure. From an economic perspective, a person will choose to commit a crime when the expected benefits of the crime are greater than the expected costs. Therefore in order to deter individuals from committing crimes, society must make it worthwhile for people *not* to commit crimes by increasing the costs of punishment. This is built on the idea of rational choice—that

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<sup>15</sup> *CCRA*, *supra* note 5, s 130(3).

<sup>16</sup> Alon Harel & Keith N Hylton, eds, *Research Handbook on the Economics of Criminal Law*, (Cheltenham, UK: Edward Elgar, 2012) at 13.

potential criminals make rational, cost-benefit calculations when deciding whether to commit a crime.<sup>17</sup>

This economic theory of deterrence was first considered by Cesare Beccaria and Jeremy Bentham in the eighteenth century, but its modern form was developed by Gary Becker.<sup>18</sup> A simplified version of Becker's model is that potential criminals weigh three factors when deciding whether to commit a crime: the expected monetary or psychological reward of criminal behaviour, the probability of being caught, and the severity of punishment.<sup>19</sup> The implication for policy makers is that by carefully calibrating detection resources and the severity of sanctions they can arrive at an optimal level of deterrence. Optimality has a specific meaning in an economic model and should not be confused with other concepts such as "best" or "ideal". An ideal outcome may be a criminal policy that prevents all crimes. However even if this was realistic, it would likely not be optimal because it would come at too high a cost. Costs are not only monetary—it is not difficult to imagine a dystopian crimeless society that sacrifices human freedom to achieve social order. Therefore the *optimal* outcome is that which achieves the lowest crime rate at the least cost to society.<sup>20</sup>

An economic approach to parole or other forms of early release could take many dimensions. Knowledge of early release may reduce the cost of punishment to potential offenders, thereby lessening its deterrent effect.<sup>21</sup> Offenders may choose to commit a crime because they think that even if there is a high probability of being caught and incarcerated,

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<sup>17</sup> Thomas Miceli, "The Economic Model of Crime" in *The Economic Approach to Law* (Stanford, CA: Stanford University Press, 2004) at 289 [Miceli, "Economic Model"].

<sup>18</sup> Gary Becker, "Crime and Punishment: An Economic Approach" excerpted in A Katz, ed, *Foundations of the Economic Approach to Law* (New York: Oxford University Press, 1998) 125-132.

<sup>19</sup> Miceli, "Economic Model", *supra* note 17.

<sup>20</sup> *Ibid* at 290 ff (on how policy makers determine socially optimal punishments).

<sup>21</sup> Miceli, "Economic Model", *supra* note 17 at 295.



they may not have to serve their full sentence in prison. Most offenders can count on being released on their statutory release date, if not sooner. Their choice to commit a crime is “rational” if the possibility of serving a conditional sentence in the community (rather than in prison) reduces the costs of punishment enough to be outweighed by the benefits of committing the crime. This type of analysis focuses on a person’s pre-offence behaviour and is concerned with reducing the deterrent effect of criminal sanctions.

Another possibility is to focus on an offender’s post-offence, institutional behaviour and assess parole from that perspective. The possibility of early release may give inmates an incentive to participate in programming, behave well, and comply with their correctional plan. This increases the costs of re-offending while in prison (because there is something to lose) and reduces the costs of monitoring inmates.<sup>22</sup>

What these examples have in common is that the decision maker is the potential offender and the focus is on deterring or incentivizing that person’s behaviour. While this reflects the general approach in criminal law and economics, the economic approach to conditional release that I propose differs in two respects. First, it focuses on non-criminal decision makers, namely Parole Board members who make release decisions. Second, it relies on incapacitation and rehabilitation as possible justifications for incarceration and release, rather than the more dominant theory of deterrence.<sup>23</sup>

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<sup>22</sup> *Ibid.*

<sup>23</sup> See generally Murat C Mungan, “The Law and Economics of Fluctuating Criminal Tendencies and Incapacitation” (18 January 2012) Md L Rev, Forthcoming at 17 (the author lists several studies and surveys of criminal law and economics which focus almost exclusively on deterrence rather than other rationales for punishment, such as rehabilitation and incapacitation).

## ***B. The Undue Risk Assessment***

An economic model of conditional release presumes that, like other rational actors, Board members weigh the costs and benefits of release in each case and make decisions that aim to achieve an optimal outcome. The relevant costs and benefits are obviously going to be different for Board members who are deciding whether to release someone than they are for a person who is deciding whether to commit a crime. Table 1 identifies some of the potential social costs and benefits in a conditional release scenario. An efficient model of release would only grant parole to an offender where the total social utility is greater if the offender is released than if he is detained.<sup>24</sup> In other words, release should only be granted where the combined value of the costs and benefits of incarceration (column I) are less than the combined value of the costs and benefits of release (column II).

**Table 1**

	<b>I. Incarceration</b>	<b>II. Conditional Release</b>
<b><i>Costs</i></b>	<ul style="list-style-type: none"><li>- Greater financial cost</li><li>- Possible increase in criminogenic factors<sup>25</sup></li></ul>	<ul style="list-style-type: none"><li>- Risk of reoffending</li><li>- Costs of victimization</li><li>- Potentially decreased deterrent effect of prison</li><li>- Monitoring costs</li></ul>
<b><i>Benefits</i></b>	<ul style="list-style-type: none"><li>- Incapacitation (no risk to society)</li><li>- Rehabilitation (access to prison programming)</li></ul>	<ul style="list-style-type: none"><li>- Lower financial cost</li><li>- Rehabilitation (community integration, employment and de-institutionalization)</li></ul>

In order to arrive at a truly optimal outcome, Board members would have to consider all of these factors when making a release decision.<sup>26</sup> Studies have compared the financial costs

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<sup>24</sup> Michael Sesnowitz, "Toward an Optimum Parole Policy" (1975) 4:2 *Journal of Behavioral Economics* 111 at 112 (the author assigns variables to the expected costs and benefits of release and creates an economic model to calculate the optimal parole policy). The variables are similar to those in Table 1.

<sup>25</sup> See generally Martin H Pritikin, "Is Prison Increasing Crime" (2008) *Wis L Rev* 1049 (detailed analysis of the potential crime causing or "criminogenic" effects of prison).

<sup>26</sup> This table is not exhaustive, however, it is beyond the scope of this paper to catalogue all the costs and benefits of parole versus prison. I will leave this task and the discussion of what is actually a socially optimal goal or outcome to criminologists.

of crime (i.e. medical care, productivity and property loss) to the financial cost of prison in order to assess cost-effectiveness of incarceration and prison programming.<sup>27</sup>

However, these considerations are beyond the Board's mandate. For my purposes, the relevant costs and benefits the Board is entitled to consider are defined by statute. The *CCRA* states that the Board may grant parole to an offender if, in its opinion,

- (a) the offender will not, by reoffending, present an undue risk to society before the expiration of the sentence the offender is serving; and
- (b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.<sup>28</sup>

So in order to achieve the optimal outcome Board members must release offenders at the moment in time where their highest potential for rehabilitation (expected benefit of release) coincides with their lowest risk of re-offending (expected cost of release).

An economic approach to criminal law that is based on deterrence fails to explain this model of conditional release because deterrence focuses on the *ex ante* behaviour of potential criminals. While Board members may be concerned with *preventing* future criminal conduct when making release decisions, they are not concerned with *detering* future criminal conduct in the sense of adjusting an offender's cost benefit analysis to make criminal conduct less attractive.<sup>29</sup> If anything, early release would *decrease* the deterrent effect of punishment.<sup>30</sup>

An economic approach that is based on incapacitation and rehabilitation can better explain conditional release and can also provide an economic rationale for the role of

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<sup>27</sup> See e.g. The Conference Board of Canada, "The Net Federal Fiscal Benefit of CSC Programming – Final Report: February 2009, online: Correctional Service of Canada <[www.csc.gc.ca](http://www.csc.gc.ca)>.

<sup>28</sup> *CCRA*, *supra* note 5, s 102.

<sup>29</sup> I am disregarding, for the sake of argument, the possible deterrent effect of re-incarceration since this has less to do with the Board's decision to release the offender than it does with the legal ramifications of breaching the conditions of release and/or re-offending while released.

<sup>30</sup> See text accompanying note 21.

certain factors, such as an offender's remorse.<sup>31</sup> If one of the rationales of imprisonment is incapacitation then the Board will not release an offender as long as his risk of recidivism is higher than the costs of incapacitation; the more dangerous the criminal, the greater the benefits of continued incapacitation.<sup>32</sup> Dangerousness would be a function of the offender's probability of committing a crime and the type of crime he is likely to commit.<sup>33</sup> Conversely, if an individual demonstrates a low risk of reoffending then the benefits of incapacitation are minimal and likely outweighed by the costs, meaning that release would be socially optimal.<sup>34</sup>

An economic model of conditional release is strengthened if rehabilitation is also adopted as rationale. First, the Board may consider that a rehabilitated offender will be less dangerous, thereby reducing the risk of release and the benefits of incapacitation. Second, gradual conditional release may itself contribute to rehabilitation and lower the offender's long-term risk for reoffending.<sup>35</sup> If this is the case then the incapacitative benefits of incarceration must be weighed against the potential rehabilitative benefits of release, which is precisely what the statute requires.

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<sup>31</sup> Mungan argues that economic models that assume that "the only benefit of imprisonment is deterrence" cannot explain certain legal practices, such as why we punish remorseful offenders less severely (*supra* note 23 at 9). This is because remorse is "an ex post concept, and therefore it should be irrelevant for deterring criminals ex ante" (*ibid* at 31). I expand Mungan's analysis to show that deterrence also fails to explain the legal practice of conditional release, and the role of remorse in this practice.

<sup>32</sup> Steven Shavell, "A Model of Optimal Incapacitation" (1987) 77:2 *The American Economic Review* 107 at 107. See also Thomas Miceli, "Deterred or Detained? A Unified Model of Criminal Punishment" (2012) 8:1 *Review of Law & Economics* 1. Shavell and Miceli incorporate the incapacitation function of prison into the standard economic model of crime.

<sup>33</sup> Both the likelihood and severity of crime are mentioned in the PBC's Policy Manual, see text accompanying note 39, below.

<sup>34</sup> Mungan, *supra* note 23 at 11; Shavell, *supra* note 32.

<sup>35</sup> Parole Board of Canada, *Performance Monitoring Report 2010/2011*, online: <[www.pbc.gc.ca](http://www.pbc.gc.ca)> [PBC *Performance Monitoring Report*] ("offenders released on parole as a result of a rigorous risk-assessment are more likely to successfully complete their supervision periods than offenders released on statutory release", at 38). Offenders will have completed their supervision successfully where they are not re-incarcerated for either a new offence or breach of condition before the expiry of their sentence (*ibid*).

### III. The Role of Remorse in Release Decisions

Remorse enters the equation once we inquire into *how* the Parole Board decides whether release will present an undue risk to society and facilitate the offender's reintegration. If the Board believes that remorse lowers an offender's risk, this means that offenders who are perceived as remorseful (whether they are or not) are more likely to be released. The economic rationale for this is that if it is true that a remorseful offender is less likely to recidivate than an unremorseful offender then the incapacitative benefits of incarcerating remorseful offenders will be lower than the corresponding benefits of incarcerating unremorseful offenders.<sup>36</sup> If the incapacitative benefits of incarcerating a remorseful offender are sufficiently low, they may be outweighed by the rehabilitative benefits of release. So if we assume that (a) the board considers remorse when making a release decision, (b) that a remorseful offender is less likely to recidivate, and (c) that Board members are able to separate remorseful offenders from unremorseful ones, then, all else being equal, it would be optimal to release remorseful offenders sooner than unremorseful offenders.

The remainder of this section tests these assumptions by looking at the Parole Board's actual decision-making process. If the Board does not consider an offender's expressions of remorse then it is irrelevant to ask whether remorse is an efficient indicator of risk. However, if the Board does consider remorse, it will only be an efficient indicator if it is actually true that a remorseful offender is less likely to recidivate and if Board members are capable of accurately determining whether an offender is remorseful. I will focus primarily on the first assumption since the second and third assumptions involve complex psychological inquiries that are beyond the scope of this paper.

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<sup>36</sup> Mungan, *supra* note 23 at 48.

### ***A. Does the Board Consider remorse?***

Determining what factors the Board relies on when making a release decision is made especially difficult by the fact that release decisions are highly discretionary, have no binding effect on subsequent decisions, and are largely unreported. In some ways parole determinations are a black hole of legal decision making. In an attempt to fill this gap and arrive at a basic understanding of the PBC's process, and whether it includes assessments of remorse, I rely on the PBC's Policy Manual, judicial review decisions, personal observations from attending seven parole hearings, and some of the leading literature on the topic.<sup>37</sup>

The PBC's Policy Manual states that its decisions are based on three principles: (1) the paramount consideration is the protection of society, (2) supervised release increases an offender's chance at successful reintegration, and (3) restrictions on the offender's freedom must be limited to what is necessary and reasonable in light of the first two principles.<sup>38</sup>

The Policy Manual also provides the following guidance to Board members:

The determination of undue risk is normally based on a structured approach used to evaluate all risk relevant information in the assessment of the offender's likelihood of re-offending taking into consideration the nature and severity of the offence that could be anticipated should the offender re-offend.<sup>39</sup>

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<sup>37</sup> To do justice to this issue would require a full quantitative analysis of release decisions made by the Parole Board. To my knowledge, no such analysis has been published.

<sup>38</sup> Parole Board of Canada, *PBC Policy Manual*, vol 1, no 25, (28 August 2012) pol 1.2 at 1 [*PBC Policy Manual*]. These are also reflected in s. 101 of the *CCRA*.

<sup>39</sup> *Ibid*, pol 2.1 at 1.

The “structured approach” includes considering aggravating and mitigating factors that appear to increase or reduce the risk of re-offending.<sup>40</sup> While the Policy Manual does not indicate what these factors would be, it does identify six main areas of inquiry:

- *Actuarial measures of the risk to re-offend*: the Board relies on the SIR-R1 scale to assess general risk among non-Aboriginal male offenders,<sup>41</sup> as well as clinical judgments and parole officers’ assessments;<sup>42</sup>
- *The offender’s criminal, social, institutional and conditional release history*: this includes the index offence,<sup>43</sup> any previous breaches of parole or probation conditions, indications of violence, recommendations of the sentencing judge and victim impact statements;
- *Factors that may affect the offender’s self-control*: these include mental illness, sexual deviance, impulsivity and substance abuse;
- *The offender’s responsiveness to programming*;
- *The offender’s change*; and
- *The offender’s release plan and community management strategies*.<sup>44</sup>

Remorse and related words, such as regret, guilt or shame, do not appear anywhere in the Policy Manual or the statute, however remorse may be relevant to several of these categories. For instance, the Board may consider the recommendations of the sentencing judge, which may refer to the presence or absence of remorse. Canadian courts have

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<sup>40</sup> *Ibid*, pol 2.1 at 2.

<sup>41</sup> The Statistical Information on Recidivism – Revised 1 (SIR-R1) scale is a psychometric examination designed to predict risk. Although there is some evidence that the scale has predictive validity for Aboriginal and female offenders as well, the Correctional Service of Canada does not require that it be used. See Annie K Yessine & James Bonta, “Tracking High-Risk, Violent Offenders: An Examination of the National Flagging System” (2006) 48:4 Canadian Journal of Criminology and Criminal Justice 573 at 584.

<sup>42</sup> Psychological and psychiatric reports are very influential in determining risk but the Board is not bound by them. See *Reyat v Canada (AG)*, 2007 FC 562 at para 20. See also *Condo v Canada*, 2005 FCA 391.

<sup>43</sup> The index offence is the offence for which the offender is serving his current sentence. The Board will not restrict its inquiry to this offence but will consider the offender’s entire criminal history.

<sup>44</sup> *PBC Policy Manual*, *supra* note 38, pol 2.1 at 2–9.

recognized the presence of remorse as a mitigating factor in sentencing.<sup>45</sup> However, in *R v. Zeek*, the British Columbia Court of Appeal held that it was “an error in principle to consider lack of demonstration of remorse as an aggravating circumstance in sentencing”.<sup>46</sup> So it is possible that sentencing recommendations could consider the offender’s remorse and that this would in turn be considered by the Parole Board. However there is no way of knowing to what extent sentencing recommendations factor into the Board’s decision-making process.

The category that likely provides the most insight into whether the Board considers remorse is offender change. It states that the Board will consider “the offender’s understanding of crime cycle indicators, . . . acceptance of positive cultural values, [and] . . . motivation to change”.<sup>47</sup> This section also states that the Board will consider professional reports assessing an offender’s “anti-social attitudes and behaviours, and other personality factors such as . . . emotional and intellectual maturity”.<sup>48</sup>

Expressions of remorse could conceivably fit into many of these aspects of offender change. And if some of these concepts are synonymous with how we understand remorse then, in an indirect way, remorse *is* considered by the Parole Board, it is just called by a different name. Michael Proeve & Stephen Tudor write that “the remorseful person thinks about what he did, how it affected other people, and may experience a sense of changed self

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<sup>45</sup> Remorse is referred to as a mitigating factor in passing in *R v Proulx*, 2000 SCC 5 at paras 113, 122. See also *R v Anderson* (1992), 74 CCC (3d) 523 (BCCA) at paras 535-36; *R v Sawchyn* (1981), 60 CCC (2d) 200 (Alta CA).

<sup>46</sup> *R v Zeek*, 2004 BCCA 42 at para. 24. See also *Anderson* and *Sawchyn*, *supra* note 45.

<sup>47</sup> *PBC Policy Manual*, *supra* note 38, pol 2.1 at 7.

<sup>48</sup> *Ibid.*



as a result of his actions”.<sup>49</sup> According to the PBC’s Policy Manual, these are precisely the factors the Board considers when assessing an offender’s risk.

For example, consider an offender who is convicted with trafficking in controlled substances. Some offenders may see this as a victimless crime since they committed no violent acts and if they themselves are not drug users they may have a limited understanding of the social impact of their criminal conduct. This type of offender would not be perceived as remorseful. But what if the offender tells the Board that his cellmate is being treated for a heroin addiction and that for the first time in his life he sees the effects of drugs? He may also say that he is moving to a different city after he is released in order to avoid falling in with the same crowd and regrets the impact of his offence on his family. This is in fact very similar to what was said in one of the hearings I observed, the only hearing in which parole was granted. If sincere, these types of comments reveal a remorseful person—someone who regrets what they have done, agrees that his actions were morally or socially unacceptable and is willing to do whatever it takes to make better choices in the future. Essentially, the Policy Manual breaks remorse into its constituent elements and then instructs the Board to look for these elements rather than focussing on “remorse” as a singular concept.

To gain a better understanding of how these guidelines are applied, I attended seven parole hearings as an observer. My goal was to see whether and to what extent the Board accounts for remorse when making a risk assessment. I considered the following factors:

- The type of release (UTA, day/full parole, post-suspension or detention);<sup>50</sup>

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<sup>49</sup> Proeve & Tudor, *supra* note 4 at 170.

<sup>50</sup> The hearings I attended were for: UTA (1), day parole (1), post-suspension from day parole (2), post-suspension from statutory release (1), detention (1), and full parole for deportation (1).

- Whether the offender had been before the Board before;
- The index offence and whether the offender admitted legal guilt;
- Whether the Board asked any direct questions about regret or remorse;
- Whether the offender made any statements (either in response to questions or not) indicating regret or remorse and whether these statements were accompanied by emotional displays that could be conceived as expressions of remorse; and
- The board's decision and reasons (if given).

The first three questions did not directly address remorse but were intended to provide context. For instance, although the sample was small, I wanted to see whether Board members asked different types of questions depending on the type of hearing. And whether the offender had admitted guilt was also relevant, since one would not expect a demonstration remorse from someone who maintained his innocence. This is an admittedly small sample and what follows is a limited qualitative study on how some members of the Parole Board assess risk. However, I did make several observations that I believe give some insight to the Board's decision-making process.<sup>51</sup>

At each of the hearings I observed there were two Board members who conducted the hearing and a hearing officer who explained the process to the offender and recorded the hearing. The offender's institutional parole officer (IPO) began the hearing by summarizing the institution's recommendation for release. In a hearing where the institution was not recommending release, the IPO told the Board that while the offender verbalized a desire to change his violent behaviour, he demonstrated limited insight and had not expressed any remorse or victim empathy. In another hearing, the IPO stated that the offender was remorseful, sincere, and had demonstrated victim empathy despite having a

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<sup>51</sup> I make only general references to the index offence, length of incarceration and reasons for decision in order to preserve the confidentiality of the hearing. Although hearings are technically open to the public, there is a specific clearing process any member of the public must go through in order to observe a hearing or obtain a copy of the hearing transcript.

limited memory of the index offence, which at the time of the hearing had occurred almost 50 years ago. While waiting for a hearing to begin, one IPO (who was not participating in a hearing that day) informed me that the “key words” for release were “insight, understanding and remorse” and that, in his opinion, if the offender failed to demonstrate these characteristics he would not be released. Most IPOs did not refer to an offender’s remorse (or lack thereof) in their opening comments but focussed on the offender’s institutional behaviour and employment, psychological reports, and program participation.

Although the Board members’ questions were topical and followed the structure outlined in the PBC’s policy manual,<sup>52</sup> they varied greatly from one hearing to another. Board members had different questioning styles, with some being more abrasive than others. Many of the questions were specific to the offender’s file. In only one of the seven hearings I observed did a Board member directly elicit responses from the offender about whether he was remorseful; specifically, the Board member asked whether there were any victims that stood out to the offender—any that he felt particularly bad about. This Board member also asked how the offender felt when he read the victim impact statement. In response the offender stated that he felt bad about all of his victims and that he would have to live with that for the rest of his life. He also stated that prison had given him time to reflect on what he had done, and he realized that this was his last chance to be better (since another conviction would likely result in a life sentence or dangerous offender designation). In this particular case, the offender had scored high on the psychopathy test, something mentioned repeatedly by the Board members during the hearing.<sup>53</sup>

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<sup>52</sup> See text accompanying note 44.

<sup>53</sup> The Psychopathy Checklist is one of the many actuarial risk-assessment instruments that is used to measure an offender’s risk.

It was more often the case that Board members would ask questions such as why the offender committed the index offence, why he breached his conditions of parole (if applicable) and what he had learned since he had been (re-)incarcerated. Despite the fact that feelings of remorse and responsibility were not explicitly elicited, offenders consistently made statements such as “I take full responsibility”, “It won’t happen again”, and “I admit it was wrong” without solicitation from Board members. It is difficult to know how important these statements were to Board members but at the very least they show that there was a possible discrepancy between how offenders and Board members perceived the role of remorse in release decisions. It seemed that offenders and their IPOs believed that an admission of responsibility and demonstration of remorse were more vital to the risk assessment than the Board members did.

After the Board has taken time to deliberate, it provides the offender with an oral decision. In some cases it will adjourn to obtain more information, such as whether the offender would be accepted by a half-way house in a certain city. A written decision and reasons follow within a certain amount of time after the hearing. In the seven hearings I observed, the Board denied release in five, reserved their decision in order to obtain additional information in one, and granted day parole in one. The Board members’ oral reasons were limited and they made no reference to a presence or lack of remorse as a reason for their decisions.

Before applying for judicial review offenders must appeal to the PBC’s Appeal Division. Like the initial decision, Appeal decisions are unreported and not easily accessible by the public. The PBC’s Performance Monitoring Report from 2010-2011 states that the Appeal Division only modified the Board’s original decision in 27 of the 537

decisions it rendered in this time period.<sup>54</sup> These modifications included ordering a new hearing and altering the Board's imposition of special conditions.<sup>55</sup> It is very unlikely for the Appeal Division to decide that an offender should be released on parole. If the Board's decision is unreasonable or does not meet the requirements of procedural fairness the case will likely be sent to a new panel for a new hearing.

One can obtain some additional insight into parole decision making by looking at judicial review decisions. However, they are few and provide limited guidance on how to apply the *CCRA*'s "undue risk to society" standard. Moreover, the courts are highly deferential to the PBC and will overturn decisions only if they are unreasonable.<sup>56</sup> A decision will be reasonable where it is justifiable, transparent and intelligible and where it falls within a range of possible, acceptable outcomes that are supported by the facts of the case.<sup>57</sup> For someone seeking judicial review, this is a difficult threshold to meet, since it would be unlikely for Board members to issue reasons that do not demonstrate some sort of justifiable connection between their decision and the facts of the case. Moreover, the courts have held that risk assessments involve questions of fact, or mixed fact and law and that "[b]eing an expert in this field, the Board is in the best situation to analyse the facts presented to it, as well as the credibility of the applicant during the oral hearings".<sup>58</sup>

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<sup>54</sup> PBC *Performance Monitoring Report*, supra note 35 at 27.

<sup>55</sup> *Ibid.*

<sup>56</sup> This is consistent with the court's approach to administrative bodies on findings of fact. To my knowledge there has been no attempt to catalogue all judicial reviews of parole decisions. Most judicial review applications fall under section 745.6 of the Criminal Code, also called the "faint hope" clause, which allows offenders to apply for judicial review to seek a reduction in the amount of time they must serve in prison before being eligible for parole. It only applies to offenders who are serving life sentences without parole eligibility for more than 15 years. Section 745.6 has been recently repealed by Bill S-6, *An Act to amend the Criminal Code and another Act*, 3rd Sess, 40th Parl, 2010, cl 3. Creating a data set for judicial review of PBC decisions would require sifting through and eliminating all of the section 745.6 applications.

<sup>57</sup> *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

<sup>58</sup> *Bedi v Canada (AG)*, 2004 FC 1722 at para 19. See also *Strachan v Canada (AG)*, 2006 FC 155 at para 16.

Regardless of the type of release, the factors the Board is entitled to take into account are seemingly endless. And given the diverse backgrounds and expertise of Board members it is almost impossible to predict which factors will be given more weight than others. For example, in *Condo v. Canada (AG)* the Court acknowledged that the Board had considered many factors in making its decision, including the “substantial degree of indifference toward past offences and the consequences thereof as well as a lack of insight into and superficial remorse, minimization and rationalization and shifting of blame for past offences”.<sup>59</sup>

Similar reasons were given in *Listes v. Canada (AG)*, where the offender applied for judicial review of the Appeal Division’s determination that the PBC’s decision to deny day and full parole was reasonable.<sup>60</sup> In this nine paragraph decision, the Court’s explanation of the meaning of “undue risk” was scant. It merely stated that, like the PBC, the Appeal Division correctly applied the principles outlined in sections 100 and 102 of the *CCRA*. The Court also noted that according to the psychological reports, “there had been a complete lack of rehabilitation” and “the applicant has not done any soul-searching; he continues to perceive himself as a victim and he hasn’t been at all motivate to involve himself in various treatments”.<sup>61</sup>

The Board’s most direct and publicized consideration of a lack of remorse was when it denied Robert Latimer’s request for day parole in December 2007. Joane Martel argues that in spite of psychological risk assessments indicating that Latimer had a very low risk of re-offending and that this risk was manageable in the community, he was denied day

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<sup>59</sup> *Condo v Canada (AG)*, 2005 FCA 291 at para 48.

<sup>60</sup> *Listes v Canada*, 2004 FC 860.

<sup>61</sup> *Ibid* at para 5.

parole on the apparent “sole basis that he had not developed sufficient insight and understanding into his actions [and that] he expressed no remorse for his crime”.<sup>62</sup> Latimer appealed the decision to the PBC’s Appeal Division, which overturned the initial ruling. The Appeal Division held that Latimer did not represent an “undue risk” of reoffending, as required by section 102 of the *CCRA* and granted his day parole.<sup>63</sup> However, Martel argues that it still framed his remorselessness as a risk by imposing a condition that he should “not have responsibility for, or make decisions for, any individuals who are severely disabled”.<sup>64</sup>

These cases and observations reveal that in at least some circumstances the Board does consider a lack of remorse when it denies release and that, contrary to sentencing principles, this has been deemed a valid consideration by the Court. What the case law is unable to tell us is whether there is a difference between remorse as an aggravating or mitigating factor. If there are situations where an offender is released substantially on the basis that he was remorseful, this decision will not be appealed. So we are only left with judicial review of decisions where an offender was unhappy with the Board’s decision and in these circumstances an offender’s lack of remorse will likely be more relevant than any remorse or regret he did demonstrate.

A parole board’s reliance on remorse is also supported by studies from Canada, the U.S. and the U.K. While literature that assesses the role of an offender’s remorse during trials and sentencing is more common, there are some empirical studies that seek to identify the factors related to the release of offenders.<sup>65</sup> In a recent U.S. study that assessed the

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<sup>62</sup> Joane Martel, “Remorse and the Production of Truth” (2010) 12:4 *Punishment & Society* 414 at 418.

<sup>63</sup> *Ibid* at 419.

<sup>64</sup> *Ibid* at 430 citing NPB Appeal Division decision, 27 February 2008: 7–8.

<sup>65</sup> Most of these studies are restricted to male offenders. For an assessment of factors that shape release decisions for female offenders see Kelly Hannah-Moffat & Carolyn Yule, “Gaining insight, changing attitudes and managing ‘risk’: Parole release decisions for women convicted of violent crimes” (2011) 13:2

consequences of failing to admit guilt for innocent prisoners, Daniel Medwed wrote that “a prisoner’s willingness to ‘own up’ to his misdeeds and to acknowledge culpability and express remorse . . . is a vital part of the parole decision-making calculus”.<sup>66</sup> This, Medwed argues, has a disproportionately negative effect on those who are wrongfully convicted.

Nicola Padfield and Alison Lieblich conducted a comprehensive study of parole decisions for offenders who had received discretionary life sentences in the U.K. The panel’s risk analysis was similar to the Canadian approach and involved balancing the interests of the prisoner and the public.<sup>67</sup> The study found that although it was difficult to test, remorse was an important component of the risk assessment.<sup>68</sup> An offender’s lack of remorse was “seen as particularly significant and inappropriate in cases of sexual crime”.<sup>69</sup> In some cases the panel preferred various proxies for remorse that were easier to test, such as the offenders’ understanding of the effect of their crimes on their victims.<sup>70</sup> This study also relied extensively on the experiences of David Tidmarsh who acted as a psychiatric member of the Parole Board of England and Wales for many years.<sup>71</sup> His conclusions reflected the answers of the Board members I was able to speak with when I observed the hearings referred to above:

Expressions of guilt are important and though probably necessary for a confident recommendation for release, are not sufficient. Remorse is far

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Punishment & Society 149 (“in contrast to previous findings about male prisoners, . . . remorse [was] not significantly associated with release decisions for women who have committed acts of serious violence” at 159).

<sup>66</sup> Daniel S Medwed, “The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings” (2008) Iowa L Rev 491 at 493.

<sup>67</sup> Nicola Padfield & Alison Lieblich, “Home Office Research Study 213: An exploration of decision-making at discretionary lifer panels” (Institute of Criminology, University of Cambridge, 2000) at ix.

<sup>68</sup> *Ibid* at 50.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid* at 51.

<sup>71</sup> David Tidmarsh, “Necessary but not Sufficient: The Personal View of a Psychiatric Member of the Parole Board” in Murray Cox, ed, *Remorse and Reparation*, (London: Jessica Kingsley Publishers, 1999) 49 at 49.



more convincing when translated into action and the more relevant this action is to the offence the more convincing it is.<sup>72</sup>

These studies, cases and guidelines show that remorse, whether it is framed as regret, insight or motivation to change, does play a role in the Board's assessment of risk. An offender who demonstrates these characteristics is "less costly" to release than an offender who does not. However, as mentioned above, remorse will only be an efficient indicator of risk if remorseful offenders are in fact less likely to recidivate and if Board members can distinguish them from those who lack remorse. If they can not then assessments of remorse could lead to sub-optimal release decisions. I turn to these questions next.

### ***B. Are Remorseful Offenders Less Risky?***

The relationship between remorse and recidivism is a difficult psychological question and the literature is equivocal. As with much of our criminal law, the focus on responsibility and remorse has roots its in Judeo-Christian traditions of confession, contrition and atonement.<sup>73</sup> Moreover, modern psychology states that "denial", which is presumably the opposite of remorse "impedes personal growth",<sup>74</sup> and that emotional guilt is connected to behavioural control, learning lessons and altering behaviour.<sup>75</sup> Psychological studies have also shown that a lack of remorse is a good indicator of psychopathy, which is associated with "high levels of violence and poor outcome following release from prison".<sup>76</sup>

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<sup>72</sup> *Ibid* at 58.

<sup>73</sup> Medwed, *supra* note 66 at 533.

<sup>74</sup> *Ibid* at 533–34.

<sup>75</sup> *Ibid* at 534, n 210.

<sup>76</sup> Proeve & Tudor, *supra* note 4 at 209.

Remorse is easily conflated with other similar notions such as guilt, shame, regret and responsibility but some empirical studies show that there is a meaningful difference between these emotions and how they relate to a person's ability to change.<sup>77</sup> For instance, Proeve and Tudor write that shame is the least helpful emotion because "the sole cognitive focus in regard to the offence is on what the offence means for oneself and not about what one did".<sup>78</sup> Regret and remorse, on the other hand, lead to more positive results. For instance, "prudential regret" describes unremorseful offenders whose desire to change is "the result of a gradual accumulation of discomfort with their lives, rather than epiphany".<sup>79</sup> The authors argue that this type of regret is not met with the same kind of social rewards as remorse since it involves less soul searching, however it is still capable of leading to behavioural change.

There are also studies that suggests that the intuitive connection between remorse, rehabilitation, and decreased risk of re-offending is unreliable. In Roger Hood's 2002 study of convicted sex offenders, 47 of the 144 inmates were deemed to be "in-denial" and were thus more likely to be labeled as "high risk". However, only 2.1% of these "high-risk deniers" reoffended, compared with 17.5% of the "low risk non-deniers".<sup>80</sup> A study by the Correctional Service of Canada also "found that the relationship between remorse and recidivism was not statistically significant".<sup>81</sup>

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<sup>77</sup> *Ibid* at 70.

<sup>78</sup> *Ibid* at 170.

<sup>79</sup> *Ibid* at 169.

<sup>80</sup> Medwed, *supra* note 66 at 537 citing Roger Hood et al, "Sex Offenders Emerging from Long-Term Imprisonment: A Study of Their Long-term Reconviction Rates and of Parole Board Members' Judgments of Their Risk" (2002) 42:5 *Brit J Criminology* 371 at 387.

<sup>81</sup> Proeve & Tudor, *supra* note 4 at 209 citing RC Serin, DM Mailloux & S Hucker, *The Utility of Clinical and Actuarial Risk Assessments for Offenders in Pre-release Psychiatric Decision-making* (Ottawa: Correctional Service of Canada, 2000).

Addiction is another complicating factor. In one of the hearings I observed, the offender was struggling with a drug addiction. His parole had been suspended and the Board had to decide whether to give him another chance. In this case there was no doubt that his remorse was sincere, but there was extreme doubt as to whether it would make a difference in his behaviour.

Martel writes that parole boards “tend to work with the postulate that denial or remorselessness are adequate risk markers”.<sup>82</sup> The adequacy of remorse as a risk indicator is ultimately beyond the scope of this paper. However, at the very least we can say that both remorse and remorselessness are inefficient indicators of risk by themselves and need to be tempered by other considerations.

### ***C. Can Board Members Accurately Assess Remorse?***

Even if we assume that there is a positive correlation between remorse and decreased recidivism, we are still left with the question of whether remorse can be accurately assessed by Board members. The criminal justice system relies extensively on the human ability to assess emotion and parole decisions are no different. Evidentiary rules such as the rule against hearsay, for example, are partly based on the fact that juries will not be able to assess the demeanour of the declarant of the out of court statement and therefore will not be able to assess credibility. This rule would not exist if we did not trust the jury to make reasonably accurate assessments of sincerity. However, there are various obstacles to making this kind of assessment in the parole context and I will discuss two of them in this section: intentional deception or insincerity by strategic and knowledgeable inmates and cultural and ethnic barriers that cause Board members to misinterpret emotional cues.

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<sup>82</sup> Martel, *supra* note 62 at 430.

Presumably, it is not enough for an inmate to say he is sorry—he must legitimize his remorse in some way by expressing it through words or emotions. However this is problematic when we consider that the offender is also a rational actor and will attempt to demonstrate remorse where it could benefit him. Offenders are coached by institutional parole officers, lawyers and fellow inmates on what they must say and do to increase their chances of parole. The question is, how should Board members measure sincerity? Is remorse something that is inherently felt, or is it learned? And if it is learned does this make it insincere?

Institutional programming is based on the idea that offenders can learn to empathize with victims and to internalize other aspects of remorse. So it is conceivable that an offender could appear remorseless at his first hearing and remorseful at a later hearing. But the opposite could also be true—perhaps the passage of time should alter the Board’s expectations. It might be “unrealistic to expect guilt to be shown and reported late in a long sentence”.<sup>83</sup> An offender who appears before the Board may have become desensitized to the specific facts of the offence, no matter how gruesome, simply by repeating them over and over again to lawyers, parole officers and program administrators. The offender may feel a great deal of remorse; however, after 15 years or more of imprisonment he may not be able to produce the expected emotional response. This may be the reason the PBC’s Policy Manual breaks remorse into its constituent elements—to guide the Board into making more accurate assessments of remorse. For instance, if an offender can point to specific examples of how his thinking has changed, the Board may perceive him as more credible, regardless of a perceived lack of emotion.

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<sup>83</sup> Tidmarsh, *supra* note 71 at 54.

Another reason that remorse is an inefficient indicator of risk is that it may be felt and expressed differently depending on a person's culture, upbringing and religion. For example, Proeve and Tudor canvass various stories of remorse in different religions. One of the great narratives of Hinduism—*The Mahabharata*—features remorse and suggests that too much remorse, or remorse that is felt or expressed in an inappropriate way is “a form of self-indulgence, even selfishness”.<sup>84</sup> Somewhat similarly, remorse is a hindrance to enlightenment in Buddhism since it focuses on “egocentric attachments”.<sup>85</sup> In these traditions, changing one's behaviour may be an important value, but this may not be related to the type of inward reflection that we often associate with remorse. The implication is that offenders who admit that what they did was wrong but express their desire “to move on because they cannot change the past” may be perceived as dismissive or unremorseful when in fact this may be a proper and legitimate response to their offence.

In a study of risk assessments in pre-sentence reports, Barbara Hudson and Gaynor Bramhall looked at various differences in the reports generated for white and Asian males.<sup>86</sup> Some of the “dynamic” factors in the risk assessment were “accepting responsibility for offending; acknowledging harm to the victim; concern for close people; motivated to deal with problems; motivated not to reoffend”.<sup>87</sup> These closely mirror the factors for assessing an offender's change in the PBC Policy Manual.<sup>88</sup> The authors found that generally, the white offenders in the study were more “risky” than the Asian offenders, both in terms of static and dynamic risk factors. But there was one dynamic category in

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<sup>84</sup> Proeve & Tudor, *supra* note 4 at 25.

<sup>85</sup> *Ibid* at 26.

<sup>86</sup> Barbara Hudson & Gaynor Bramhall, “Assessing the ‘Other’: Constructions of ‘Asianness’ in Risk Assessments by Probation Officers” (2005) 45 *Brit J Criminol* 721 at 725.

<sup>87</sup> *Ibid* at 724.

<sup>88</sup> See text accompanying notes 44–45.

which Asians were “riskier”—that of denying responsibility for the offence. The authors found that pre-sentence reports in the case of white offenders demonstrated more of a dialogue and a process of mutual understanding. The reports for Asian offenders, by contrast, were “thin” and showed that for Asian offenders there was “no discursive space in the interview (at least, as reflected in the reports) for remorse to emerge, for understanding of the seriousness of the offence to be reached or for responsibility to be accepted”.<sup>89</sup>

One must ask whether there is a similar lack of “discursive space” for certain offenders in parole hearings, or even in the report-producing interactions they have with correctional staff leading up to the parole hearing. The PBC’s substantial amount of discretion in making release decisions, and the court’s unwillingness to review the substance of these decisions could lead to “unwitting discrimination” if the Board is not alert to this possibility.<sup>90</sup>

#### **IV. Behavioural Economics: Sometimes People are Just Irrational**

The previous section built on a rational choice theory of economics as it applies to conditional release decisions. It assumed that Board members are rational actors who balance the expected costs and benefits of release in order to arrive at an optimal outcome. Despite the tenuous connection between remorse and recidivism and the inherent difficulty in separating remorseful and unremorseful offenders, Board members who consider remorse in their risk assessments are acting rationally. Up to this point, I have argued that the inefficiency of remorse is not due to irrational decision making but rather its intrinsically slippery nature as an indicator of risk.

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<sup>89</sup> Hudson & Bramhall, *supra* note 86 at 730.

<sup>90</sup> *Ibid* at 737.

The primary criticism of traditional economic theory is that it relies too much on the idea that people are rational actors. Behavioural economics, which is built primarily on empirical studies rather than theoretical modelling, suggests that people deviate from perfect rationality in systematic and predictable ways. The fact that people act irrationally could undermine the fundamental premise of an economic analysis but it could also simply mean that the “traditional economic analysis ought to be supplemented by behavioural and experimental research”.<sup>91</sup> Adopting the latter approach, Richard McAdams and Thomas Ulen consider various deviations from the standard economic assumption of rationality and discuss how these are relevant to non-criminal actors in the criminal justice system.<sup>92</sup>

I suggest that the heuristics and biases they identify can be applied to Parole Board members as well. A “heuristic” is simply a rule that impacts the way one makes a decision. For instance, the “availability heuristic” is a mental shortcut that causes people to overestimate the frequency of memorable events.<sup>93</sup> For example, if I get a speeding ticket I am more likely to drive slower afterwards, even though there may have been no increase in the probability of getting a ticket (assuming there has been no increase in police patrol). I drive slower, not because it is rational, but because the unpleasant experience of getting a ticket is fresh in my mind. In the context of release decisions, stories of lifers (offenders with life sentences) who commit murder while released on parole could potentially impact a Board member’s assessment of risk in the same way. The availability heuristic may also affect release determinations in a more indirect way. Horrific stories of paroled offenders who commit violent crimes lead to public outcry and a demand for stricter parole conditions

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<sup>91</sup> Harel & Hylton, *supra* note 16 at 35.

<sup>92</sup> *Supra* note 1.

<sup>93</sup> *Ibid* at 5.

even though, statistically, crime rates could be falling.<sup>94</sup> This can have a trickle down effect as government policies impact the appointment and training of Parole Board members.

A confirmation bias may also impact the Parole Board's assessment of risk. This is "the tendency for individuals to search for new evidence and to interpret ambiguous evidence in a way that confirms their existing beliefs (all without consciously aiming to do so)".<sup>95</sup> Just as police officers who believe that a suspect is guilty will interpret ambiguous evidence in favour of guilt, so might Board members, who believe that an offender is unremorseful, interpret ambiguous emotional cues as a lack of remorse.<sup>96</sup> Board members review all cases before a hearing and are thoroughly familiar with an offender's index offence and institutional history, including psychological and risk assessments, program reports and disciplinary offences. If a psychologist or institutional parole officer reports that the offender lacks remorse or insight or does not accept full responsibility for his offence, then the Board members who read this report may interpret the offender's responses during the hearing as corroborating their existing opinions. An offender who says that he has reflected on his actions, takes full responsibility for his crimes and regrets making his victims suffer may be dismissed as "faking it" if his institutional paperwork states that he has not been remorseful.

Board members may also look for a lack of remorse where they think it does not exist. As mentioned above, one of the hearings I observed was for the day parole of an

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<sup>94</sup> See National Parole Board, "Vision 2020 – Public Safety, Public Service" (Ottawa: Government of Canada, 2009) ("the public remains sceptical about declining crime rates, focusing instead on media reports of tragic incidents, which are frequently characterized as system failures" at 9); Ian Mulgrew, Canadians buy into Harper's crime crackdown; Despite statistics showing falling crime rates, two-thirds of the public like the get-tough stance", *The Vancouver Sun* (30 April 2011) A13.

<sup>95</sup> McAdams & Ulen, *supra* note 1 at 27.

<sup>96</sup> *Ibid* at 27-28 (on the role of confirmation bias in police investigations). See also Keith A Findley & Michael S Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases" (2006) *Wis L Rev* 291.



offender who had scored high on the psychopathy scale. Interestingly, this was the only hearing I observed with a detailed inquiry into an offender's remorse. The Board member may have been looking for indicators that confirmed the diagnosis such as insincere expressions of remorse, attempts to deceive or apathy. Of course this may be completely valid since the alternative would be to accept the report at face value and not follow up with the offender on these issues. But even if that is the case, it seems strange to pursue an inquiry into an offender's level of remorse, when the Board member knows that this is likely the least reliable indicator of recidivism for this type of offender.

The confirmation bias is particularly problematic in the case of wrongful convictions. Richard Weisman writes that the absence of remorse can result in someone being diagnosed as "sociopathic" by one person and can be interpreted as "consistent with the reaction of an innocent man" by someone else.<sup>97</sup> Since an offender has been convicted of the offence "beyond a reasonable doubt" the Board will (and is probably entitled) to assume that he is guilty. Failure to demonstrate that guilt in some way is more likely to be interpreted as a lack of insight, understanding and ability to change than it is to reveal the honest expressions of an innocent person.

The role of emotion or "affect" in individual decision making may also cause the Board to deviate from perfect rationality. Specifically, moral intuitions about the underlying rationale for punishment and release may guide a Board member's decision to deny release, even though she subscribes to a different normative guide.<sup>98</sup> This has been

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<sup>97</sup> Richard Weisman, "Showing Remorse: Reflections on the Gap between Expression and Attribution in Cases of Wrongful Conviction" (2004) 46 *Canadian Journal of Criminology & Criminal Justice* 121 at 130.

<sup>98</sup> Cherie Metcalf, "Introduction: Emerging Paradigms of Rationality—Theory and Applications" (2009) 35:1 *Queen's LJ* 1 at 20-21.

described as a dual systems approach to cognition.<sup>99</sup> System I is characterized by instinctive judgements that rely on emotional cues and System II cognition is slower, and draws on logic and evidentiary justification.<sup>100</sup>

The difference between the two is illustrated in a study by Kevin Carlsmith, John Darley and Paul Robinson.<sup>101</sup> The study assessed people's psychological motivations for imposing punishment and showed that although people say that deterrence is an important rationale for punishment, when they are asked to impose a punishment in a specific case they will opt for a "just deserts" model instead. Just deserts is "retrospective rather than prospective" model of punishment; it is concerned with ensuring that the punishment fits the crime, not its deterrent effect.<sup>102</sup> The authors suggest that when thinking about sanctions on a macro or societal level (System II) the intuition is to deter people, but when looking at the facts of a specific case, on a micro level (System I), people are more likely to try and punish offenders according to what they deserve.<sup>103</sup> The authors also found that the participants imposed higher punishments when deterrence, rather than deservingness, was the goal.<sup>104</sup>

Although the participants in this study were laypeople who were being asked to impose an appropriate punishment and not make a conditional release decision, the dual systems approach to cognition may still provide some insight into parole decisions. Consider this example: Under normal circumstances Michael would never even think of killing someone, however if he finds his wife in bed with another man he may be overcome

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<sup>99</sup> *Ibid* at 18.

<sup>100</sup> *Ibid* at 18-19.

<sup>101</sup> Kevin M Carlsmith, John M Darley & Paul H Robinson, "Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment" (2002) 83:2 *Journal of Personality and Social Psychology* 284.

<sup>102</sup> *Ibid* at 285.

<sup>103</sup> *Ibid* at 296.

<sup>104</sup> *Ibid* at 293.

and kill his wife's lover.<sup>105</sup> Mungan argues that reduced sentences for offenders who commit murder "in the heat of passion" are justified because the "[e]xpected incapacitation benefits from punishing him are small compared to similar benefits from punishing [an unprovoked] criminal".<sup>106</sup> Since the crime was committed under "extreme emotional stimuli", which may be difficult to replicate, the offender's risk of re-offending is low and potential for social re-integration is high. A rational economic approach would suggest that Michael should be released on parole once eligible.

However, the study by Carlsmith *et al* suggests that the just deserts rationale for punishment is closer to people's moral instinct and that this can drive a person's decision even if she believes that another approach is more rational. It is possible that when release decisions are made in the context of a specific offender, or a specific kind of offence, Board members are more likely to be driven by System I cognition and base their decisions on a just deserts rationale rather than a rehabilitative or incapacitative rationale. Since a just deserts theory is "highly sensitive to such contextual factors that mitigate or exacerbate the degree to which a perpetrator deserves punishment" a perceived lack of remorse may increase the moral gravity of the offence.<sup>107</sup> This may lead Board members to deny release on the basis that the offender has not been sufficiently punished, in spite of his low risk of reoffending. Robert Latimer is a case in point. The circumstances that led to his offence would be almost impossible to replicate. Perhaps the emotional intuition of a just deserts model of punishment is what motivated the Board's decision to deny parole.

The Board is not a sentencing body and achieving proportionality is not their mandate. A release decision serves a different purpose than a sentencing decision and it is

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<sup>105</sup> Example borrowed from Mungan, *supra* note 23 at 41.

<sup>106</sup> *Ibid* at 10–11.

<sup>107</sup> Carlsmith, Robinson & Darley, *supra* note 101 at 285.

therefore motivated by different principles. The potential for Board members to make decisions that do not conform to the statutory goals of rehabilitation does not suggest any malicious intent on their part. In fact, the insidious problem with heuristics, biases and other deviations from rationality is that they are often unintentional and unknown.

## **Conclusion**

In this paper I have argued that remorse does play a role in conditional release decision making, even though there is no formal recognition of its value as a risk indicator. An economic model of conditional release is useful because it shows that in spite (and possibly because) of its intuitive value, remorse is not an efficient indicator of risk. Its debateable connection to recidivism and the fact that it is difficult to accurately assess, limits its usefulness in parole decisions. This is exacerbated by the fact that assessments of remorse are vulnerable to cognitive deviations from rationality that may lead Board members to make decisions that depart from the statute's mandate to make carefully balanced determinations of risk.

It is difficult to know to what extent Board members rely on remorse when making release decisions, however there is some evidence that a lack of remorse is more determinative than remorse. This is supported by David Tidmarsh's observations that remorse is a necessary but not sufficient condition for release.<sup>108</sup> This means that if an offender shows remorse but does not have any other indicators of low risk, remorse will be insufficient. However, if an offender has many indicators of low risk and does not show remorse, release may still be denied.<sup>109</sup> If this is the case then a lack of remorse may be an

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<sup>108</sup> Tidmarsh, *supra* note 71.

<sup>109</sup> For example, Robert Latimer (Martel, *supra* note 62).

even *more* inefficient indicator of release than remorse, since other more valid indicators of risk are more likely to mitigate the misleading connection between remorse and lower risk.

The extent to which attributions of remorse or lack of remorse lead to suboptimal release decisions is difficult to assess. One of the outcomes of this research is that it shows how little is known about the factors the Board actually considers when making a release decision. There are relatively few cases that are reviewed by the Appeals Division and even fewer that are examined by the court. The Board needs a reliable accountability mechanism to ensure that release decisions are being made in a consistent manner that conforms to statutory requirements and does not rely on inefficient indicators of risk. This could take the form of periodic reviews of parole determinations but any recommendations would need to begin with a comprehensive review of release decisions. At the very least, this paper shows that when the Parole Board balances an offender's risk of recidivism with his potential for rehabilitation, assessments of remorse only muddy the waters.