IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL PHILLIP ANSELMO,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

Supreme Court No. 81382

Second Judicial District Court
Case No. 271359

Appeal from Second Judicial District Court, State of Nevada, Washoe County
The Honorable Lynne K. Simons, District Judge

APPELLANT'S APPENDIX
VOLUME 8 OF 8
(APPN 1503 – APPN 1682)

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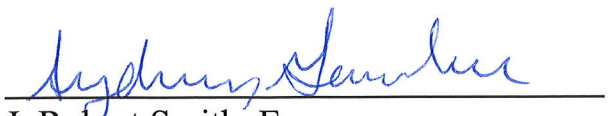
DATED this 6th day of November 2020.



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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I electronically filed the foregoing **APPELLANT'S APPENDIX – VOLUME 8 OF 8 (APPN 1503 – APPN 1682)** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's e-filing system on November 6, 2020.

I further certify that service of the foregoing has been accomplished to the following individuals by the methods indicated below:

☑ Electronic: by submitting electronically for filing and/or service with the Nevada Supreme Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following listed below:

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/s/ Valerie Larsen
An employee of Holland & Hart LLP

EXHIBIT 3

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Seventh Session
April 29, 2013

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 9:04 a.m. on Monday, April 29, 2013, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Tick Segerblom, Chair
Senator Ruben J. Kihuen, Vice Chair
Senator Aaron D. Ford
Senator Justin C. Jones
Senator Greg Brower
Senator Scott Hammond
Senator Mark Hutchison

GUEST LEGISLATORS PRESENT:

Assemblywoman Lesley E. Cohen, Assembly District No. 29
Assemblywoman Lucy Flores, Assembly District No. 28
Assemblyman Ira Hansen, Assembly District No. 32
Assemblyman James Ohrenschall, Assembly District No. 12

STAFF MEMBERS PRESENT:

Mindy Martini, Policy Analyst
Nick Anthony, Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Jim C. Shirley, District Attorney, Pershing County
John Wagner, Independent American Party
Robert Roshak, Nevada Sheriffs' and Chiefs' Association

Kristin Erickson, Nevada District Attorneys Association
Steve Yeager, Public Defender's Office, Clark County
Beverlee McGrath, Best Friends Animal Society; American Society for the Prevention of Cruelty to Animals; Nevada Humane Society; Northern Nevada Society for the Prevention of Cruelty to Animals; Nevada Political Action for Animals; PawPac; Lake Tahoe Humane Society and Society for the Prevention of Cruelty to Animals; Compassion Charity for Animals; Pet Network of Lake Tahoe; Wylie Animal Rescue Foundation; Lake Tahoe Wolf Rescue
Margaret Flint, Nevada Humane Society; Canine Rehabilitation Center and Sanctuary
Richard Hunter
Fred Voltz
Jesica Clemens, Incred-A-Bull
Keith M. Lyons, Jr., Nevada Justice Association
Vanessa Spinazola, American Civil Liberties Union of Nevada
Sean B. Sullivan, Public Defender's Office, Washoe County
Michelle Ravell

Chair Segerblom:
I will open the hearing on Assembly Bill (A.B.) 212.

ASSEMBLY BILL 212 (1st Reprint): Prohibits the possession of portable telecommunications devices by certain prisoners. (BDR 16-639)

Assemblyman Ira Hansen (Assembly District No. 32):
This simple bill takes the prohibition against the possession of cell phones and other portable telecommunications devices by prisoners in the Department of Corrections (DOC) and applies it to inmates of our county jails or similar local detention facilities. The new language in section 1, subsection 4 of A.B. 212 mirrors the language used to prohibit cell phones in prisons. The differences are necessary to clarify that an inmate who is not yet convicted of another crime could still be guilty of possessing a cell phone or similar device without authorization. It also specifies that for jail inmates being charged or already serving a sentence for a misdemeanor, violation of this statute would carry a misdemeanor charge. For those charged with a gross misdemeanor, it would be a gross misdemeanor; for those charged with a felony, it would be a felony. Inmates would not face a stiffer penalty for possessing a cell phone than for the original charge.

The DOC originally proposed a law banning possession of portable telecommunication devices by its inmates in A.B. No. 106 of the 74th Session. The law has worked well for the DOC as a major deterrent against inmates trying to keep cell phones, and the law has not needed amendment since its passage 6 years ago. It is reasonable to have a similar restriction for our jail inmates.

This bill was brought in response to a lawsuit out of Pershing County regarding whether a county jail inmate could have a cell phone in his or her possession. That case eventually went to the Nevada Supreme Court.

Chair Segerblom:
What is the theory behind having the penalty escalate based on why the offender is in jail?

Jim C. Shirley (District Attorney, Pershing County):
We graduated the consequences because if you were in jail waiting to go to prison on a felony charge, it would not worry you to face a misdemeanor charge for carrying a cell phone. We were trying to keep the consequences on the level of the crime for which the person was in jail.

Chair Segerblom:
Did the original bill make it a felony for everyone, and the Assembly Committee on Judiciary reduced it?

Mr. Shirley:
No. The original bill had felonies and gross misdemeanors lumped together and misdemeanors with misdemeanors. When we discussed it before the Committee, the members broke it down so each level had the same corresponding crime. That seemed a lot more fair. Someone in jail on a misdemeanor will not face a felony charge and vice versa.

The lawsuit referred to eventually resulted in the Nevada Supreme Court decision *Sheriff v. Andrews*, 128 Nev. ____, 286 P.3d 262 (2012). We had a prisoner who had somebody throw a cell phone to him over the fence. He then hid the cell phone among some Bibles in his cell. By the time we found it, he had made a number of phone calls, threatening people on the outside and calling family members. We prosecuted him for violation of *Nevada Revised Statutes* (NRS) 212.093, which is the prohibition against having an escape device. The

Nevada Supreme Court said that the prohibition in NRS 212.093 applied only to items that physically manipulated the jail.

In almost every case in which an inmate used a cell phone to escape, murders have been committed either during or immediately following the escape. In fact, a situation like this in Nevada caused the statute to be amended in 2007. In that case, a social worker brought the cell phone in to the prisoner; he used it to communicate with confederates and escaped. After his escape, he killed two or three people. A similar thing happened after a recent escape in Arizona. An inmate used another inmate's cell phone to communicate with confederates, escaped, killed a family in the Arizona desert and fled up into Colorado. In Brazil, there have been cases of carrier pigeons bringing cell phones into jails.

Chair Segerblom:
Have officials considered jamming the cell phone signals in prisons?

Mr. Shirley:
They cannot. A federal law prohibits a local government from having jamming technology within the prisons. In any event, we would never be able to afford something like that in Pershing County. I think it was just an oversight that A.B. No. 106 of the 74th Session did not include language adding jails. The biggest concern is not the use of cell phones to escape; it is their use to threaten witnesses, contact confederates and conduct criminal enterprises while inside the jail. Cell phones bypass the jail phone systems, so the monitoring you normally do of inmates' interactions cannot be done.

Chair Segerblom:
Many of the inmates of county jails are there because they have not yet been convicted. If you are awaiting trial on a felony and you get a felony for having a cell phone, and then you end up pleading to a gross misdemeanor on your original charge, does the cell phone charge become a gross misdemeanor?

Mr. Shirley:
Yes.

Senator Ford:
I am not certain I understand the progression of the penalties. Is the point that a person in jail on a felony is not concerned about a gross misdemeanor, so we need to charge the prisoner with a felony for having a cell phone?

Mr. Shirley:
That is exactly the point. If someone is in jail awaiting trial on a Category A felony, it is not going to mean anything to convict him or her of a misdemeanor because it does not add anything to his or her sentence.

Senator Ford:
Did I understand you to say that if an inmate charge changes from a felony to a gross misdemeanor, the cell phone charge also goes down to a gross misdemeanor?

Mr. Shirley:
That would be the just thing to do. I do not think you should impose a penalty that is heavier than the original charge.

Senator Ford:
Is that in the bill? As I read section 1, subsection 4, I am not certain it says that if the penalty is pled down, the cell phone penalty will follow suit.

Nick Anthony (Counsel):
I believe your reading of the bill is correct. If you would like language that specifically says the inmate could only be convicted of the lesser charge to which he or she pled, then we can certainly add that.

Mr. Shirley:
I would have no objection to that. The intent is for the cell phone possession penalty to mirror the penalty of the crime the inmate was originally charged with.

Assemblyman Hansen:
I concur. That would make perfect sense.

Senator Ford:
I will offer it as a friendly amendment if this bill advances.

Senator Hutchison:
Section 1, subsection 4 says a prisoner shall not possess a telecommunications device "without lawful authorization." How is that phrase interpreted?

Mr. Shirley:
Within a jail, a sheriff has the authority to authorize certain things. For example, an inmate on the work crew might have a shovel, which might constitute an escape device. But because the sheriff authorized the inmate to have a shovel at that time, the inmate is not subject to a criminal penalty.

Senator Hutchison:
So what is authorized is decided on a case-by-case basis by the sheriff and correctional facility. What constitutes a lawfully authorized cell phone is not defined anywhere.

Mr. Shirley:
Correct.

John Wagner (Independent American Party):
We support A.B. 212. I assume cell phones are confiscated when prisoners are incarcerated. That means someone is smuggling cell phones in to prisoners. I would think the person who smuggles in cell phones should also be guilty of a crime.

Robert Roshak (Nevada Sheriffs' and Chiefs' Association):
I am also speaking for the Las Vegas Metropolitan Police Department and Washoe County Sheriff's Office. We support A.B. 212.

Kristin Erickson (Nevada District Attorneys Association):
We are in support of A.B. 212. Having a cell phone in jail is always a serious security threat.

Steve Yeager (Public Defender's Office, Clark County):
We are neutral on this bill. I want to bring one potential area of concern to the Committee's attention. Some concern was expressed in my office about tying the penalty to the custody status of the offender. It was conveyed to me that there could be a constitutional problem with that, in that the penalty for the crime would depend on something unrelated to the crime itself. I did some research on this and found that there is not a lot of caselaw dealing with the Eighth Amendment to the U.S. Constitution, which includes the "cruel and unusual punishment" or proportionality doctrines. Most of the caselaw seems to deal with death penalty work. I was not able to find anything that would directly relate to this, but it was suggested that one way to avoid this issue is to have a

stepped-up penalty, where the first offense would be a misdemeanor, the second offense a gross misdemeanor and the third a felony. I am neutral on the bill because I was not able to confirm if that is a legitimate constitutional concern, but I wanted to make you aware of it.

Chair Segerblom:
What is your opinion about the argument that if you are in jail for a felony, getting a misdemeanor is irrelevant?

Mr. Yeager:
I certainly understand the rationale behind that, but there are some practical considerations for how the charge would actually work. Typically, when you are found with a cell phone, you are charged right away. In theory, that charge would be related to what you are in custody for. Some practical difficulties would arise; for example, the cell phone charge would have to wait until the resolution of the underlying charge. But I agree with the position that if you are in custody on a serious felony, you are probably not going to be deterred by the specter of a misdemeanor hanging over your head.

Chair Segerblom:
Mr. Anthony, do you feel it is constitutional to have a varying penalty?

Mr. Anthony:
I am not aware of anything that would say it is clearly unconstitutional.

Senator Hammond:
I am not a lawyer. You say you have constitutional concerns, and yet this was heard in the Assembly, giving you ample time to track down those concerns, and you have not found any yet. Your concerns are clearly not that serious or you would not be neutral on the bill. You are just throwing out the idea. Is that correct?

Mr. Yeager:
Yes. When we looked at this in the Assembly, this concern was not raised; it was brought to my attention recently. In the limited research I did, I was not able to find anything saying this is unconstitutional. I just want to make the Committee aware that this is a concern. I will continue to look at it, but at this time I do not have any reason to believe it would be a problem.

Assemblyman Hansen:
This bill closes a peculiar loophole in the law. I am willing to work with legal staff to resolve any potential issues on the penalties. The bottom line is that people in jail should not be allowed to have cell phones.

Chair Segerblom:
We will close the hearing on A.B. 212 and open the hearing on A.B. 110.

ASSEMBLY BILL 110 (1st Reprint): Revises provisions concerning canines and breed discrimination. (BDR 15-567)

Assemblyman James Ohrenschall (Assembly District No. 12):
Many municipalities in the U.S. have enacted ordinances declaring one specific breed of dog dangerous or vicious. Assembly Bill 110 seeks to preempt the enactment of such ordinances in Nevada. I am not aware of any existing ordinances like that in Nevada, but many cities around the U.S. have enacted breed-specific ordinances. From everything I have learned since I was asked to introduce this bill, the problem is with the owners of these dogs, not the dogs. It is how the dog is raised.

Chair Segerblom:
Did we have a bill like this last Session?

Assemblyman Ohrenschall:
Assemblyman John Hambrick did introduce A.B. No. 324 of the 76th Session regarding dangerous and vicious dogs. However, it did not specifically prohibit local breed-specific ordinances.

Chair Segerblom:
Are there currently any such ordinances in Nevada?

Assemblyman Ohrenschall:
Not that I am aware of, no. There are quite a few in municipalities across the U.S., including Denver, Colorado. This bill seeks to make sure that does not happen in Nevada. Legislation banning breed-specific legislation is supported by the American Kennel Club (AKC), the American Veterinary Medical Association, the National Animal Control Association, the American Society for the Prevention of Cruelty to Animals (ASPCA) and the National Animal Interest Alliance. This is important preventive legislation.

Senator Ford:
You want to preempt local ordinances and the ability for local counties to enact their own laws in this regard, is that right?

Assemblyman Ohrenschall:
Yes. In this instance, we believe an ordinance like that is misguided and will cause more harm than good. I have letters of support from Kevin O'Neill of the ASPCA (Exhibit C) and Sarah Sprouse of the AKC (Exhibit D) attesting to that. When one breed is declared dangerous and banned, it leads to more problems.

Senator Ford:
How? If I ban the breeding of pit bull dogs at a local level, how does that ban lead to more problems with pit bulls?

Assemblyman Ohrenschall:
Of the many scenarios, the one that comes to mind is that caring owners who make sure their dogs get the training they need will not run the chance of breaking the law by raising good dogs.

Senator Hutchison:
Why not allow local governmental authorities to make local decisions about dogs? Are we so smart up here at the State level that we have to take that over?

Assemblyman Ohrenschall:
Yes, but not in all the details. In the original version of A.B. 110, we prescribed a procedure to be followed when a dog was declared either dangerous or vicious. It was a good process, and we worked hard to get all the local governments and animal control agencies on board. Lots of folks were tweaking it to make it work for their local areas. In the end, however, we amended that part out of the bill and left such matters to the discretion of local governments. But in terms of saying that every individual animal in a particular breed is dangerous and must be banned, the action in this bill is wiser than any potential local ordinance. Those ordinances have not worked well in the municipalities that have enacted them in other states.

Senator Hutchison:
So you are saying that the subject of the bill lends itself to a statewide regulation rather than a local one, based on experience outside of Nevada.

Assemblyman Ohrenschall:
Yes. Breed-specific legislation is not well-thought-out, and it does not work well to protect the public or the animals. This bill is good policy and needs to be uniform across the State.

Senator Ford:
I am still skeptical about this. I do not disagree with Senator Hutchison that we should be letting the counties make this decision. I am also surprised this issue did not come to the Senate Committee on Natural Resources, which I chair. We recently heard a bill about exotic animals, and ultimately it was rewritten to the point where we are giving local autonomy to Clark County and the cities to develop their own legislation regarding the ownership of captive wild animals. I do not understand why we should prohibit local communities from making their own regulations about dogs. West Las Vegas may have a different kind of pit bull problem than the rural counties. Why should Clark County not be allowed to regulate that issue?

Assemblyman Ohrenschall:
I do not disagree with your comments, but I do not believe A.B. 110 would deny any local government the ability to regulate dangerous or vicious dogs. They would still have that power. What it would preempt is banning specific breeds outright and declaring that one breed of dog is dangerous or vicious by virtue of its genetic makeup. This bill would not prohibit the ability to, if need be, take a vicious or dangerous dog away from its owners and destroy it. It simply does not allow local governments to paint one breed with a broad brush.

Senator Ford:
Would section 1, subsection 6 of the bill prevent Clark County from saying the dogs that are proliferating in West Las Vegas, primarily pit bull breeds, need to be regulated more heavily?

Assemblyman Ohrenschall:
Subsection 6 would prohibit local governments from singling out one specific breed of dog. It would not prohibit local governments or animal control agencies from looking at a problem with dangerous or vicious dogs.

Senator Ford:
They can look at it, but they cannot do anything about it.

Assemblyman Ohrenschall:
I respectfully disagree. This bill does not change what local governments or animal control agencies can do to deal with dangerous or vicious dogs. They can do plenty of things, up to and including ordering the dogs to be destroyed in the worst cases. The bill simply does not allow them to impound every pit bull in the community, to go house to house looking for pit bulls. They can still check for dangerous dogs.

Senator Jones:
I need to give a little background. On December 26, 2011, my 6-year-old daughter was mauled in the face by a neighbor's dog. It was not the specific breed that is being referred to in this. That dog is still roaming the streets in my neighborhood, despite having bitten more than three people. Can we strengthen the laws with regard to dogs that are dangerous but do not seem to have anything happen to them?

Assemblyman Ohrenschall:
This bill does not change the local government's ability to set standards and regulations. In the horrifying situation you describe, that dog would be subject to being declared dangerous, perhaps even vicious, under existing statute. Perhaps the problem is the execution of the law by the county or the city. This bill would not change that. It would not change the rules for a dog being declared vicious or dangerous. It just says that one breed cannot be singled out.

Senator Jones:
It seems like the focus of the law is to protect people who do not need protection rather than those who do need protection.

Assemblyman Ohrenschall:
Perhaps the laws could be tightened. Existing law allows the animal control agency to take action against the dog that mauled your daughter and its owner. We are saying that dogs and their owners need to be held accountable based on the dogs' actions, not on the dogs' breeds. That has to do with how the dog is raised and trained, not its genetic makeup.

Senator Hammond:
I think I understand what you are getting at, and I also understand my colleagues' problems with it. You are saying you cannot look at one breed and label it as dangerous. I agree with that. I wonder if we should be having this

conversation in front of a county commission and letting it make this decision, since each county seems to have a different opinion on the problems in its jurisdiction. However, I understand the big picture here. I was at a park on Saturday with my 2-year-old daughter. A pit bull came by on a leash, and she grabbed it. My immediate reaction was to grab my daughter and pull her out of the way, but the dog turned around and licked her, then walked away.

I understand the need for a bill to make sure we are not discriminating against one particular breed. But are we overreaching? Are we not allowing the local jurisdictions to look at the problem? Your intent is to make sure we do not label every single dog in a breed as vicious and eradicate each one.

Assemblyman Ohrenschall:
Many people do not have the kind of positive experience you had with what is known as a bully breed. Nevada has not yet had a local ordinance of this type, but many communities around the Country have them. I do not believe those communities have had positive results from those ordinances. I am not one for tying the hands of local governments, but here the evidence is that those ordinances are not good for the dogs, the owners or the public. That is why I think this is needed.

Beverlee McGrath (Best Friends Animal Society; American Society for the Prevention of Cruelty to Animals; Nevada Humane Society; Northern Nevada Society for the Prevention of Cruelty to Animals; Nevada Political Action for Animals; PawPac; Lake Tahoe Humane Society and Society for the Prevention of Cruelty to Animals; Compassion Charity for Animals; Pet Network of Lake Tahoe; Wylie Animal Rescue Foundation; Lake Tahoe Wolf Rescue):
We support A.B. 110. As Assemblyman Ohrenschall said, this bill leaves in place the ability of law enforcement to confiscate and euthanize dangerous and/or vicious dogs while preventing dogs from being euthanized based solely on breed. Currently, 6,000 pit bull-type dogs are euthanized daily in the U.S. This is a look-alike thing. Pit bull is not a specific breed of dog, but many dogs look like pit bulls, and it is difficult to distinguish between them.

Clark County has an ordinance that outlaws breed-specific ordinances, and Washoe County is working on something similar. At this time, 300 cities and towns in the U.S. have breed-specific legislation. It does not work. Fourteen states prohibit breed-specific legislation. They still allow dangerous or

vicious dogs to be controlled. The reasoning behind breed-specific legislation is public safety, which is why Denver, Colorado, adopted it in 1989. Denver did a 12-year study of dog-related hospitalizations, and in that time Denver had 273 cases. The neighboring City of Boulder, which does not have breed-specific legislation, reported 46 cases in that same period. Denver taxpayers are shelling out $1 million a year for a law that fails to make the community safer. Breed-specific legislation does not ensure public safety and is extremely expensive to enforce. I have a handout from John Dunham and Associates showing the anticipated costs associated with breed-discrimination legislation (Exhibit E).

Chair Segerblom:
Clark and Washoe Counties, which between them have about 85 percent of Nevada's population, already prohibit breed-specific ordinances. Therefore, this bill will affect about 15 percent of Nevada's residents.

Ms. McGrath:
Yes. If you would like further information, I have a packet of information regarding misconceptions about pit bulls prepared by Best Friends Animal Society and others (Exhibit F).

Margaret Flint (Nevada Humane Society; Canine Rehabilitation Center and Sanctuary):
We support A.B. 110. I have a handout showing pictures of 25 purebred dogs that all look like pit bulls, but only one of these dogs is a pit bull (Exhibit G). Three-quarters of shelter workers and the general public cannot pick out the pit bull. Only 3 percent of a dog's DNA contributes to its physical appearance.

Here is the problem. Recently, a community in Missouri adopted a pit bull restriction. Law enforcement literally went into people's homes and confiscated animals they thought looked like pit bulls and euthanized them. The owners had no recourse; there was nothing they could do. This is the situation we want to avoid. This is a heartbreaking scenario. We want to make sure Nevada families never have to experience this. In the 1970s, it was Dobermans that were feared; in the 1980s, it was German shepherds; and in the 1990s, it was Rottweilers. Now we are dealing with pit bulls.

Senator Jones:
I am trying to make sure I understand this. Having a dog declared dangerous is kind of a three-step process. If you have an animal that is declared dangerous, it also has to be vicious under NRS 202.500, subsection 1, in order to get you to subsection 5, which is the meat of NRS 202.500, the repercussions for having a dangerous and vicious dog. "Vicious" is defined as both dangerous and having without provocation killed or inflicted substantial bodily harm on a human being.

Let us say you had a dog breed ordinance in a county where officials said pit bulls were dangerous. Are there repercussions other than NRS 202.500, subsection 5, that come from that kind of a designation?

Assemblyman Ohrenschall:
As I understand it, if a dog is declared dangerous, the owner can still keep the dog, but a special permit is required and the owner must ensure the dog is enclosed in a safe place where it cannot cause harm. I believe that if the dog is declared vicious, that triggers the process to put the dog down. The preemption we are seeking, to disallow local government from passing breed-specific legislation, would not affect whether that dog, no matter what breed, is declared dangerous or vicious. It would not change that process.

Senator Jones:
If you adopted one of Michael Vick's dogs and it was declared dangerous because of its breed, what is the problem if the dog does not cause substantial bodily harm or kill someone? You are never going to be convicted under subsection 5 of NRS 202.500.

Richard Hunter:
I own one of the dogs rescued from the Michael Vick dog-fight training compound. Senator Jones, the importance of it for me, as a responsible dog owner and law-abiding citizen and someone who passed a federal criminal background check in order to have this dog, is that I do not want to be preemptively stigmatized. What you are saying does make sense in terms of thinking what is the real likelihood of it. However, I do not like knowing that I might already be preemptively designated as the owner of a dangerous animal based solely on his breed and without any consideration of his actual behavior and temperament.

Senator Jones:
Are there insurance implications of owning a dog that has been designated as dangerous?

Assemblyman Ohrenschall:
If a dog attacks someone, the owner's homeowner's insurance would be liable. If the owner is not a homeowner, I do not know the answer. I do not know, in terms of local governments, what kind of insurance requirements they impose.

Ms. McGrath:
If you have a dangerous dog, that dog is required to be muzzled and on a short leash when it goes out in public. You have to have an extremely high fence, and the dog must be confined at all times. There are many stipulations. The dog is regularly monitored by animal control officers.

Senator Jones:
That is not in the NRS. Are those requirements in local codes?

Ms. McGrath:
Each county has various code restrictions. Initially, Assemblyman Ohrenschall tried to combine the dangerous dog codes throughout the State in A.B. 110. It was very cumbersome and no one could agree, so that portion of the bill was dropped.

Senator Ford:
Do you have any studies breaking down dog attacks by breed? I am interested in seeing if any breeds show a greater propensity toward violence.

Ms. McGrath:
The American Staffordshire terrier, which is the AKC breed closest to what is commonly called a pit bull, is a very protective dog. As noted in Exhibit F, this breed was developed to be a babysitter. German shepherds, Doberman Pinschers, mastiffs and Chihuahuas also have a tendency to be protective.

Senator Ford:
Let me redirect my question. I am not talking about dogs that are protective. I mean dogs that tend to make aggressive, unprovoked attacks on other dogs or people. Do we know which dogs tend to have more of that propensity?

Ms. McGrath:
No. Some breeds have the ability to be trained to do certain things. The border collie will herd. The breeds I just mentioned can be trained to be more protective and more cooperative with what the owner requires of them.

Senator Hutchison:
You said that if we do not pass A.B. 110, a specific breed of dog would go into a shelter and be euthanized. Under what authority? What would allow that?

Ms. McGrath:
It happens in the rural counties all the time.

Senator Hutchison:
I thought you said no breed-specific ordinances exist in Nevada at this point.

Ms. McGrath:
It has nothing to do with a dog being dangerous or vicious. The way a dog looks will determine whether the dog is put down in the rural shelters.

Senator Hutchison:
Can you give me an example? Which counties?

Ms. McGrath:
Storey, Lyon, Nye and Elko Counties.

Senator Hutchison:
Are you saying that in all those counties, every single time you bring a dog of a specific breed into a shelter, the dog will be automatically euthanized?

Ms. McGrath:
I cannot say in every single case. I know it is being done in these counties on a regular basis. It depends on who is the manager of that shelter when the dog comes in. Nothing prevents shelters from doing it. In their minds, it is a precautionary measure.

Senator Hutchison:
I will not belabor the point.

In my mind, the reason it has been difficult to get everyone to agree on this bill is that it is a local issue. People have different views depending on their experience and what their voters want. You say there are no consequences of this, but there are consequences—political consequences. If you do not like the way your county commissioner or your city council is doing something, you kick the bums out. This is a local issue with important local considerations, and it is difficult to try to manage it at a State level.

Chair Segerblom:
But it seems crazy to have a dog that is safe in Clark County but gets put down immediately in Elko County.

Senator Hutchison:
Perhaps Elko County is having local issues with that breed of dog. Under the statute you want us to pass, Clark County would not be able to stop a breeder from starting a pit bull breeding factory next to a nursery school. You could not say, "Based on the breed, we're going to regulate," or "We're going to declare those to be animals that are vicious or dangerous." To me, this is a local issue and deserves local consideration.

Assemblyman Ohrenschall:
Certainly. If A.B. 110 were to pass, you could not have an ordinance that said a homeowner living next to a nursery school cannot have a Rottweiler. However, you could still have a law saying you could not have a dangerous dog next to a nursery school. Those protections are still there. We are trying to cure painting an entire breed with that broad brush.

The local jurisdiction is great, but the lack of uniformity could cause great issues. If I am allowed to have a Rottweiler in the City of North Las Vegas and I go to visit my cousins in Ely where Rottweilers are banned, I am now breaking the law. Because I took my dog with me to visit family, I am now a criminal and my dog is going to be put down. It is a recipe for quite a bit of problems.

Senator Hutchison:
We deal with that all the time. Different laws exist from county to county and city to city. It becomes a policy question that we have to ferret out. That is why we are here.

Senator Jones:
This is one of those issues where I have difficulty seeing the nexus between the problem and the solution. I do not see anything in this bill that would prevent animal shelters from putting down dogs because of their looks. Animal shelters can do whatever they want regardless of whether we pass this bill.

Ms. McGrath:
It is breed-specific legislation, which this bill prohibits.

Senator Jones:
But nothing here would prohibit anyone from euthanizing a dog. Am I missing something?

Assemblyman Ohrenschall:
You are right; nothing in A.B. 110 would prevent putting a dog down based on its actions. However, it would prohibit an animal control agency from putting a dog down based solely on its breed.

Senator Jones:
Yes, but Ms. McGrath did not say breed, she said what the dog looks like. So if a dog looks like a pit bull, animal control can still put it down. Right?

Assemblyman Ohrenschall:
I do not know how widespread this practice is, and I do not know that much about what goes on when an animal is impounded. If this is not based on the actions of the dog but on how it looks, that is a problem. Will A.B. 110 cure that? We have no guarantee, but that is not a reason not to pass a good bill.

Mr. Hunter:
I have a short video called "Vicktory Dogs" showing how the dogs removed from Michael Vick's dog-fighting facility have been rehabilitated (Exhibit H).

The importance of supporting A.B. 110 is that I need my freedom protected as a law-abiding citizen of Nevada. The issues raised by Senator Ford and Senator Jones are well-taken; we have a responsibility issue in those areas. I too have a house in Las Vegas, so I am well aware of the problem down there. The issue there is that we need leash laws and mandatory spaying and neutering, and we need to crack down on irresponsible owners. As we have all seen repeatedly, it is not just the dog those owners are getting in trouble with.

These are the same people who are visited by Child Protective Services, and they often have a criminal rap sheet. My concern is that I do not want to move to Las Vegas and on paper, because of the dog I own, appear to be no different from Michael Vick. If the dog is deemed dangerous based solely on his breed, I am looked at by the local government as no different from Michael Vick, and I can assure you that only one of us has to check in with a probation officer.

I understand the reverence for government at the local level, and that makes a lot of sense. But history is prevalent with examples in which citizens, if the local government does not adequately protect their rights, go to the state level for help and then to the federal level. If it were not so, segments of local populations throughout history would be denied their basic rights. The reason it is important to take preemptive action is we do not wait for responsible citizens' rights to drive cars, vote or own firearms to be taken away and then fight to get them back. Those are discretionary privileges, and when someone demonstrates himself or herself to be a criminal, we take those rights away from that person. But we do not lower our standard of living to our lowest common denominator. I am asking for you to pass A.B. 110 in order for me on paper to appear in a different designation from the criminal element vis-à-vis the dog I own.

Senator Ford:
I am still skeptical of this bill for two reasons. First is the local control issue. Second, I am not convinced that breed-specific legislation is wrong. I am looking at studies online that talk about pit bulls having a greater propensity for violence. I am looking at caselaw that talks about courts upholding breed-specific legislation based on these types of reports and expert identification. As far as your right to own a dog is concerned, I hear you; that is fine. But none of our rights are unfettered. We are not going to take away your right to own a pit bull, but just like getting a car requires license and insurance, we can require certain protections. I would think the local ordinances can put restrictions on what you have to do if you want to own a certain breed of dog.

Mr. Hunter:
To respond to your point about the online studies, I offer this analogy. The pit bull is a very strong dog. We have all been in a store and seen an out-of-control child, and we know to look to the parent to see the problem. If you are a negligent parent who has raised an eighth-grade bully, that bully may cause more mischief on the playground if he or she weighs 200 pounds. But at

that point, the horse is out of the barn. The real problem is your dereliction in your parenting duties.

I have no problem proving my merit as a pit bull owner in any community I move into. The importance of preemptive legislation like A.B. 110 is that I do not want a local municipality to be able to outright deny me the ability to have my dog. I do not want the local government to knock on my door and say, "I know you have a clean criminal record and there's never been any problem with your dog, but on paper he's dangerous and he's coming with us or you're moving." That is not hyperbole; this is what actually happened in Denver, Colorado. That is the importance of A.B. 110.

I understand it is a balance, but it always comes back to the issue of the responsible citizen. Throughout our laws, we draw a clear distinction between responsible citizens who have all the rights afforded to them as American citizens and those who are restricted for good reason. I look for us to draw that distinction.

Fred Voltz:
I support A.B. 110. I have written testimony explaining the need to outlaw breed-specific legislation (Exhibit I).

Jesica Clemens (Incred-A-Bull):
I am here in favor of A.B. 110. I have written testimony (Exhibit J) and a handout from the Animal Farm Foundation giving talking points regarding breed-specific legislation (Exhibit K).

Senator Ford asked about studies regarding aggression in dog breeds. If you look to the National Canine Research Council, you will find that Dr. Victoria Voith at the Western University of Health Sciences has done multiple studies on the link between breed and aggression. The two are not related. You can also look at the American Temperament Test Society facts and figures. The Society has been testing hundreds of breeds of dogs since the 1970s. The American Staffordshire terriers, American Staffordshire bull terriers and American pit bull terriers, which make up the pit bull group, perform extremely well in the temperament test, scoring overall in the ninetieth percentile.

This is not just a pit bull issue. Some 75 kinds of dogs have been outlawed in communities across America. They include pugs, Chihuahuas, German

shepherds and Rottweilers. This bill is not necessarily about the dogs. This is about the right of citizens to own the kinds of dogs they want, provided they are responsible owners and follow the laws of their local municipalities, such as spay/neuter and leash laws. Breed-specific legislation ultimately discriminates against the owner of the dog. As the owner of a pit bull-type dog, I strive to be responsible, to make my dog a safe member of the community. I do not want those rights taken away. Like Mr. Hunter, I do not want to be looked at any differently than anybody else. I am a responsible taxpaying citizen.

Assemblyman Ohrenschall:
I also have written testimony from Erik Gavilanes (Exhibit L) and Laura Handzel, J.D. (Exhibit M) in support of A.B. 110.

The ASPCA Website includes its position statement on breed-specific legislation that cites a study of such a ban in Prince George's County, Maryland, where the County said it found the ban had not been effective and had not increased public safety. The Centers for Disease Control and Prevention declined to endorse breed-specific legislation.

While I believe local autonomy is great in many cases, we have many examples of situations in which we preempt local autonomy. This is an area where it is needed.

Chair Segerblom:
I will close the hearing on A.B. 110 and open the hearing on A.B. 262.

ASSEMBLY BILL 262: Revises provisions governing child custody and visitation. (BDR 11-951)

Assemblywoman Lesley E. Cohen (Assembly District No. 29):
Before I discuss A.B. 262, I would like to review some legal terms that sometimes get confused but actually have very different meanings and which are relevant to this bill.

A divorce case is always a divorce case. If years after the divorce you come back to court because of visitation issues with a child or an issue about where the child is going to live, it is still a divorce case. It is a postdivorce action, but it is still a divorce case and not a custody case, even if custody is at issue. A paternity case is where parentage of the father has to be established. After

paternity is established, the court can make custody and visitation decisions, but the case remains a paternity case. Paternity is dealt with in NRS 126.

Assembly Bill 262 has to do with custody, which is covered in NRS 125C. Custody cases have to do with custody and visitation determinations between unmarried parents where paternity is not an issue. In those cases, the father is legally the father; the parents have filed the proper acknowledgement of paternity form with the court, or the court has already made that decision. To add some more confusion into this, NRS 125C includes statutes that address other issues such as grandparents' rights, custody and visitation of children with a parent who is deployed in the military, and moving a child out of state. On top of all this, you can refer to a custody issue, meaning the parents share time with the child, in a divorce or paternity case, but the case is still a divorce case or a paternity case.

In the case of *Miller v. Wilfong,* 121 Nev. 619, 119 P.3d 727 (2005), the Nevada Supreme Court ruled that "attorney's fees are not recoverable unless allowed by express or implied agreement"—and that is a contract—"or when authorized by statute or rule." Also, you have to be the prevailing party to be awarded attorney's fees.

Assembly Bill 262 looks to make it clear that in NRS 126, the courts have authority to grant attorney's fees in custody cases. Doing so would bring NRS 126 in line with other similar statutes. In divorce cases, the court can award attorney's fees even if the case becomes a postdivorce case, and the court can also award attorney's fees in a paternity case. In a custody case, except in a limited exception, the court cannot award attorney's fees. For example, think of two sets of unmarried parents. The first family never established paternity, so if the parents separate and go to court to get orders regarding the child's living schedule, attorney's fees can be awarded. The second family filed the paperwork to establish paternity, so if they come to court to resolve custody issues, the judge cannot award attorney's fees. There is really no logical reason why these two similarly situated families should be treated differently by the court. They are both unmarried parents; but in one family, paternity has been legally established.

Chair Segerblom:
So attorney's fees cannot be awarded if there was a paternity action. Is that correct?

Assemblywoman Cohen:
No. If the case is a paternity action, the court can award attorney's fees.

Chair Segerblom:
But if it was agreed that there was paternity but there was never a paternity action, the court cannot award attorney's fees. Right?

Assemblywoman Cohen:
Right. A lot of confusion arises between practitioners and laypeople who are representing themselves in court about whether they come into court as custody cases or paternity cases. If you then add in the issue of awarding attorney's fees, it adds more confusion. We see some back and forth where cases that could probably be custody cases are instead brought as paternity cases in order to allow attorney's fees to be awarded.

Chair Segerblom:
There is no logical reason for the distinction. The awarding of attorney's fees should be discretionary but available in any kind of case.

Assemblywoman Cohen:
Right. I have written testimony from District Judge Sandra L. Pomrenze (Exhibit N) in which she refers to this situation as "a 'doughnut hole' in the litigation process." We are not sure why it happened like this; it just happened.

The limited exception that does allow attorney's fees is in NRS 125C.180, which has to do with children of military families and deployment of a family member. It is a very specific exception.

What is happening is that practitioners are picking and choosing between NRS 125C and the paternity statutes. When litigants represent themselves, it gets more confusing. People are filing cases that could be custody cases; paternity is already established, but they are filing them as paternity cases in order to get an award of attorney's fees. When that happens, the judges are left with the decision of whether to dismiss the case and have the litigants refile, which wastes the court's time and the litigants' time and money, or to let the case continue as a paternity case when it is not technically a paternity case.

Just to make sure you are getting the full picture, I understand that a family court judge in Clark County did award attorney's fees in a custody case under

that limited exception, but it was not a military family. That case is now in appeal with the Nevada Supreme Court.

There is a lot of confusion, and A.B. 262 seeks to clarify the situation. It is also an issue of fairness and access to judgment. It is better for parents as a whole. We want to keep parents on equal footing. When one party has an attorney and the other does not, cases tend to get bogged down. We want to encourage people to have attorneys because it keeps the system flowing faster. When you are dealing with two pro pers, or even one pro per and one attorney, it bogs down the system.

This would also help to keep overly litigious litigants from dragging a case out. For instance, if you know your ex-spouse cannot afford an attorney and you can, you might try to drag the case out because you know your ex cannot meet you in court on equal footing. But if you know the judge can award attorney's fees against you, you may be more reasonable and try to stay out of court or keep the case moving through court faster.

This is an issue of access to judgment, and this bill is just filling that doughnut hole. The bottom line is that allowing attorney's fees in custody cases just brings custody cases in line with divorce and paternity cases.

Keith M. Lyons, Jr. (Nevada Justice Association):
We support A.B. 262.

Senator Hutchison:
I have two questions. First, can you get attorney's fees for child custody matters or paternity matters under NRS 18.010, which basically says if you get a recovery for less than $20,000, the judge can award attorney's fees? Maybe there is a roadblock to that in family court of which I am not aware. Second, page 2, lines 3 and 4 of A.B. 262 includes the phrase "if those fees and costs are in issue under the pleadings." I do not know what that means.

Assemblywoman Cohen:
You can get attorney's fees under NRS 18.010, but that is used only in cases with winners and losers. In these cases, it is not necessarily about winning and losing; it is about bringing the parties into equal footing. Under *Miller v. Wilfong*, that court said that there needs to be a statute that specifically covers this

situation. As I mentioned, in a case on appeal with the Nevada Supreme Court, a family court judge did allow attorney's fees in a custody case.

Senator Hutchison:
The purpose of this statute is to give a court discretion not to just award fees to the prevailing party, but to consider the circumstances and bring some equity and proportionality to payment of fees—who bears the costs for those payment of fees based on the case and the issues before the court.

Assemblywoman Cohen:
Yes. Just to be clear, in a paternity case the court can award attorney's fees. The statute specifically allows it. The only difference here is that in those families, the court has not established paternity yet; in these families, paternity has been established.

Senator Hutchison:
On my second question, that phrase sounds like the old Sandy Valley attorney's fees criteria, from *Sandy Valley Associates v. Sky Ranch Estates Owners Association*, 117 Nev. 948, 35 P.3d 964 (2001), where you can get attorney's fees when they are not otherwise offered by statute or the contract. Is that what you are getting at here, or is it something else?

Assemblywoman Cohen:
It is standard in family court cases to ask for attorney's fees in your pleadings. I think that phrase is just getting at that, though frankly I had not really thought about it. I will have to look at the paternity statute. In a divorce case or in a paternity case, you automatically ask for attorney's fees.

Senator Hutchison:
You may want to put a period after "court," so page 2, line 3 reads, "... and at times determined by the court." In most civil cases, we routinely put in requests for attorney's fees. So you are just saying that these are typically at issue in the pleadings in family court.

Assemblywoman Cohen:
Right. But I will certainly compare that with what is going on in the paternity statute, which is probably where the language came from.

Mr. Lyons:
One of the issues is that the introduction to NRS 126 says it is a fundamental principle of Nevada law that all children should be treated equally, whether their parents are married or unmarried. A few years ago, I took a case in which I came in 5 years after the case started. It was filed as a custody case because the couple had already established paternity at some point. My client was basically indigent, and I ended up doing about $7,000 worth of work for which I could not be paid. You do not want to be the greedy attorney, but if those cases come in the future, the other side will have an attorney. If attorneys know they will not get paid, they will not take those cases. The system gets bogged down, people get treated unfairly, and the issue before the court regards what is in the best interest of the children. If one party has counsel who ensures certain evidence does not get before the court, the court will not have the evidence to decide what is in the best interest of the children. This can lead to the children being harmed.

With regard to NRS 18.010, I have never argued that, but if this bill is not passed, I will probably add that on. The only issue with NRS 18.010, subsection 1 is in a custody case, you are not generally seeking monetary damages but rather what is in the best interest of the children. Because there is no award of money, nothing under NRS 18.010 allows the awarding of attorney's fees.

Chair Segerblom:
How does the court determine to award attorney's fees in a case with no winner or loser?

Mr. Lyons:
In a case with no winner or loser, you argue the factors set forth in *Miller v. Wilfong*. If you are an attorney for rights and family law, you have a brief that sets out all the factors, including *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969). That Nevada Supreme Court decision includes a list of factors—including the skills of the attorney and the difficulty of the legal question argued—when awarding attorney's fees. The judge reviews those factors and then decides. It is a fairly straightforward process here in Nevada family court with the *Brunzell* factors.

Unfortunately, when it is simply a custody issue and parentage has already been established, the courts lack the jurisdiction to award attorney's fees. Another

Nevada Supreme Court case, *Love v. Love*, 114 Nev. 572, 959 P.2d 523 (1998), says you can always question paternity even if paternity has been established. Is that a little bit of legal gamesmanship? Yes, it is, but that is the savvy attorney versus the unsavvy attorney. Assembly Bill 262 takes away the need to resort to such strategies. If the parents are only concerned about custody, they can litigate the custody case. It does not bog down the courts with extraneous matters.

Senator Hutchison's question about the pleading reference took me back to law school. I seem to remember an issue where a pleading was limited to a complaint, an answer, a counterclaim and an answer to the counterclaim. I do not know if that holds true today, and I have never researched how Nevada defines a pleading. If that is true and we want to make this fair, we may want to do as Senator Hutchison suggested and put a period after "court" because a lot of the earlier cases sought attorney's fees in the motion itself. If the motion itself is considered a pleading, we would not need it.

Senator Jones:
Nevada Revised Statutes 125.150 has that awkward language too. If we need to pull it out, that is where it came from.

Assemblywoman Cohen:
I will certainly consider Senator Hutchison's amendment.

This bill is just filling in a doughnut hole, making sure families in custody cases are treated equally with similarly situated families and making sure they are treated equally by the court.

Chair Segerblom:
I will close the hearing on A.B. 262 and open the hearing on A.B. 233.

ASSEMBLY BILL 233: Revises provisions governing postconviction genetic marker analysis. (BDR 14-1000)

Assemblywoman Lucy Flores (Assembly District No. 28):
This cleanup bill was initially passed in 2009 as A.B. No. 179 of the 75th Session. That bill was an effort to address a U.S. Supreme Court decision in *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52 (2009), which said a denial of access to postconviction DNA testing was not a

violation of due process. The decision left it up to the states to make this right available to those who have been already convicted in a situation where they had DNA evidence not previously tested, generally because the science did not exist at the time. In the last 10 years or so, we have had hundreds of postconviction exonerations due to the advent of DNA testing.

In 2009, we created a statutory right for postconviction DNA review. At that time, only those who had been sentenced to death had the right to petition for DNA testing. Assembly Bill No. 179 of the 75th Session expanded this to include those convicted of Category A and Category B felonies. Even though the minutes recorded that the intent was that there should be a right of appeal, the Nevada Supreme Court did not take that into consideration and said there was no right of appeal because it was not explicit in the statute. Therefore, A.B. 233 ensures a right of appeal for those who petition for access to postconviction DNA testing.

I have an amendment that makes two changes to A.B. 233 (Exhibit O). First, it was not clear that appeal was available to the State as well, and the language in section 1, subsection 10 of the amendment clarifies that if the petitioner is allowed to access DNA evidence under this law, the State can also appeal. This gives the right of appeal to all parties.

Chair Segerblom:
Do you have any objection to that?

Assemblywoman Flores:
I have no objection to that. It is part of our justice system that any party aggrieved has the ability to appeal.

Another change is in section 1, subsection 1, where I am removing the language requiring that the person be under sentence of imprisonment for the conviction. We have seen situations in which parolees were exonerated after they were released from prison. That is important because it clears your record completely and totally. It is not like sealing your record; you are actually exonerated of the crime of which you were convicted, and your record completely disappears. We thought "under sentence of imprisonment" probably covered parole, but we wanted to be clear, and the best way to be clear is to take out that language.

Chair Segerblom:
This is also true after parole has ended.

Assemblywoman Flores:
Correct. We want to make DNA testing available to everyone, regardless of whether you are still in prison, on parole or satisfied parole.

Chair Segerblom:
What is the standard when you seek to have your DNA tested?

Assemblywoman Flores:
The standard is an odd one. It is "reasonable possibility," which is completely different from other postconviction processes like habeas corpus or the other appeal measures available. This is almost a completely separate body of law because the *Osborne* decision said denial of postconviction DNA access is not a due process violation. This left it up to the states to create another right of appeal. We could not necessarily have the same higher standard that criminal law has because this is just the first part. This is just saying that we reasonably believe that had the DNA been tested at the time, the outcome would have been different. That does not mean that just because the petition is granted, the person is let out of prison. This actually would start the justice process over again. The DNA would be tested, and at that point the district attorney still has the opportunity to ask for another trial. That has happened in the past after DNA has been tested; on a couple of occasions, the person has actually been reconvicted.

Chair Segerblom:
Does the petitioner pay for the test?

Assemblywoman Flores:
No, the State bears the burden of the test. For the record, I will note that since A.B. No. 179 of the 75th Session passed in 2009, there has been only one petition.

Senator Hutchison:
I was going to ask what kind of appeal load the court could expect from this. You are saying the load will be light.

Assemblywoman Flores:
We expect it to be very light. When we were first trying to pass A.B. No. 179 of the 75th Session, one of the things we continuously argued against was the theory that it would open a floodgate of appeals and everyone would petition for testing. Unfortunately, when you get into these cases, it is difficult to find evidence that still exists. In 2009, we also passed a companion bill, A.B. No. 279 of the 75th Session, requiring that evidence had to be preserved until incarceration ended. Before that, no law said you had to keep evidence. Folks had been convicted, and the evidence had been completely destroyed. Even if they did have a claim of innocence, there was nothing to test. All the same, hundreds of people who were wrongly convicted, quite a few of them sentenced to death, were then found to be completely innocent of the crime they were convicted of, and the State was getting ready to kill them. These are difficult cases. But when we do have them, it is our obligation to ensure that we do whatever we can to give them the opportunity to be heard, if that possibility exists.

Senator Hammond:
Is the DNA test you are talking about in A.B. 233 the cheek swab test that matches 13 genetic factors, or is it more involved?

Assemblywoman Flores:
It depends on what kind of test is required for the evidence. I am not a DNA expert, but I have been working on wrongful convictions since 2007, and it is my understanding that sometimes you might need more involved tests. Usually, a basic test using a cheek swab or a hair sample is enough.

Chair Segerblom:
The sample collected from the scene of the crime could have been any kind of DNA.

Assemblywoman Flores:
Correct.

Mr. Yeager:
We are in support of A.B. 233. With respect to Senator Hammond's question, the unique part of this bill does not have the same privacy concerns because the person donating the DNA is the one requesting the test. This means more expansive testing can be done.

Chair Segerblom:
Maybe we should expand it to cover all felonies rather than just Category A and Category B felonies.

Mr. Yeager:
We would be in favor of that.

Ms. Erickson:
We support A.B. 233. We would like to thank Assemblywoman Flores for addressing our concerns in her amendment and giving both parties the ability to appeal. We are also supportive of the amendment in section 1 of the bill that gives the petitioner the ability to petition the court at any time, not just during incarceration.

Vanessa Spinazola (American Civil Liberties Union of Nevada):
We support A.B. 233. We believe it remedies the due process concerns from the U.S. Supreme Court decision on *Osborne*, particularly in cases where the petitioners have to go back to the judge who actually sentenced them. It is important that they have the right of appeal.

Sean B. Sullivan (Public Defender's Office, Washoe County):
We support A.B. 233.

Michelle Ravell:
I am in support of A.B. 233, but it does not go far enough. In most cases, the appeal goes back to the judge who originally sentenced the person. That gives the judge a preconceived notion.

I brought a shoebox as a prop to explain what it is like to be innocent. Imagine you have been convicted of a crime you did not commit, and the evidence that will prove your innocence is in this box. But the court will not let you see the box; it will not let you have the box; it will not let your attorney have the box; it will not let your friends have the box; and it will not let any testing be done on any information in the box. In Nevada, you have to prove your innocence before you can prove your innocence. Genetic testing goes a long way to doing that.

Unfortunately, our law is predicated on a judge giving you the right to prove your innocence. Without a provision allowing the person to pay for the testing without the court having to order it, it is not true justice. You can scream all

you want that you are innocent, but no one will believe you until you can prove it.

I am proposing an amendment to A.B. 233 that gives the person the opportunity to prove it. In section 1, subsection 4 of the bill, change the word "may" to "shall." In section 1, subsection 4, paragraph (a), add, "Enter an order granting the petition and release of the evidence for genetic marker analysis if the testing is to be performed at no charge to the state. Otherwise, enter an order ..." and continue on as written. This is a simple amendment, and it gives the innocent person a chance to open the box.

Assemblywoman Flores:
I have seen Ms. Ravell's amendment, and I do not consider it a friendly amendment. I do not agree with the reasoning behind it.

I would like to address the idea that you have to prove your innocence before you can prove your innocence. This is why I was talking earlier about the reasonable possibility standard. "Reasonable possibility" is essentially the lowest standard you can think of. If there is any possibility whatsoever, the court must grant the petition. The burden of proof for a criminal standard is much higher. "Reasonable possibility" was purposely designed to have a low threshold; the idea was to have the court grant these petitions so we can discover whether the evidence can prove the person's innocence.

Second, the idea that paying for something in our justice system should automatically grant it to you is not the way our system works or is designed, nor should it work that way. It creates a situation in which people who have money are entitled to action in the courts just because they have money. That in and of itself is not fair. It is in fundamental violation of the way our system works. We motion, we petition, we do the appropriate steps that are necessary within our system, and at every step of the way that motion can be denied or granted. If those things happen, procedures exist to deal with the decision of the court. I cannot think of a situation where petitions are automatically granted. Therefore, I do not accept this amendment as presented.

Chair Segerblom:
What about expanding the categories of felonies included?

Assemblywoman Flores:
I would be open to that.

Chair Segerblom:
Is there any public comment? Hearing none, I will adjourn the meeting at 11:05 a.m.

RESPECTFULLY SUBMITTED:

_____
Lynn Hendricks,
Committee Secretary

APPROVED BY:

_____
Senator Tick Segerblom, Chair

DATE: _____

EXHIBITS				
Bill	**Exhibit**		**Witness / Agency**	**Description**
	A	1		Agenda
	B	6		Attendance Roster
A.B. 110	C	1	ASPCA	Letter of Support from Kevin O'Neill
A.B. 110	D	1	American Kennel Club	Letter of Support from Sarah Sprouse
A.B. 110	E	1	Beverlee McGrath	Breed Discriminatory Legislation in Nevada
A.B. 110	F	11	Beverlee McGrath	Information packet
A.B. 110	G	1	Margaret Flint	Pictures of 25 dogs
A.B. 110	H	NA	Richard Hunter	Vicktory Dogs CD
A.B. 110	I	1	Fred Voltz	Written testimony
A.B. 110	J	1	Jesica Clemens	Written testimony
A.B. 110	K	19	Jesica Clemens	BSL Talking Points
A.B. 110	L	1	Erik Gavilanes	Written testimony
A.B. 110	M	16	Laura Handzel	Written testimony
A.B. 262	N	1	Sandra L. Pomrenze	Written testimony
A.B. 233	O	5	Assemblywoman Lucy Flores	Proposed Amendment 8698

EXHIBIT 4

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON CORRECTIONS, PAROLE, AND PROBATION

Seventy-Fifth Session
March 10, 2009

The Committee on Corrections, Parole, and Probation was called to order by Chairman William C. Horne at 8:13 a.m. on Tuesday, March 10, 2009, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/75th2009/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman William C. Horne, Chairman
Assemblyman Tick Segerblom, Vice Chair
Assemblyman Bernie Anderson
Assemblyman John C. Carpenter
Assemblyman Ty Cobb
Assemblywoman Marilyn Dondero Loop
Assemblyman Don Gustavson
Assemblyman John Hambrick
Assemblyman Ruben J. Kihuen
Assemblyman Mark A. Manendo
Assemblyman Richard McArthur
Assemblyman Harry Mortenson
Assemblyman James Ohrenschall
Assemblywoman Bonnie Parnell

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Allison Combs, Committee Policy Analyst
Katherine Malzahn-Bass, Committee Manager
Julie Kellen, Committee Secretary
Kyle McAfee, Committee Secretary
Karyn Werner, Committee Secretary

OTHERS PRESENT:

Chuck Callaway, Sergeant, Intergovernmental Services, Las Vegas Metropolitan Police Department, Las Vegas, Nevada
Karen Hughes, Lieutenant, Vice Section, Las Vegas Metropolitan Police Department, Las Vegas, Nevada
Bernard W. Curtis, Chief, Division of Parole and Probation, Department of Public Safety
P.K. O'Neill, Chief, Records and Technology Division, Department of Public Safety
Jason Frierson, Chief Deputy Public Defender, Clark County Public Defender's Office, Las Vegas, Nevada
Orrin Johnson, Deputy Public Defender, Washoe County Public Defender's Office, Reno, Nevada
Rebecca Gasca, Public Advocate, American Civil Liberties Union of Nevada, Reno, Nevada
Lucy Flores, External Affairs and Development Specialist, University of Nevada, Las Vegas, Las Vegas, Nevada
Katie Monroe, Executive Director, Rocky Mountain Innocence Center, Salt Lake City, Utah
Kate Kruse, Director, Innocence Clinic, William S. Boyd School of Law, University of Nevada, Las Vegas, Las Vegas, Nevada
Sam Bateman, representing Nevada District Attorneys Association, Las Vegas, Nevada
Renee L. Romero, Director, Forensic Science Division, Washoe County Sheriff's Office, Reno, Nevada

Chairman Horne:
[Roll taken.] We are going to hear two bills today: Assembly Bill 238 and Assembly Bill 179. Both of them are my bills, so it is William Horne day. Vice Chair Segerblom will be conducting the hearings.

We will start with A.B. 238.

Assembly Bill 238: Provides that persons who are convicted of certain offenses involving pandering or prostitution of a child are subject to lifetime supervision. (BDR 14-177)

Vice Chair Segerblom:
We will open the hearing on A.B. 238.

Assemblyman William C. Horne, Clark County Assembly District No. 34:
I am presenting Assembly Bill 238. This bill deals with lifetime supervision for pandering a minor. I am not going to say that it is a simple bill, but the concept is very simple.

If a neighbor of yours were to go down the street in the neighborhood and solicit a 15-year-old to have sex and was discovered, he would be convicted of a sexual offense of a minor. He would have to report on the sex offender registry and be put on lifetime supervision until such time that he could petition to be removed from that registry. That time period is seven years. If that same person wants to have sex with a minor who happens to have been put out for prostitution, he would likely be cited and possibly arrested for solicitation of prostitution, but he would not have to register or be put on lifetime supervision.

I would like to think that those are equal crimes, because they are putting a minor at risk from something that we have put on our books that we are going to protect these minors from. Why should this person, who has decided to participate in this type of conduct, be protected because this child victim happened to have been a runaway, for whatever reason, or forced out on the streets to prostitute?

This bill is attempting to shine a light on these people. It is a risk that one is going to take if he solicits a prostitute. This prostitute may be underage. He may have to register as a sex offender for life if he chooses to conduct himself in this manner. Some people have told me that the age of consent in Nevada is 16 years of age. What about those kids who are 16 years old or older? The difference is that a 16- or 17-year-old who truly consents to having sex with an adult is different than a 16- or 17-year-old who is participating in an illegal activity. That is not consent, because a minor cannot consent to do an illegal activity. That is how I draw this distinction. This is a policy question for this Committee on whether or not we want to protect those minors who are not afforded the opportunity to live in the suburbs and be protected by our general statutes on sexual offenses against a minor.

Sitting next to me is Assemblyman Hambrick, who had a similar bill. Instead of having two separate bills, he has agreed to be a primary sponsor on my bill. He is asking this Committee to amend his name onto A.B. 238 as a primary sponsor.

Assemblyman John Hambrick, Clark County Assembly District No. 2:
We are all familiar with Judge William Voy's attempts to address some of these issues in his family court in the Eighth Judicial District. His courtroom has seen, and I prefer to use this word only once, prostitutes. In the federal sector, they are called victims. He has seen them as young as 11 years old.

The teen sex trade is a disgrace to any state that tolerates it. I am thankful to Chairman Horne for adding my name as a primary co-sponsor. This scourge has got to be addressed. Civilized society has no place for the teen sex trade. It must be stopped.

Most of you know my background, and I come to this in a beat cop mentality. Some say that we are never going to stop it, not on our beat, but we must.

Vice Chair Segerblom:
Right now, it is illegal for someone to have sex with someone under the age of 16 years. Is that correct?

Assemblyman Horne:
That is correct.

Vice Chair Segerblom:
Does this change the penalty for prostitution or voluntary sex?

Assemblyman Horne:
The charge for sexual assault on a minor under 16 years of age is not going anywhere. That will still be there and still be applicable. However, what is different is that sex with a prostitute who is 16 or 17 years old will no longer be a consensual act. It will be a felony crime requiring lifetime supervision.

Vice Chair Segerblom:
Is this a knowing crime? If they are under 18 years of age, but the person soliciting sex did not know that, does that make a difference?

Assemblyman Horne:
I do not believe that should make a difference. We currently have statutory crimes for sex with a minor. Age of consent is 16 years of age, and under that it becomes statutory rape. We have all heard the stories of the gentleman who

goes to the nightclub, and the girl looked like she was over 21 years old and had a fake ID. He came to find out, after sexual relations with her, that she was under the age of 21 or even under the age of 16. He can be convicted of statutory rape. That is the level that we place on protecting these kids. It does not matter if he knew, if she lied with a fake ID, or if she looked older. This is a group that we are going to protect.

If you move that level of protection to these kids who are on the street, I think that the protection should be the same. The vast majority of the kids on the street, no matter their age, are not there of their own volition. They have been forced or coerced to be there, and I believe that level of protection should exist. How do we attempt to dry up this solicitation of minors? I believe that once it is understood that if the person is soliciting sex from a minor, and he would have to report if caught, it would stop people from seeking out prostitutes in the first place.

This is not going to affect the legal brothels that we have. Those operations are legal, and the proprietors of those businesses thoroughly vet their workers, and that should not be a problem. If there was a minor who was working at a brothel, someone would stand a chance of being convicted of this crime.

Vice Chair Segerblom:
Does this also include the pimp who puts the girl out there? Will they be subject to lifetime supervision?

Assemblyman Horne:
Yes.

Vice Chair Segerblom:
Because we are going to amend the bill to add Assemblyman Hambrick's name, are you interested in having anyone else be a sponsor?

Assemblyman Horne:
Anyone else who would like to amend their name onto the bill, I would be happy to have them.

Vice Chair Segerblom:
Assemblyman Cobb, do you want your name on this great bill?

Assemblyman Cobb:
Actually, I would.

Assemblyman Horne:
It was pointed out to me that this will have to be done in drafting later, to get the true intent of this bill because it incorporates *Nevada Revised Statutes* (NRS) 201.300 through 201.340. At NRS 201.300, subsection 3, it says that "this section does not apply to the customer of a prostitute." Obviously, that is not the intent of this bill; it is supposed to apply to a customer of a prostitute. We may have to amend the definition of "minor prostitute" in this bill in order to incorporate the "customer."

Assemblyman Hambrick's bill was basically the same bill, but his bill adds a conviction for an attempt to crime. That would be the amendment proposed to be blended from his bill into A.B. 238. Assemblyman Hambrick's bill does not have a bill number yet, but it is Bill Draft Request (BDR) 15-977.

Assemblyman Anderson:
Will we be seeing this in a mock-up?

Assemblyman Horne:
Yes, this will be in a mock-up ready for the Committee's consideration at a work session yet to be determined.

Assemblyman Anderson:
Assemblyman Hambrick is going to drop his bill?

Assemblyman Hambrick:
It is my intent to let it die. I do not want competing bills out there. I would like to see my bill merged into Chairman Horne's bill.

Assemblyman Carpenter:
Assemblyman Horne, could you explain the amendment with NRS 201.300? How would you amend that?

Assemblyman Horne:
It was brought up to me this morning that this section does not apply to a customer of a prostitute. I am not exactly sure how the drafting would go, but it would outline what a minor prostitute is. For a prostitute under the age of 18, in the context of this bill, it calls for lifetime supervision for those customers of the minor prostitute and those persons who put her out to prostitute. Right now, the draft does not include the customer, but we want the customer to be included for these penalties, in this context for minors. We will have an opportunity to look at that when we have the mock-up.

Assemblyman Carpenter:
It is probably there now to protect the legal brothels in the rural areas. We need to be careful how we draft this.

We have these laws on the books. How successful are they at getting convictions now?

Assemblyman Horne:
There are not a large number of convictions. I received a notice of eight arrests in 2008 from the Las Vegas Metropolitan Police Department (Metro). From the District Attorney's (DA) Office, there were 11 people charged with this crime in these parameters. That was the request that I had made to them. I was asked how much this lifetime supervision proposal was going to cost. The numbers were small, and until this bill passes, it is not a felony crime. We are looking at small numbers now.

Assemblyman Carpenter:
I represent the area where there are legal brothels. Every time I go to Las Vegas, it makes me wonder why things go on there that we are able to control in the rural areas.

I understand what you are getting at, and I have no problem with it as long as it does not reach into the places where brothels are legal. That is the best way to handle it because the police make regular checks on the brothels, and the girls have to see a doctor regularly. I think it is a better situation, and I want to make sure that we do not disturb that.

Assemblyman Horne:
There is no intent of going into the legal brothels in the rural areas.

Assemblywoman Parnell:
Am I reading this correctly that there would be a level playing field for both the pimp and the customer? Is that what this bill does as far as level of punishment and lifetime supervision?

Assemblyman Horne:
Yes. I think they are equally responsible. The customer is the person who has the demand, and the pimp is supplying that demand. They are on either side of the victim. Without this demand—the customer—the pimp has nothing to provide for this child. I think that they are equally complicit in this crime.

Assemblyman Anderson:
This trade in underage prostitution, even in a legalized system, is unfortunately growing tremendously. I think that even though we have taken steps in the past to protect those who are being forced into houses of prostitution, whether they are legalized or not, the police cannot be there 24 hours a day supervising the activities of those places. We have to be concerned about that and make sure that the pandering or transportation of these people through the state does not take place. We want to make sure that these perpetrators are charged. Does this not happen with this piece of legislation?

Assemblyman Horne:
I know that I have already said this, but it is not our intent to reach into the legal brothels. I do not think that anyone would turn a blind eye if someone was forcing minors into these legal establishments, nor do I believe that the operators of these legal establishments want those minors there. They do everything that they can to get them out of there. How bad would it be for business if they had minors in the brothel, and there was a sting, and their customers were arrested? The operators do not want that situation, nor do we want it. If somebody tries to dodge this by hiding this activity in a legal brothel, we need to punish them.

Assemblyman Carpenter:
They are going to lose their license to operate. You need to be very careful.

Chuck Callaway, Sergeant, Intergovernmental Services, Las Vegas Metropolitan Police Department, Las Vegas, Nevada:
We wholeheartedly support this bill. Lieutenant Karen Hughes, who is standing by in Las Vegas, can probably give a more technical side as to why we support the bill.

Karen Hughes, Lieutenant, Vice Section, Las Vegas Metropolitan Police Department, Las Vegas, Nevada:
The department supports this bill. We see the sexual exploitation of these kids every day. I do not want to get too technical, but I do want to go beyond some of the comments that have already been made in regard to the numbers. Last year in 2008, just our unit was able to identify 150 exploited kids who have been put into a life of prostitution. Many of those kids are from Nevada. Some are transported throughout the country to Nevada, and are exploited within our Strip Corridor in Las Vegas. They are not exploited into legalized houses of prostitution. This is specific to Clark County. It is alarming to us to see the number of kids who are coming into this lifestyle as young as 11 years old. Many are high-risk runaways between the ages of 11 and 15. They are being exploited by the pimps who consider them quite vulnerable. They are turned

out into a life of prostitution where they are soliciting customers and tourists within our corridor.

We support the bill wholeheartedly.

From a pimp's standpoint, these men are profiting off the backs of these young kids, and these kids are a special group of victims. They are damaged, and it is a difficult road to recovery for them if they do recover their innocence. In my unit, I have an entire squad that deals with nothing but child pandering cases, and we made 84 arrests last year of pimps and those who have exploited these kids in their life of prostitution. Some of them have been what we call the bottom girl in the stable; that is also a part of the recruitment and training of these young kids as they come into a life of prostitution.

We are making arrests. I cannot speak to the numbers of convictions, but I am sure that the Clark County DA's Office can attest that we were pretty successful, especially in child pandering cases. We charge for statutory sexual seduction. When these pimps recruit these girls into what they would like these young ladies to believe is a lavish lifestyle, the girls are sexually assaulted, beaten, and raped. That is typical behavior of these pimps. Lifetime supervision is appropriate for these types of offenders. They are pretty horrific.

I made a presentation last week to my department and the sheriff, and we spoke about quite a few of the cases that we are now putting together. The focus of my unit is on pandering and putting the violent offenders behind bars, and many of them prey on our kids. It is a feather in their cap when they have a child who is part of their stable. It is a strong statement when we can get a pimp in custody and sentenced, and if he is released, he has lifetime supervision. These pimps deal with each other and recruit from across the country, and lifetime supervision, in my opinion, is very appropriate.

Bernard W. Curtis, Chief, Division of Parole and Probation, Department of Public Safety:
We are in support of this bill. It is the right thing to do, and yes, there will be some impacts upon the Division of Parole and Probation, but it is well worth it.

P.K. O'Neill, Chief, Records and Technology Division, Department of Public Safety:
Within the division is a sex offender registry. I wish to express our concurrence with Chief Curtis, as the bill will have an impact, but we will absorb that. We think that it is the appropriate bill for us.

Vice Chair Segerblom:
While we say lifetime supervision, the same provisions that apply to other lifetime supervision will apply here, correct? There is an appeal process, and after a certain number of years one has the right to appeal for removal of his name.

P.K. O'Neill:
Lifetime supervision is handled by Parole and Probation. Yes, they would also have an appeal process within our tiering system of the sex offender registry.

Vice Chair Segerblom:
Do you know what tier this would be, or would it depend on the case?

P.K. O'Neill:
Under the current guidelines that we work under, I cannot say for sure because it depends on the criminal history of the individual. Most likely, because of the age of the victim, they would probably fall into tier 2 or tier 3.

Vice Chair Segerblom:
Are there any other individuals who would like to speak in favor of this bill? How about those in opposition?

Jason Frierson, Chief Deputy Public Defender, Clark County Public Defender's Office, Las Vegas, Nevada:
In this instance, we do not take issue with the effort in requiring that people who victimize those under the age of 18 have to register. Our concern is that we do not believe this bill does that. This bill relies on a statute, and that statute is the pandering statute in which subsection 1, paragraph (a) in NRS 201.300 provides that someone "who induces, persuades, encourages, inveigles, entices or compels a person to become a prostitute or to continue to engage in prostitution" is guilty of pandering. That is essentially a conversation in a bar.

While we have not, at the Public Defender's Office, represented a significant number of cases where the prostitute turned out to be under the age of 18, there is a reason for that. It is because we are often involved in representing those juveniles in a family court capacity, protecting them. However, we have, in the last couple of years, represented nearly 100 defendants charged with pandering where they were essentially having a conversation at a bar.

Paragraph (a) does not require that there be an agreement to exchange money, and it does not require that there be anything other than encouragement for someone to engage in what is otherwise a legal activity. In the counties where

it is legal, if you are encouraging someone to engage in prostitution, this will subject you to felony treatment in the statute.

My issue with the instant bill is that it is relying on that statute and possibly opening the door to require people to register as lifetime sex offenders who are not necessarily predators. We have no issue with isolating, identifying, and registering for life people who victimize children.

Our concern is that this bill opens the door, and we have had many examples where the judge has thrown out a case because the judge concluded that it was just a casual conversation at a bar. For every one of those cases, there are other cases that do not get thrown out or get negotiated because of fear of lifetime felony implications. We believe that paragraph (a) is the primary problem with this bill and its reliance on that statute. We are going after those who threaten or force someone to engage in prostitution with the pandering statute. Paragraph (f) deals with the exchange of money, and if someone enters into an agreement to convince someone to become a prostitute and discuss an exchange of money, that is illegal conduct.

To simply say, "There is an opening at the Bunny Ranch; I think you should go apply," and to make this a felony and to rely on this statute for lifetime supervision, the implication is problematic. I have spoken with law enforcement about the effort on putting "attempt" into the pandering legislation, which broadens it even more. If you encourage or "attempt" to encourage someone to engage in prostitution, that broadens it. We would be far less concerned if paragraph (a), which requires no exchange of money, was removed from the pandering statute. To some extent, that would eliminate the need for concern, litigation, and continued appeals on cases where it is a conversation at a bar. While that might seem like the exception to the rule, oftentimes that is what we, at the Public Defender's Office, deal with, the exception. Those cases are oftentimes negotiated down or dismissed, but it is a tremendous amount of litigation, and for those individuals, a tremendous amount of exposure over a broad statute that makes it a felony to have a conversation.

Assemblyman Anderson:
When I read NRS 201.300, I read paragraph (a) as a preliminary sentence which includes "encourages," and it gets progressively harsher with threats and exchange of money. It seems to me that one needs paragraph (a) and any of the other paragraphs in order to fit into the pandering definition.

Jason Frierson:
I would like it to be read that way, but, unfortunately, in practice, pandering is charged under any of those sections. I believe from paragraph (e) to

paragraph (f) it says "or." That means any of those criteria would meet the statutory requirements for pandering. The threats of force and other criteria are there but do not have to be relied on. If someone encourages someone to engage in prostitution, that meets the definition of pandering. It has been charged that way, at least in Clark County.

Vice Chair Segerblom:
Realistically, was this a conversation with an undercover officer?

Jason Frierson:
Yes, they are typically sting operations. This is where an undercover officer is at a bar, typically in a casino, and she is targeting people who she identifies as potential panderers. I have a transcript from a recent preliminary hearing where the undercover officer listed the factors that they look for, and it was the way the person dresses, looks, and their race. That was that particular officer's criteria for the type of person they would approach at a bar to engage in a conversation and to feel out whether or not that person was trying to pander them. This undercover officer would rely on language that, through their training, they believe is typical in pimp language.

In the course of representing individuals who are charged with this crime, we have obtained some of the materials that the officers rely upon. In particular, there is an article from 1979 that officers today rely on about pandering language, the lingo, to determine whether or not this person at the bar is saying things that would make him a panderer.

Vice Chair Segerblom:
When you said that they look for a certain race, what race would that be?

Jason Frierson:
That would be African American. An attorney in our office collected some statistics over the last couple of years of the pandering cases that we have had. While the typical pandering cases resulted in 25 arrests, it appears 36 percent of those were black males. The sting operations resulted in 66 arrests, and 97 percent of those targeted were black males. The officer testified that is what she looked for.

Vice Chair Segerblom:
If we eliminated paragraph (a), you would have no problem with the rest of the bill?

Jason Frierson:
Whether or not someone is labeled as a sex offender for life, I think, is within the purview of this body, and we would respect what the Legislature decides are appropriate levels of supervision. We would have no opinion on this bill if paragraph (a) was removed from the statute. We think that would make the statute much less problematic, and therefore, relying on it to register someone as a sex offender much less problematic.

Assemblyman Carpenter:
I think I am getting the sense of what you are saying. You are able to get many of these people off? Is that correct?

Jason Frierson:
A good percentage of all our cases negotiate down. There is no exception in this case. The difference in this case is that people are subjected to sex-related crimes, and for it to be that level of penalty, with lifetime consequences for something that could turn out to be casual conversation, there is much more at stake.

Orrin Johnson, Deputy Public Defender, Washoe County Public Defender's Office, Reno, Nevada:
I echo what Mr. Frierson said.

Rebecca Gasca, Public Advocate, American Civil Liberties Union of Nevada, Reno, Nevada:
We would like to echo the sentiments expressed by Mr. Frierson. Obviously, the idea that racial profiling is being used in order to address pandering is highly problematic. We hope that you take that into consideration. Beyond that, this statute and all the statutes that relate to pandering are extremely broad. It is likely that the legislative intent, when these statutes were created, was meant to be broad. When the Legislature changes the application of criminal penalties, it highlights how overly broad the pandering statutes are.

Currently, the crime of pandering is not limited to illegal prostitution. There is one exception, and that is in NRS 201.354, which makes an exception for licensed houses of prostitution. The definition of pandering, as it relates to prostitution, is not limited to illegal prostitution. Before you make any decisions on this bill, I encourage you to review all of the statutes that this bill is proposing to cover because, for example, NRS 201.300, subsection 1, paragraph (e) covers an individual who "takes or detains a person with the intent to compel the person by force, threats, menace or duress to marry him or any other person." What this would do is cover the young girl who is

17 years old and her boyfriend who is 18 years old and is encouraging her to runaway with him. As you see, the language provided there is broad.

Nobody knows better than this Committee the seriousness with which the label of "sex offender" affects a person's life. Because of that, we have challenged the application of the law as this body applied it in the 2007 Session. Currently, we are involved in litigation in the Ninth Circuit. There is a possibility that the question of the laws as currently written, and not yet in effect in the State of Nevada, could go all the way up to the Supreme Court. Congress, at a federal level, is reviewing the Adam Walsh Act, and that is with good reason. It is being applied in problematic ways across the nation. Being classified a sex offender can prohibit a person from living in a certain place, cause lifetime supervision, be extremely expensive, and in the cases in which a person who, under paragraph (a), for example, induces or persuades a person to engage in prostitution, which could be legal if in a rural county, they would be covered. For example, two young girls who are best friends are talking about what their future is going to be. If the two of them are inducing each other to become prostitutes when they turn 18, that would be covered by the way this statute is written.

Most importantly, the way that the pandering statutes are written, it shows that pandering is not actually a sexual act. What this does is, if this body decided to apply the definition of "sex offender" to the acts as delineated in the pandering statutes—although this panderer is not committing a sexual act but is inducing people or trying to get somebody to become involved in prostitution—is label that person as a sex offender even though they are not committing any sexual acts. This dilutes the pool of sex offenders and, as someone noted earlier, is meant to address those individuals who are the worst of the worst.

I am not here to say that some of the possibilities that might fall under the pandering statute are awful. I am saying that the pandering statutes are overly broad and are vague. When applying the sex offender definition to these statutes, I think that it opens up a Pandora's Box that this state should not open up.

Assemblyman Anderson:
Is it the American Civil Liberties Union's (ACLU) position that anything dealing with sex crimes should not be dealt with because of Megan's Law and pandering, and we should just ignore the questions dealing with the peculiarity of Nevada's rural counties that have legal prostitution? I do not think that any other state has legalized houses of prostitution, so we should stay away from the question entirely? Is that what your contention is?

Rebecca Gasca:
That is quite a complicated question. You are right, and as far as I am aware, Nevada is the only state where the majority of its counties allow prostitution. The application of different prostitution laws is very different in our state. Therefore, because we find ourselves in a unique situation—not only with prostitution but also with the sex offender laws that are currently in litigation—Nevada as a state should not move forward with an additional overbroad application of sex offender laws.

I am by no means an expert in this area, and for those of you who have detailed questions, I would be happy to put you in touch with Maggie McLetchie, who is the attorney currently litigating the Adam Walsh Act at the Ninth Circuit.

Assemblyman Anderson:
Maybe they are overly broad because Nevada has those 15 counties that have legal prostitution. We have always been careful in making accommodations for that. Nevada may not feel it is necessary to wait around for the determination of a particular piece of federal legislation. We can wait for the court system to operate forever, and we would never get anything done.

Rebecca Gasca:
What you said does ring true in that the body of law that covers issues of public policy is ever-evolving. This Legislature needs to make decisions at some point and has to make it in the best interest of their constituents. I am not here to determine how the history of Nevada law relates to the legalized forms of prostitution. I am sure that could be a doctoral dissertation. I am here to ask you to consider the implications of the way that the pandering statutes are worded and how that applies to the sex offender laws. It is a large question, but I am here with good intent to offer the information that we have.

Assemblyman Hambrick:
There was an analogy mentioned a few minutes ago about this bill affecting the casual conversation in a bar. Do you believe that an 11-year-old could have a casual conversation with a pimp about prostitution?

Rebecca Gasca:
I am not an attorney, and I am not involved in situations like that. I do not think that me saying yes or no would make a difference. It would be a pure supposition.

Assemblyman Hambrick:
That is what I am asking.

Rebecca Gasca:
Is it possible? Probably, and I understand that there is an intent of this bill to address highly problematic situations that have been identified in the public sphere. I go back to the way that these laws are written, and how overly broad they are. The targeting is not clear.

Assemblywoman Dondero Loop:
With all due respect, I think you missed the operative word "bar." I have three daughters, and I do not think any of them at 11 years old looked old enough to be in a bar. Rephrasing that question, do you think that an 11-year-old could sit in a bar and be induced into that situation?

Furthermore, the way I am reading this—and someone in the legal community will have to correct me if I am wrong because I am an educator—what if two 18-year-old girls are sitting in a bar who have fake IDs, and they are talking to each other about becoming a prostitute. Using the language of NRS 201.300, a panderer "induces, persuades, or encourages." In this case, "persuades" means, "I have decided to do it." "Encourages" means, "I have decided to do it." So does "compels." It does not mean that the person has just thought about it and did not do it. Someplace along there, the action takes place, and that is the part that is escaping me when I am hearing the opposition.

Rebecca Gasca:
The example of the bar was presented by Mr. Frierson. I could be wrong, but when I presented the example of two girls talking, I did not describe it in the setting of a bar because that could happen in the setting of a school. Teachers or principals could hear it, and after extracting it out of them, they both get in trouble, and one parent is extremely upset and wants their daughter's friend to be prosecuted because they believe that she is the one who is influencing this.

When it comes to finding 11-year-olds in a bar, it could very well be possible. An 11-year-old girl can get a fake ID and get into a bar. Young women these days are very mature looking sometimes, and as has been identified, problems such as that have been presented. I am not here to deny that there is an issue that is meant to be addressed by this bill. I am here to help put forward the recognition that these pandering laws, as currently written, are overbroad in their application to sex offenders.

I apologize to the Committee. I am not an attorney, so I cannot follow up on that last interpretation of paragraph (a).

Assemblyman Horne:
We know that this is not a court of law, and this will not be a rebuttal. I knew about the Adam Walsh dilemma that currently exists, and I asked Legal to keep that in mind in drafting this. I was aware of that when working on the bill.

Many of these Committee members have served with me on this Committee before and know that I am one of the first to step up when particular bills or statutes are not supposed to capture certain people or are too broad. In introducing it, I understand, as with all pieces of legislation, there may be some issues. With that said, I brought this bill with the best intent, which was primarily to protect our children who are out there being victimized in the realm of prostitution.

Vice Chair Segerblom:
I will close the hearing on A.B. 238.

[Recessed and reconvened.]

Vice Chair Segerblom:
I will open the hearing on Assembly Bill 179.

Assembly Bill 179: Revises provisions governing post-conviction genetic marker analysis. (BDR 14-869)

Assemblyman William C. Horne, Clark County Assembly District No. 34:
Today, I am presenting Assembly Bill 179. Assembly Bill 179 creates a post-conviction deoxyribonucleic acid (DNA) testing statute. Currently, Nevada provides for post-conviction DNA testing only for death row inmates. The Ninth Circuit Court of Appeals recently ruled that prisoners have a right to this testing if the evidence is in the state's possession and the evidence has the potential to prove innocence.

If this Committee remembers testimony from the Department of Corrections earlier this session, the cost per year, per inmate, for incarceration is more than $20,000. A recent study establishes an error rate of 36 percent in the criminal justice system. Besides being the right thing to do, it would be fiscally prudent to identify those innocent persons who are currently being incarcerated in our state.

With me today are Katie Monroe, the Executive Director of the Rocky Mountain Innocence Center, and Professor Kate Kruse of the William S. Boyd School of Law Innocence Clinic. They will go through this bill in more detail and describe

how post-conviction DNA testing is supposed to be implemented and the successes that they have witnessed.

There are some friendly amendments to this bill being presented today. In fact, this is a consensus amendment made by Katie Monroe, Kate Kruse, and Sam Bateman of the Nevada District Attorneys Association. One of them will outline, in more detail, the amendments which have already been passed out to you (Exhibit C).

I was first introduced to the Rocky Mountain Innocence Project last year when I was working at Snell & Wilmer. A couple of people there had benefited by this effort to find those individuals who have been wrongfully convicted. The DNA evidence at the time of their conviction either was not available or, due to less advanced technology, gave insufficient results. Those individuals were later exonerated for the crimes that they were incarcerated for and have since been released.

I will be relinquishing my seat to Lucy Flores at the witness table.

Assemblyman Cobb:
Do you want to take questions on the particulars of the bill now? I did not know if the witnesses were going to speak directly to the aspects of the bill or just provide a background on the Innocence Project.

Assemblyman Horne:
They are going to do both.

Assemblyman Cobb:
I will wait until they have the chance to testify.

Lucy Flores, External Affairs and Development Specialist, University of Nevada, Las Vegas, Las Vegas, Nevada:
As Chairman Horne mentioned, when we did this presentation regarding wrongful convictions, we did bring some exonerees who gave their story. That is what we are going to start with today. Unfortunately, we could not bring anyone in person, but we are going to introduce a short video regarding that.

In addition, we are going to talk about wrongful convictions and give a background on that, but we are also going to go through A.B. 179, which would extend Nevada's post-conviction DNA testing statute to noncapital crimes.

[Showed video (Exhibit D).]

I will hand it over to Katie Monroe to give an introduction on the wrongful conviction area.

Katie Monroe, Executive Director, Rocky Mountain Innocence Center, Salt Lake City, Utah:
[Provided PowerPoint presentation (Exhibit E).]

We investigate provable and credible claims of actual innocence in three states: Nevada, Utah, and Wyoming. We work in conjunction with the Innocence Clinic formed at the beginning of this school year that is based at William S. Boyd School of Law in Las Vegas, Nevada. It is directed by my colleague, Professor Kate Kruse. Together, we work on cases and investigate claims of innocence in Nevada.

That video introduced you to three exonerees from Texas. We have actually had, in our country, 232 DNA exonerations. The most recent happened a few weeks ago. What this means is that these individuals had claims of innocence and were able to get access to physical evidence that had been left by the actual perpetrator at the scene of the crime 5, 10, 15 years ago and had been collected at the time. The evidence either was never subjected to DNA testing because it was not available as a science or for any number of reasons was not subjected to DNA testing. DNA testing has the capacity to take the biological evidence left by the actual perpetrator and identify both the person who did not commit the crime and, in 50 percent of those exonerations, the actual perpetrator of the crime. These 232 individuals came from 31 different states and, on average, spent 12 years individually in prison; collectively they wrongly spent 2,789 years in our prisons.

DNA testing has established that our criminal justice system makes mistakes. It has also established a number of causes for those mistakes. You heard a few of them in the video. Eyewitnesses often get it wrong, and police often rush to judgment and latch onto the wrong person. Sometimes prosecutors cut corners to win a conviction, and defense attorneys often do not do justice for their client. Most importantly, DNA has established that a number of forensic sciences that we used to rely on in the past, like blood, hair, or fiber comparison, are not actually reliable.

DNA evidence has the scientific certainty to establish who did or did not commit a crime. As a result, it serves a variety of purposes. It does not just benefit the innocent prisoner, but it is also a service to the crime victim, law enforcement officials, and the public, because at the end of the day, no one wins when the wrong person goes to prison. When the wrong person is in prison, the right person is still free on the streets to commit additional crimes. The crime victim

has not had closure or justice because the person who actually committed the crime against them or their loved one has not been brought to justice and imprisoned. The public's faith in law enforcement is weakened drastically, and precious public funds are wasted on investigating, trying, prosecuting, and imprisoning the wrong person.

I wish I had a particular person at the table to speak to today, but I do not. Her name is Jennifer Thompson Cannino, and she is a rape victim from North Carolina who illustrates the importance of DNA testing to the crime victims better than anyone else. Jennifer was a college student in North Carolina, and she awoke one night to someone in her bedroom and was subjected to four hours of violent and almost fatal rape.

During the course of her rape, Jennifer decided that she was going to survive, and she was going to memorize the face of her attacker so she could put the person who was harming her in prison.

When Jennifer was finally able to escape her rape and get to the police that same evening, they asked her, "Can you identify your rapist." She said, "Absolutely." She had actually gotten her rapist into the kitchen and turned on a light. She had gotten him to relax a little bit in her house so she could get a good look at him. Unfortunately, as a result of the way eyewitness identification works, she started with a drawing, then moved on to photo identification, and then to a live identification. Jennifer actually picked the wrong young man, Ronald Cotton. This innocent young man went to prison for Jennifer's rape while the actual rapist, Bobby Poole, went on to rape eight other women in Jennifer's apartment complex before being caught and put in prison.

Ronald was able to get access to DNA testing 12 years into his prison sentence, and the evidence proved not only that Ronald Cotton was not her rapist, but that Bobby Poole was.

The reason Jennifer is not here is because she and Ron, after this horrible ordeal, became friends and now tell their story together. Last week they published a book called *Picking Cotton* that they wrote together and which tells the story, so they were not available to come here today.

I cannot overemphasize what DNA testing has the capacity to do for all of us in the room, and particularly for crime victims. When the wrong person goes to prison, they suffer a double tragedy. It is easy for us to say this as an Innocence Project, but our goal is not to assist a guilty person in prison. Our goal is to identify people in prison who may be innocent and give them a remedy to be rightly released. If that DNA evidence can exonerate an innocent

person, it can be put into a program, and ideally, the DNA can identify who actually committed the crime. We see this as a win-win situation for law enforcement officials. The DNA evidence has the capacity to prove who actually committed the crime with scientific certainty. If someone were to bring a false claim of innocence and get access to DNA testing, the DNA testing would have the capacity to shut down that case forever and bring true finality. Either way, law enforcement wins and the crime victim wins, because the innocent person is released, the guilty person is identified, or a false claim of innocence is put away forever.

I want to make one last policy point. Currently, there are 44 states that have DNA testing statutes. Often, when DNA testing is being considered as a statutory remedy for a prisoner with a claim of innocence, the concern is how many requests there will be. Will there be a flood of litigation? From our research, the answer to that is no. I have personal experience on this. I have worked on DNA cases in Virginia, Maryland, and Washington, D.C. I now work on them in Nevada, Utah, and Wyoming. The states that have tracked the number of requests for DNA testing have found that there have been very few requests. There are a couple of reasons for that. The vast majority of criminal cases do not have biological evidence that can be tested for DNA. This is because it was not the kind of crime where the perpetrator left biological evidence at the scene, or because it was not collected or preserved. In order to get access to DNA testing, the prisoner must meet standards. He must be able to say that he is making a credible claim of innocence and that evidence exists to prove that innocence. Most statutes build in a punitive measure for those who might be bringing a frivolous or false claim. The innocence projects that handle these cases have strict vetting processes because our goal is not to assist a guilty person. Long before we would ever seek DNA testing in a case, a years-long investigation has gone on to make sure that this prisoner has a credible and provable claim on innocence.

I would like to turn it over to my colleague, Professor Kate Kruse, who is going to walk us through the components of this bill.

Vice Chair Segerblom:
Ms. Kruse, do you have the proposed amendments?

Kate Kruse, Director, Innocence Clinic, William S. Boyd School of Law, University of Nevada, Las Vegas, Las Vegas, Nevada:
Yes, I have the proposed amendments.

I am going to talk about the post-conviction DNA testing statute in Nevada, the changes that we want to make to it and how those changes fit into the larger

picture of the remedies that are available for people who are claiming innocence in Nevada.

Like 43 other states in the nation, Nevada does have a statute that allows prisoners to petition for post-conviction DNA testing. However, unlike 42 of those states, Nevada does not have a remedy for prisoners not on death row, including all of the people you saw in the video, Ronald Cotton, and anyone who is not serving a death sentence. Nevada's statute applies only to capital cases. There are six states that have no statute, while Nevada and Kentucky have a statute that applies only to capital cases.

It is important to understand that once someone is convicted, innocence is no longer a question. For people who are not serving death sentences, the whole appellate process is focused on whether they got a fair trial and not on whether the jury reached the correct result, and one cannot admit new evidence into the process. The appellate courts are looking solely at whether or not the defendant received a fair trial based on the evidence that was presented at that trial. There is a habeas corpus remedy where someone can file a post-conviction habeas corpus claim, but that does not provide a remedy for someone who is claiming innocence. It provides a remedy for someone who claims that there was a constitutional violation in the way his case was handled.

The way that someone claiming innocence could get a new trial based on newly discovered evidence would be through NRS 176.515. This is a statute that allows one to petition a new trial based on newly discovered evidence. This is typically what new DNA evidence is; however, motions for a new trial under that statute are limited to two years. In 1989, the Nevada Supreme Court decided, for important policy reasons, that the court could not provide exceptions for that two-year limit.

The case *Snow v. State*, 105 Nev. 521 (1989), is interesting because it is based on an assumption, which was probably true at the time, that the longer the case is around, the staler the evidence becomes. It is not fair to the state to allow a petitioner to reopen a case after a certain amount of time because the evidence that could be used to reconvict them at a new trial has gotten older and less useful.

The first DNA exoneration was in 1989, the very year that the *Snow* case was decided. That first exoneration changed the way that people looked at older cases. Unlike other evidence, DNA testing gets more powerful as time goes by because DNA technology improves. Blood or body fluid samples can now be tested that could not be tested in 1989. In 1989, a significant amount of a sample was needed in order to subject it to testing. The technology has

improved so that only small amounts of biological material left at the crime scene are needed. We used to think that we did not have a test available for hair samples without the follicle, but now the technology is advancing to the point where hair can be tested even if it does not contain the cells in the hair follicle. We are at the frontier of developing technology to lift DNA off of fingerprints. There is an ever-widening pool of old evidence that could bring us answers that we did not have before, because the evidence is actually getting better rather than worse.

In 2003, Nevada passed the DNA testing statute that we currently have. It recognized that DNA was different from other kinds of evidence, and it created a procedure to petition for DNA testing if there is a reasonable possibility that new tests available now would change the outcome of an old case. If the DNA tests came back favorable to the petitioner, our DNA testing statute allows an exception to that two-year limit. There is a special exception for DNA because of the different type of evidence that DNA is. However, as we have mentioned, it applies only in capital cases.

I am going to talk about the five main changes that we are proposing to A.B. 179. We have had some time to talk to Mr. Bateman, who is representing the district attorneys (DA), and to work on some additional language which has been distributed to you (Exhibit C). We all find this language agreeable. We are all concerned about the balance between allowing a remedy for truly innocent inmates when new technology can shed light on their old evidence, and preventing a flood of people who could get in under the current language in the Nevada statute.

The first major change is in section 1; this would extend Nevada's post-conviction DNA testing statute to all category A and B felonies. If you go lower than that, you are talking about crimes that carry a maximum sentence of five years. This adds a subsection 3 to section 1. Subsection 3 creates a clear definition of what needs to be alleged in the petition for DNA testing. It basically says that, if a prisoner wants to ask for testing, in his petition he must state what evidence he thinks the state has, and explain why testing that evidence now would help support a claim of innocence.

The reason the petition needs to specify these things is because we want courts to be able to sort through these petitions. In the event that there are petitions that are filed that do not have a basis in the case, the court can look at the face of the petition and dismiss it. These are amendments in what is now subsection 4. It creates a sorting mechanism for the court. The court can dismiss petitions that are inadequate on their face, and can also appoint counsel in cases where a good claim appears to be alleged. I think that is especially

important so that someone can go through and negotiate with the DAs about what should be tested and the extent of testing. When the tests come back for many of these cases, there can be stipulations for a new trial or to dismiss the charges if the testing warrants it.

Assemblyman Carpenter:
Will you go back to the situation where you want to change it to an A or B felony and give your reasons?

Kate Kruse:
When you get down to category C felonies, the sentences are one to five years. I think the types of cases that are most important are older convictions where the technology has changed since the time of trial, and the person is still serving his sentence for that crime. It is not for defendants who could have gotten a test prior to trial—but decided not to—but for those where the technology has changed and a new test could be done. I think limiting testing to category A and B felonies would be responsive to the concern of the overburdened crime labs that they would be flooded with requests for testing; yet, it would leave a remedy available in those situations where post-conviction remedies are needed.

Assemblyman Carpenter:
As I understand it, in your handouts (Exhibit F), there are very few people who ask for this, especially when your organization, or an organization similar to yours, does a lot of pretesting.

Kate Kruse:
I share your concern to make the remedy as widely available as possible. However, it takes several years to develop the type of investigations that we are talking about. We do not see those types of investigations occurring in cases where the perpetrator is serving less than five years in prison. The one exception might be for inmates serving sentences for lower category felonies where habitual offender enhancements have created longer than normal sentences.

Assemblyman Carpenter:
It is okay if I disagree with you, right?

Assemblyman Anderson:
Justice Hardesty's Advisory Commission on Sentencing has a piece of legislation that they have been pursuing in this general area. One of the issues that they have been looking at is that the people who are incarcerated may want to pay for the testing themselves. Thus, the lower end crimes would fall into this category.

Oftentimes, individuals do not behave well inside the prison system, and as a result, they end up being there longer than two or three years. Part of our prison population may be serving longer than you were anticipating, and you would not want to cut off their opportunity. Are you trying to broaden this so anyone who feels they have been wrongfully convicted would now have the opportunity to have DNA testing done?

Kate Kruse:
Your questions may be better addressed when Renee Romero from the crime lab comes up. I believe that our willingness to limit this to A and B felonies comes from our desire to present you with some compromise legislation where everyone who is involved in these questions can agree to the terms. We would not oppose broadening the crime categories or broadening them with the provision that people in other crime categories would have to pay for the testing themselves.

The proposed amendments to the bill also create two disincentives for those who know they are guilty and who are filing petitions. First is their knowledge that the test results will be forwarded to the Parole Board if those results are not favorable to the petitioner, and this appears in subsection 8, paragraph (f).

The second disincentive appears in subsection 12. The cost of the genetic marker analysis will be born by the Department of Corrections only if the petitioner is incarcerated, is indigent, and the genetic marker analysis is found to support the petition. Slightly before this hearing, we and Mr. Bateman agreed to "support the petition or if the results of the testing are inconclusive." This means that it is only if the tests come back in a way that is not favorable or is culpatory to the petitioner that they would be asked to bear the cost. I think that the prospect of having the costs of the tests laid on them, and also having the Parole Board notified of unfavorable results, provides a disincentive to people. It is our experience that it is an important part of the process of counseling our clients as to whether they want to push for genetic marker analysis—DNA analysis—and that they understand there is a downside for them if it comes back unfavorable.

Vice Chair Segerblom:
This may be a rhetorical question, but if one is an incarcerated indigent, how does that person pay for it?

Kate Kruse:
I take your question to being whether it will really deter people if they know that they are judgment proof.

Vice Chair Segerblom:
I said that it may be a rhetorical question.

Assemblyman Anderson:
Can the lab reject a sample if it knows it is not of a quantity or quality to be tested? What happens if testing has already been requested and completed? They cannot request a second or third test, thus increasing the cost to the Department of Corrections, correct? Even when new technology comes around, do they have only one request?

Kate Kruse:
The process is that the court holds a hearing on the petition after it is filed. Part of that hearing process is to request an inventory from the agency that holds the evidence. At that hearing, the court and both sides consider what evidence actually exists and what condition it is in. The court will then make an order for the evidence to be tested. For the court to request an order, there must be a reasonable possibility that the petitioner would not have been prosecuted or convicted had the results been obtained earlier, that evidence exists, and the evidence had not previously been subjected to genetic marker analysis, unless it was subjected to another type of analysis or an analysis that was inconclusive.

The last major change that our bill—not the amendments—makes is to provide notice to the victims, pursuant to the statutes that already apply to victims' rights, that the hearing has been ordered.

The flip side of one of these stories of a wrongfully convicted person is the story of Christopher Ochoa, and the parallel story to that crime about Jeannette Popp, who is the mother of the young woman who was raped and murdered in that case. Under interrogation by the police, Christopher broke down and confessed to a crime that he did not commit. Usually, when that happens, the law enforcement officer is pushing and saying that they, the police, have the evidence, and they have a scenario of how they think the crime occurred.

Based on the physical evidence that they had at the time, the police believed the crime was committed by more than one person, and they believed it was a multiple sexual assault that involved both rape and sodomy. The confession that Christopher Ochoa gave was consistent with the police's interpretation of the physical evidence at the time. He included the detail that the victim was shot as she was down on her knees begging for her life. For 12 years, her mother had to live with that image in her mind. When the true perpetrator finally confessed, it was a single person and a single rape. There was no

begging for her life on her knees before she was shot. It was a much less painful thing for the victim to live with. The true perpetrator confessed because he went through a religious conversion while in prison for other rapes.

The DA behaved honorably in this case. When the true perpetrator contacted them, they contacted Christopher Ochoa and told him that someone else confessed to his crime. They asked him if he wanted the DNA to be tested. He was afraid of how it would affect his parole and declined the offer to test the DNA while still claiming his guilt. Eventually, he contacted the Innocence Project of New York and asked for help. He finally consented to have the DNA testing completed. As soon as that request was made, the DA tested it because they wanted to know and to preserve the evidence. When the DNA was tested, it turned out that the man who confessed after the fact was, indeed, the true perpetrator. Both Christopher Ochoa and his co-defendant, who was also wrongfully convicted, were excluded by those tests.

I have had the pleasure of hearing Jeannette Popp speak, and it is a moving story. Some say that Christopher Ochoa should have to live with the consequences of falsely confessing. He chose to confess and plead guilty; however, the victim in that case did not choose to live with the version of events that was not true. DNA has the power to change everyone's view of the case and to bring the truth to light. We would encourage you to extend that remedy beyond capital cases.

Lucy Flores:
I wanted to bring your attention to a publication that you all have that is called *200 Exonerated* (Exhibit G). It is little snippets of stories of the first 200 exonerees that were exonerated based on DNA evidence. We are not dealing with one victim, but many victims. It is in all of our interests to have the true perpetrator incarcerated rather than an innocent person. I hope that the Committee will take a moment to look at this.

Vice Chair Segerblom:
What is the average cost of the DNA tests?

Katie Monroe:
There are a variety of DNA tests. The most basic form is testing just to identify the DNA sample. This is called Short Tandem Repeat (STR) testing, and that testing costs anywhere between $800 and $1,500. There is a secondary type of testing that isolates a biological sample from a male or female and is often run in a rape case. This testing is called Y-chromosome Short Tandem Repeat (YSTR) testing and costs anywhere between $2,000 and $2,500. The most expensive DNA testing is a new form called mitochondrial testing. This can be

done on hairs, bones, and teeth. This is not a common form of DNA testing, and we have never requested it in a case. Most of the 232 exonerations were based on biological evidence that can be tested by an STR or Y-STR DNA test. A mitochondrial test can run in the range of $10,000 or more.

I would like to give a couple of extra numbers. In Utah, where we unanimously passed a post-conviction DNA testing statute applying to all felonies, we have had seven requests for DNA testing since 2002. Arizona, which passed its statute in 2000, has had no more than 20 requests. In Wyoming, we passed this same statute last year, and they have had no requests, and we do not have any in the near future. Nevada should not expect any kind of flood. There will be some fiscal impact, but it will not be huge amounts. We made these numbers available in the handouts you received earlier (Exhibit F).

Assemblyman Cobb:
Is this bill intended to have a retroactive effect on those who have already been convicted?

Katie Monroe:
In spirit, yes. One of the things that we have discovered is that these exonerations are based on cases from 10 to 15 years ago when DNA testing was not available, or the testing that was available is not as scientifically accurate as it is now. Ideally, going forward, testing will happen in a pretrial setting, and the questions about who the actual perpetrator may be will happen before anyone goes to trial or is wrongly convicted. That said, this bill is not meant to be retroactive. The idea is that if someone ends up being wrongfully convicted and finds himself in prison and testing was not available at the time, or as testing gets more advanced, or for any number of reasons, it is important to test that evidence. Ideally, we will see fewer numbers going forward.

Assemblyman Cobb:
There is an issue of spoliation of evidence because we do not hold onto this evidence indefinitely. However, this bill requires that you cannot apply that retroactively because, in many cases, the evidence has been removed, so there is nothing to compare it to anymore. I have not examined the entire bill and amendments to see if there would be a legal issue there, because I do not think there is any type of allowance for spoliation of evidence on behalf of the DA's office or the courts.

The other issue is bringing these matters before the trial occurs. We do not want to have the cost of the trial when we can clear an individual with DNA testing ahead of time. I have been told by the DA that they already do this if there is a question of identity.

Katie Monroe:
All of the cases that I have worked on personally, and the cases that we are currently working on, are from some years in the past. There are some cases that raise the legitimate question that DNA testing was not available at the time. This bill does not require evidence preservation. I commend Nevada because we often find in this state that the evidence does exist. We have a case right now that is 26 years old, and all of the physical evidence from the crime scene was preserved by the trial court. We can put this kind of matter to rest. In other states where I have worked, in 75 percent of the cases, we do not find the evidence because it is no longer available. That is a tragedy for all involved. This bill does not mandate evidence preservation, but it does require that once a petition is filed and a hearing is scheduled, the state must inventory the evidence it has and preserve it for the purposes of the testing going forward. We did not attempt to address the former complex issue of statewide evidence preservation in this bill.

Kate Kruse:
There may be other legislation coming on evidence preservation, but this remedy applies only to evidence that exists at the time the petition is filed. It requires that the evidence be held onto while the petition is pending, and that an agency would not respond to a petition by losing or destroying evidence. It is a separate question, and we would hope that it would not be necessary to test evidence into the future, but in the event that there is evidence to be tested and technology has advanced to the point where we can get answers to stuff that we did not know before, it allows us to seek those answers. At this point, people who are convicted of noncapital cases in the State of Nevada can be sitting in prison with the evidence sitting in the crime lab or evidence vault, and there is no way to test it. There is no way for the person sitting in prison to ask for it to be tested.

Assemblyman Cobb:
There is nothing in existing law or in this bill, and is certainly not the intent of this bill, to provide some type of remedy to a convicted felon because evidence has disappeared over time, intentionally or not? We are not going to see court cases down the line where a convicted felon is making the argument of the state not living up to the requirements under this statute; therefore, since there was spoliation of evidence, he should be released?

Kate Kruse:
This does not provide a remedy based on the destruction of evidence. It provides a remedy for the testing of evidence that still exists.

Assemblyman Cobb:
It is a due process argument, regardless of whether it is explicitly written in statute, if the state does not live up to their obligations under evidentiary rules and such.

Kate Kruse:
There may be a due process argument that could be made, but this statute would not be the way to make it. The way to make that argument would be through already existing state habeas corpus proceedings. This would not change that in any way.

Katie Monroe:
We had a case in Virginia where the courthouse wrongfully disposed of all of the physical evidence in a capital case. It was understood by all of the authorities that the evidence was supposed to be preserved. The state actually said that it was on the verge of criminal. The defendant, Robin Lovitt, was represented by Ken Starr. He was facing the death penalty, and he had no remedy because the evidence no longer existed. He had no argument to make other than saying, "If the evidence were still around, it would prove my innocence." That evidence was not, so there was nothing further to do in the case. Fortunately, the governor at the time, Mark Warner, commuted Lovitt's death sentence to life, with the understanding that there was a potential claim of innocence, but he had no remedy.

Assemblyman Horne:
I came up to the table for clarification about the last line of questioning on the spoliation of evidence, but I believe that Ms. Monroe addressed that adequately.

Sam Bateman, representing the Nevada District Attorneys Association, Las Vegas, Nevada:
I wanted to note, on behalf of the Nevada District Attorneys Association, that we are not opposed to post-conviction DNA testing. We believe, in the vast majority of cases, that it is going to vindicate individual prosecutor's decisions and vindicate law enforcement's investigations. In the past, we have worked with the Rocky Mountain Innocence Project doing DNA testing. Currently, there is one in the Clark County District Attorney's Office from the early 1980s. I want to make sure that the Committee is aware of the Nevada District Attorneys Association's position in that regard.

Initially, when we reviewed A.B. 179, we were concerned. The concern was that this statute in existence applied only to those convicted of the death penalty. It did not have some of the safeguards that other statutes have across the west that encompass more felony convictions than just those of individuals

sentenced to death. As a result, I spoke with the sponsor, Assemblyman Horne, and I reviewed some of the statutes in the west to see what kinds of safeguards are included in those statutes. I wanted to know what other states were doing in this regard, given the fact that we are opening it up to a substantial amount of felony convictions.

I came up with an initial set of amendments that were taken largely from those other statutes. I sat down yesterday with interested parties, and we worked out the amendments that you have before you (Exhibit C). Those amendments are something that our association and interested parties can live with. I cannot speak for the Las Vegas Metropolitan Police Department (Metro) or any other law enforcement agency, but I believe that they feel comfortable with the amendments that are included. I think the amendments strike a balance between the interest in exoneration, if that can be done, and the interest of the people in the State of Nevada, in the finality of judgments. The amendments create some clear standards: they give courts flexibility to address cases, and they address who is going to pay the costs.

I am not as concerned about groups like the Innocence Project coming forward and asking for this testing. I am more concerned about the potential of a flood of requests, and I understand that there are numbers from other states that would suggest that this is not going to happen. Unfortunately, I think things happen differently in Nevada. I am concerned about an influx of, for instance, *pro se* or *pro per* petitions. We already deal with those now in the context of petitions for writs of habeas corpus, and they can be very time consuming and difficult to deal with. I think that the structure that we have included in these amendments and to the existing statute would address the potential for that type of litigation.

I would note one additional point. I spoke with our lab director, Linda Krueger, recently about this situation, and the status of their DNA testing in the Clark County laboratory. Currently, they are four months behind in DNA testing. We ask for quite a bit of DNA testing because it is more available for ongoing criminal cases prior to conviction. I think going forward, we will be doing more and more of that, but right now, we are four months behind on cases that are in the system where we are either trying to solve crimes or are in the actual criminal justice process prior to conviction, when defendants have the most rights.

The concern from the Clark County laboratory's standpoint is that a flood may occur and extend that four-month period. We are delaying investigations and hampering public safety to some extent. That is why the amendments are proposed the way they are. They strike that balance that will not have a

significant negative impact on the system. With the amendments, the Nevada District Attorneys Association can support A.B. 179.

Chuck Callaway, Sergeant, Intergovernmental Services, Las Vegas Metropolitan Police Department, Las Vegas, Nevada:
We support A.B. 179 with the proposed amendments from the DA's office.

Assemblyman Anderson:
Currently, who covers the cost of the DNA testing that is done through the Clark County office for both the prosecution and defense? Is there a screening process with DNA testing? How is that information shared with the defense?

Sam Bateman:
I assume you are referring to prior-to-conviction testing. I do not know all of the funding mechanisms for how the Metro pays for testing, but I assume it comes out of their budget. The State of Nevada pays for it prior to conviction.

Assemblyman Anderson:
The State of Nevada or the county pays for it?

Sam Bateman:
That might be a better question for the representative from Metro to answer. I do not know how the funding operates for preconviction DNA testing.

Assemblyman Anderson:
What about the sharing of that information to all of the potential people whose DNA is tested?

Sam Bateman:
The first part of your question was how we screen. It is like any other investigation. We decide whether or not DNA testing would be relevant to the case. That is often done by law enforcement before it gets to our office. We may do it after it gets to our office upon further review of the case. We are obligated to provide to the defense attorney discovery regarding any reports in the case and any testing. Sometimes the defense will ask us to do specific testing, and if we think it is relevant, we might comply with that request. In anticipation, we either negotiate the case or go to an actual trial. We provide all information that we intend to use at trial to the defense. If the DNA ultimately is exculpatory, we have some obligation to provide that information as well.

Assemblyman Manendo:
Back in 2001, Assemblyman Price had a similar piece of legislation, so I appreciate this piece coming forward.

Along the same lines as Assemblymen Anderson and Cobb, when one is put into the position of trying to be convinced to confess to a crime, and when a test can be done to find out for sure if that is the right person, why is that not done in the first place? I have an issue with anyone spending time in jail or prison for a crime that they did not commit. I think that it is an absolute waste of time and energy for everybody in our system. The judicial system, the prison system, and jails are bloated, and nobody wins. Maybe you can explain that to me and why you believe that is not the right way to go.

Chuck Callaway:
I wholeheartedly agree with you. I think that the right thing to do, if we have that evidence beforehand, is to test it. In the majority of cases, we are either lacking the evidence, or the crime is not of a magnitude to justify the expense of the DNA testing beforehand. We might have other evidence which we feel is sufficient enough to prosecute. Submitting for a DNA test, which is expensive, is something that the officer or the department may choose not to do.

I do agree that if it is a case of such magnitude where someone could spend a degree of time in prison, it would be in the best interest of the public and the department to do that testing prior if we are able to.

Assemblyman Manendo:
In a case of rape or murder, if you have a piece of DNA, do you test in every single situation? And if not, why not?

Chuck Callaway:
I would like to say that, yes, we do. If we do not, it would be decided on an individual, case-by-case basis as to why that testing was not done.

Assemblyman Manendo:
Is it because you think you have the right person?

Chuck Callaway:
I would say in a case of major magnitude where someone is charged with murder or rape, and they will probably go to prison for a long time, that DNA would be tested prior to the trial date.

Vice Chair Segerblom:
I think, Assemblyman Manendo, we are dealing with prior cases as opposed to current cases. I think that they do test everything now.

Chuck Callaway:
We support this bill with the proposed amendments.

Renee L. Romero, Director, Forensic Science Division, Washoe County Sheriff's Office, Reno, Nevada:
I support the bill with the amendments. Initially, I did not support this bill, but now that I have gotten the chance to see the amendments, I do support it. I was concerned about all felonies and the floodgates, much of which has been discussed today.

Today, we test DNA for touched samples. We can process touch DNA, and I worry about the floodgates opening from the lower crimes in analyzing touch DNA. For example, a controlled substance case where a baggie of drugs was taken off of the individual, and now we want the bag tested for who touched the bag. Hopefully, there would be enough vetting out that something as irrelevant would not come forward, but that is where I had concerns. I do support the amendments that were provided today.

Assemblyman Cobb:
In reference to the sixth amendment listed on page 2, is that meant to be aimed toward achieving that goal of having these issues handled pretrial? It makes reference to tactical or strategic decisions, and I would like to hear more about that. Are you trying to require a defendant to request this evidence up front and avoid the cost of the trial? What type of penalty would there be if one does not request this pretrial and waits until after the trial?

Sam Bateman:
A number of statutes around the West have that type of limitation, which is to say that if DNA testing is readily available prior to trial and one chooses not to take advantage of that, or perhaps one chooses a theory of defense that would render DNA testing irrelevant, there could be a penalty. The example I can think of is sexual assault where someone claims that it was a consensual encounter as opposed to, "I was not there, and I did not do it." DNA would prove that. I think there is an interest in providing some incentive to do that up front and make those requests early on, if they are available, and to identify whether that can be helpful as opposed to going through the process with one particular type of defense and later, even five years later, someone makes the request. We would not be the only state to include something of that nature. I think it would vet these cases by having that particular requirement in there.

Assemblyman Cobb:
That answers my question, that you are just encouraging the defendants to request this up front in pretrial at their cost.

Sam Bateman:
Yes, and that happens now mostly in cases where DNA is an issue. Defense attorneys will file motions with the court to have their own independent testing done to either try to corroborate or to vet the testing done in our crime labs. They absolutely have that ability to make the motion prior to trial. Very rarely does the state oppose that type of motion so long as strict controls are placed upon the testing. The crime lab in Clark County has controls about how they send biological evidence out to private labs on request of defense counsels. Those are all intermediate steps the defense counsel can take if DNA is an issue in the case, and if it would make DNA an issue in the case.

I will make one more point. There is nothing in this bill that would eliminate the ability of a petitioner and a prosecuting agency from entering into a stipulation to test DNA evidence. There is one particular statute in another state that has that exact provision. While this creates a scheme for people to file these motions, there is nothing to prevent, for instance, the Innocence Project from coming to the Clark County DA's office and saying, "Hey, this is our case, and this is what we have been investigating. We think testing on this particular piece of evidence would be beneficial and helpful. Would you agree with us to do that?" For any of the other concerns that are out there for lower level felonies and such, this statute would not necessarily preclude testing where the parties agree to testing on their own terms.

Rebecca Gasca, Public Advocate, American Civil Liberties Union of Nevada, Reno, Nevada:
I am in support of A.B. 179. I would like to comment that the American Civil Liberties Union (ACLU) would like to see the language re-expanded out to include other felonies. As Assemblyman Manendo noted, we have bloating in our system, and in the cases in which we could spend $2,000 to exonerate an individual, rather than keep him incarcerated for five years, there would be a huge cost savings.

On the amendment that has been proposed, in section 1, page 3 of the document that you have (Exhibit C) it says, "A person convicted of a crime [crime and under sentence of death] category A or B felony..." What is also added is "who is currently under sentence of imprisonment." We would object to the addition of that language because we believe that the due process rights still cover their requests after they have served their time. This Committee knows that when a person is convicted of a serious felony, particularly A or B, it is difficult to live a productive life after their sentence ends. It is hard to do things, for example get a job, if there is a felony on one's record. If a person maintains his innocence and wants to try to get that conviction overturned after

he has already served many years, we are certainly of the ilk that he deserves to have his day in court and have that addressed.

Finally, there was a statement made earlier by one of the women from the Rocky Mountain Innocence Center who was testifying as to the intent of this bill and whether it is retroactive or not. Clearly, there have been 232 people mentioned today whose convictions have been overturned based on evidence that was kept from crimes that may have been committed as long as 25 years ago. We hope this bill will be entered in, as record of the intent of this legislative body, to allow those people whose crimes were tried years ago to have the opportunity to enjoy the full establishment of rights.

Vice Chair Segerblom:
It looks to me, due to the last sentence of the bill, it is definitely retroactive and applies to anyone who was convicted before October 1 or after October 1.

I want to thank you for bringing this. I think this a fantastic piece of legislation.

Assemblyman Ohrenschall:
I wanted to thank you as well, Assemblyman Horne. I actually got to meet Mr. Cotton at the William S. Boyd School of Law. As someone who served a decade of his life for a crime he did not commit, and going around lecturing and campaigning for this type of legislation, he makes a very powerful statement. It tears me apart to think that there might be people who are sitting in prison right now and who cannot access this DNA evidence because we do not have this provision in law.

Assemblyman Anderson:
Justice Hardesty's advisory committee has similar concerns, and Bill Draft Request (BDR) 14-518 will be dropped today which addresses some of the other concerns that were raised. The Innocence Project may want to take an examination of it.

Assemblywoman Parnell:
I do not know if you are all aware, but *60 Minutes* ran Mr. Cotton's story on Sunday night. It is probably still easy to access.

Vice Chair Segerblom:
We will close the hearing on A.B. 179.

[Assemblyman Horne resumed chair.]

Chairman Horne:
There is a work session on Thursday. I believe Chairman Anderson has a number of bills for the Assembly Committee on Judiciary's work session on Thursday.

[The meeting adjourned at 10:58 a.m.]

RESPECTFULLY SUBMITTED:

_____
Julie Kellen
Committee Secretary

APPROVED BY:

_____
Assemblyman William C. Horne, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Corrections, Parole, and Probation

Date: March 10, 2009 Time of Meeting: 8:13 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 179	C	Katie Monroe, Kate Kruse, and Sam Bateman	Proposed amendments to Assembly Bill 179.
A.B. 179	D	Lucy Flores	Video of exonerees due to DNA testing.
A.B. 179	E	Katie Monroe	PowerPoint presentation.
A.B. 179	F	Katie Monroe, Kate Kruse, and Lucy Flores	Handouts explaining Nevada's post-conviction statute.
A.B. 179	G	Katie Monroe, Kate Kruse, and Lucy Flores	*200 Exonerated* booklet.

EXHIBIT 5

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

Daniel S. Medwed[*]

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. THE THEORY AND PRACTICE OF PAROLE

A. HISTORICAL ORIGINS AND PURPOSES OF PAROLE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. In the last quarter of the nineteenth century,

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

parole" increased in the 1980s as well, a trend facilitated by the U.S. Supreme Court's rejection of claims that such sentences constituted cruel and unusual punishment.[45]

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

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

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

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

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

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

50. *Id.* at 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- post-release employment and housing prospects;
- substance and alcohol abuse history;
- intelligence and social history;
- physical and mental health; and
- evidence of rehabilitation.[78]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

97. *Id.*

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

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

parole might be the only viable alternative to incarceration in many situations, save for completing a sentence.[100]

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

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

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

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

Posting to CrimProf Blog, The Problem of Actual Innocence and Parole Boards, http://lawprofessors.typepad.com/crimprof_blog/2005/01/actual_innocenc.html (Jan. 25, 2005).

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

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

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

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

A. PAROLE: AN INNOCENCE OPTION OF LAST RESORT

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

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

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

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

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

107. *Id.* at 1–2.

108. *Id.* at 4.

109. *Id.* at 2.

110. *Id.*

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

112. *Id.* at 4.

113. *Id.*

114. *Id.*

115. *Id.*

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

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

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

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

117. *Id.* at 5.
118. *Id.*
119. *Id.*
120. *Id.* at 5–6.
121. Letter to Parole Board, *supra* note 106, at 7.
122. *Id.*
123. *Id.*
124. *Id.* at 5–8.
125. *Id.* at 5.
126. Letter to Parole Board, *supra* note 106, at 5.
127. *Id.* at 5–6.
128. *Id.* at 6.
129. *Id.*
130. What Perry's testimony did not adequately explain was why he had failed to come forward during the trial to clear Fennell's name. Mogulescu, Perry's attorney, supplied this essential piece of the puzzle. After his client testified at the evidentiary hearing, Mogulescu took the rare step of testifying himself and described the circumstances that led to Perry's decision to remain silent at trial. *Id.* On the stand, Mogulescu asserted that Howard Jaffe, Fennell's lawyer,

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

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

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

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

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

132. *Id.*

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

134. *Id.* at 8.

135. *Id.*

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

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

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

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

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

139. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

149. *Id.* at 10.

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

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

B. PRESSURE ON INNOCENT INMATES TO "ADMIT" GUILT

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

Goodman, an "A" secretor, soon surfaced as the prime suspect. He had met Williams in October 1984, and they started an intimate relationship.[157] On November 19, 1984, they departed Las Vegas in a pickup truck, and their

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

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

152. *Id.*

153. *Id.*

154. *Id.*

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

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

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

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

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

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

158. *Id.*

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

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

161. *Goodman*, 763 P.2d at 787–88.

162. *Id.* at 788.

163. *Id.*

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

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

166. *Id.* at 789–90.

167. *Id.* at 790.

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

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

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

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

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

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

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

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

173. *Id.*

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. §§ 78-35a-108(2)(a)–(b).

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

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

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

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

III. ADMISSIONS OF GUILT AND THE PAROLE RELEASE DECISION RECONSIDERED

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. POTHOLES ON THE PATH TO REDEMPTION THROUGH THE PAROLE PROCESS

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

215. *Id.* at 850–52.

216. *See id.* at 820.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

with most other humans) are far less proficient at detecting deception than many of us would like to believe.[237]

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

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

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

239. *Id.*

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

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

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

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

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

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

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

243. *See id.* at 50–59.

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

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

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

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

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

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

IV. SUGGESTIONS FOR REFORM

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

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

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

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

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

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

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

"I would not open windows into men's souls."[252] This warning appears fitting for parole commissioners who, in opening windows into inmates' souls, may dislike what they find or, worse, become blinded by deceit.

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

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

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

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

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

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

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

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

B. DISENTANGLING ADMISSIONS OF GUILT FROM EXPRESSIONS OF EMPATHY

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Modifying the Structure of Parole Release Hearings

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

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

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

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

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

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

271. Godsey, *supra* note 100.

272. *Id.*

273. *Id.*

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

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

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

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

275. *Id.*

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

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

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

2. Enhancing Factual Investigative Powers

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

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

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

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

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

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

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

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

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

a. Innocence Projects

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

295. *Id.*

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

and thereby help innocence projects in later presenting those cases to prosecutors and judges.[297]

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

b. Prosecutorial "Innocence" Departments

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

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

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

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

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

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

Medwed, *supra* note 56, at 183.

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

c. Innocence Commissions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

317. *Id.*

318. *Id.*

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

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

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

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

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

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

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

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Jacqueline Bryant
Clerk of the Court
Transaction # 7882764

CODE 2540

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL PHILLIP ANSELMO,

Defendant.
_____/

Case No: 271359

Dept. No: 6

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on May 11, 2020, the Court entered a decision or order in this matter, a true and correct copy of which is attached hereto.

Dated May 19, 2020.

JACQUELINE BRYANT
Clerk of the Court

/s/N. Mason
N. Mason-Deputy Clerk

CERTIFICATE OF SERVICE

Case No. 271359

Pursuant to NRCP 5 (b), I certify that I am an employee of the Second Judicial District Court; that on May 19, 2020, I electronically filed the Notice of Entry of Order with the Court System which will send a notice of electronic filing to the following:

JENNIFER P. NOBLE, ESQ. for STATE OF NEVADA
JOSHUA HALEN, ESQ. for MICHAEL PHILIP ANSELMO
DIV. OF PAROLE & PROBATION
MARILEE CATE, ESQ. for STATE OF NEVADA
SYDNEY R. GAMBEE, ESQ. for MICHAEL PHILIP ANSELMO
J. ROBERT SMITH, ESQ. for MICHAEL PHILIP ANSELMO

I further certify that on May 19, 2020, I deposited in the Washoe County mailing system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a true copy of the attached document, addressed to:

Attorney General's Office
100 N. Carson Street
Carson City, NV 89701-4717

Michael P. Anselmo (#10999)
N. Nevada Correctional Center
P. O. Box 7000
Carson City, NV 89702

The undersigned does hereby affirm that pursuant to NRS 239B.030 and NRS 603A.040, the preceding document does not contain the personal information of any person.

Dated May 19, 2020.

/s/N. Mason
N. Mason- Deputy Clerk

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Jacqueline Bryant
Clerk of the Court
Transaction # 7870443

Code:

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

MICHAEL PHILLIP ANSELMO,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

/

Case No. 271359

Dept. No. 6

ORDER DISMISSING PETITION FOR GENETIC MARKER ANALYSIS

Before this Court is the *Post-Conviction Petition Regarding Genetic Marker Analysis Evidence Within the Possession or Custody of the State of Nevada* ("*Petition*") filed by Petitioner Michael Philp Anselmo ("Mr. Anselmo"), by and through his counsel of record, Holland & Hart LLP. Respondent THE STATE OF NEVADA ("the State") filed its *Response to the Petition for Genetic Marker Analysis* ("*Response*"), by and through its counsel of record, Appellate Deputy District Attorney Marilee B. Cate. Mr. Anselmo filed his Reply in Support of Petition for Genetic Marker Analysis ("*Reply*") and the matter was originally submitted thereafter. This Court heard argument on the issues on

February 25, 2020 and allowed the parties to file simultaneous supplemental memorandums of points and authorities, which were filed on March 10, 2020.

The Court has reviewed the record related to the *Petition* together with the record that resulted in entry of the *Judgment of Conviction* and this Order follows.

I. FACTS AND PROCEDURAL HISTORY.

Mr. Anselmo was found guilty of the crime of Murder and judgment was entered against him on May 26, 1972. Mr. Anselmo filed his *Petition* on November 2, 2018. On March 7, 2019, this Court entered its *Order Granting, in Part, Post-Conviction Petition Requesting Genetic Marker Analysis of Evidence; Order to Set Hearing; and Order Directing Preservation and Inventory of Evidence* ("*Inventory Order*"). On April 19, 2019, a hearing was held before this Court to confirm the existence and possession of evidence held by the Washoe County Sheriff's Office Crime Lab and the Second Judicial District Court Deputy Clerk responsible for evidence retention.

On May 6, 2019, the Washoe County Sheriff's Office, through counsel, filed its *Response* to the *Inventory Order* and attached its *Evidence Inventory*. On June 6, 2019, the District Attorney's Office filed a *Notice of Inventory for the Second Judicial District Court*, (collectively, "*Evidence Inventories*").

On June 28, 2019, Mr. Anselmo filed *Petitioner's Motion for Order to Show Cause,* arguing the *Evidence Inventories* filed did not describe the physical evidence in sufficient detail. On August 1, 2019, this Court entered its *Order Denying Motion for Order to Show Cause; and, Order Denying Motion for Order Shortening Time*. In the Court's August 1, 2019 Order, the Court granted Mr. Anselmo additional time to

supplement his *Petition* to amend the list of physical evidence he requested be submitted to DNA testing based on the *Evidence Inventories* as filed.

On August 29, 2019, Mr. Anselmo filed *his Notice of Non-Submission of Supplemental Petition* and reaffirmed his request for DNA testing of the physical evidence outlined in his *Petition*.

II. APPLICABLE LAW AND ANALYSIS.

Pursuant to NRS 176.0918, a petition for genetic marker analysis must, among other things, include a declaration "under the penalty of perjury attesting that the information contained in the petition does not contain any material misrepresentation of fact and that the petitioner has a good faith basis relying on particular facts for the request." NRS 176.0918(3). A petition for genetic marker analysis must also include:

> (a) Information identifying specific evidence either known or believed to be in the possession or custody of the State that can be subject to genetic marker analysis;
> (b) The rationale for why a reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in paragraph (a);
> (c) An identification of the type of genetic marker analysis the petitioner is requesting to be conducted on the evidence identified in paragraph (a);
> (d) If applicable, the results of all prior genetic marker analysis performed on evidence in the trial which resulted in the petitioner's conviction; and
> (e) A statement that the type of genetic marker analysis the petitioner is requesting was not available at the time of trial or, if it was available, that the failure to request genetic marker analysis before the petitioner was convicted was not a result of a strategic or tactical decision as part of the representation of the petitioner at the trial.

Id. A petition for genetic marker analysis must satisfy the several procedural requirements set forth in the statute or is subject to dismissal. See NRS 176.0918(4)(a) ("If a petition is filed pursuant to this section, the court may: (a) [e]nter an order dismissing the petition without a hearing if the court determines, based on the

information contained in the petition, that the petitioner does not meet the requirements set forth in this section"); see also NRS 176.09183(5)(a) ("The court shall enter an order dismissing a petition filed pursuant to NRS 176.0918 if: (a) [t]he requirements for ordering a genetic marker analysis pursuant to this section and NRS 176.0918 and 176.09187 are not satisfied").

The Court has reviewed the record related to the *Petition* as well as the relevant information in the record that resulted in Mr. Anselmo's conviction. Based on its review, the Court finds genetic marker analysis is not legally warranted in this case. Specifically, the Court finds Mr. Anselmo has failed to demonstrate a reasonable possibility he would not have been prosecuted or convicted if exculpatory results were obtained through the genetic marker testing he proposes.

Significant to this Court is Anselmo's assertion that he could not have killed Ms. Trudy Hiler ("Ms. Hiler") based on Dr. Laubscher's testimony.[1] In fact, Dr. Laubscher

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[1]The Court's *Inventory Order* stated:

> In pertinent detail, the Court finds persuasive the original testing of semen found in Ms. Hiler belonged to an individual who may have been sterile or recently had a vasectomy, neither of which apply to Mr. Anselmo. Thus, had genetic marker testing been available at the time of Mr. Anselmo's trial, exculpatory results **may** have dissuaded prosecution or resulted in a different verdict. Additionally, had exculpatory evidence obtained through genetic marker testing of Ms. Hiler's fingernails, pantyhose, and hairs found in her car may have resulted in a different verdict. The Court further finds Mr. Anselmo provided evidence the specific genetic marker testing requested was not available at the time of his trial in 1972. Although Mr. Anselmo previously filed a *Request* in 2005 asking for testing of evidence, the Court finds NRS 176.0918 was not enacted until October 1, 2013, therefore a change in law supports consideration of the *Petition.*

Inventory Order, p. 5, lns. 7-22). The Court did not find he has demonstrated a reasonable possibility he would not have been prosecuted or convicted.

initially testified that semen was likely not found in the sample of seminal fluid because of the degenerative nature of the substance and its presence for at least a day in the environment of a dead body. Dr. Laubscher opined the degenerative nature of the sample was the first reason semen was not found. Dr. Laubscher indicated that a second possibility existed to explain the lack of semen, and that was the contributor may have been sterile or had a vasectomy. Mr. Anselmo asserts his semen was tested and there was sperm identified in his sample. Therefore, he asserts he could not have been the source of the sterile semen found in Ms. Hiler. The jury heard evidence that Mr. Anselmo's seminal fluid was tested and contained the presence of sperm. Mr. Anselmo's counsel established in Dr. Laubscher's cross-examination that Mr. Anselmo was not sterile, and his sample contained semen. Therefore, the jury heard this exculpatory information. However, given the degenerative nature of sperm, the jury could still conclude, based on the expert testimony of Dr. Laubscher, Mr. Anselmo's semen had degenerated prior to Dr. Laubscher's collection of a sample from Ms. Hiler.

The Court also notes the felony murder theory was not the primary theory advanced by the State at trial. The thrust of the State's evidence was focused on malice and the premeditated and deliberate nature of the murder. Thus, the fact that Mr. Anselmo's DNA may or may not be found inside or on Ms. Hiler is not of consequence.

Mr. Anselmo also requests testing of hairs found in Ms. Hiler's vehicle; however, the record reveals the vehicle Ms. Hiler drove on the night she disappeared was not hers. It was a roommate's vehicle shared by several women. Mr. Anselmo admits in his *Petition* that the jury heard evidence the hairs did not match his. Thus, the jury

heard exculpatory information of the nature Mr. Anselmo claims exists now, but nonetheless convicted Mr. Anselmo.

At trial, Mr. Anselmo's counsel argued, based on the evidence presented, there was no physical evidence connecting Mr. Anselmo to the murder. Mr. Anselmo's counsel also inquired into the possibility of another male, John Soares, involvement. The jury heard the evidence on which these arguments were based.

The Court recognizes the jury made its determination and found Mr. Anselmo guilty beyond a reasonable doubt after hearing evidence of Mr. Anselmo's suspicious behavior on the night Ms. Hiler disappeared , during the searches and discovery of her body, as well after hearing evidence including his inconsistent statements and unique knowledge regarding locations of Ms. Hiler's belongings, such as the keys to the vehicle.

Mr. Anselmo asks this Court to disregard his confession, both before trial and when he appeared before the Parole Board. Mr. Anselmo's counsel challenged his pretrial confession and argued it was involuntarily made. The jury heard this information and found Mr. Anselmo guilty beyond a reasonable doubt.

Mr. Anselmo's request that his Court find his confession to the Parole Board was made for purposes other than confession to a crime he committed and provided substantial argument and information highlighting cases characterized by defendants exonerated after confessions.

The Court finds and concludes, based on its analysis and review of the record in this case, as well as the *Petition* and supporting papers, Mr. Anselmo has not demonstrated that a reasonable possibility exists that would not have been prosecuted

or convicted if DNA-tested exculpatory results had been obtained. See NRS 176.0918(3)(b).

Because the Court decided this matter on the merits, the Court finds no ruling on the timeliness of the *Petition* is required.

Accordingly, and good cause appearing,

IT IS HEREBY ORDERED that Mr. Anselmo's *Petition* is DISMISSED.

DATED this 10th day of May, 2020.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 11th day of May, 2020, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

JENNIFER NOBLE, ESQ.

MARILEE CATE, ESQ.

J. SMITH, ESQ.

SYDNEY GAMBEE, ESQ.

JOSHUA HALEN, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Heidi Boe

$2515
J. Robert Smith (NSB #10992)
Jessica E. Whelan (NSB #14781)
Sydney R. Gambee (NSB #14201)
Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
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T: (702) 669-4600 / F: (702) 669-4650
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jspringer@rminnocence.org

Attorneys for Michael P. Anselmo

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

MICHAEL PHILLIP ANSELMO,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 271359
Dept. No. 6

NOTICE OF APPEAL

Petitioner Michael Phillip Anselmo hereby files his Notice of Appeal of the Second Judicial District Court Order Dismissing Petition for Genetic Marker Analysis ("Order"), entered on May 11, 2020 (attached hereto as **Exhibit "1"**). The notice of entry of the Order was filed and served on May 19, 2020. Ex. 1. Pursuant to NRS 176.09183(6), "[i]f the court enters an order dismissing a petition filed pursuant to NRS 176.0918, the person aggrieved by the order may appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution within 30

days after the notice of the entry of the order by filing a notice of appeal with the clerk of the district court." Notice is hereby given that Mr. Anselmo, Petitioner above named, appeals to the Supreme Court of Nevada from the Order.

The undersigned affirms pursuant to NRS 239B.030 that the preceding document does not contain the social security number of any person.

DATED this 18th day of June, 2020.

HOLLAND & HART, LLP

/s/ Sydney R. Gambee

J. Robert Smith (NSB #10992)
Jessica E. Whelan (NSB #14781)
Sydney R. Gambee (NSB #14201)

ROCKY MOUNTAIN INNOCENCE CENTER
Jennifer Springer (NSB #13767)

Attorneys for Petitioner Michael P. Anselmo

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(a), I hereby certify that on the 18th day of June, 2020, I served a true and correct copy of the foregoing **NOTICE OF APPEAL** by the following method(s):

☑ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following listed below:

Division of Probation & Parole
Jennifer Noble, Esq.
Marilee Cate, Esq.
Appellate Division
Washoe County District Attorney
1 S. Sierra Street, South Tower, 4th Floor
Reno, NV 89501

☑ U.S. Registered Mail: by depositing same in the United States mail, first class registered mail postage fully prepaid to the persons and addresses listed below:

Office of the Attorney General
State of Nevada
100 N. Carson Street
Carson City, NV 89701

☑ U.S. Mail: a true copy was placed in Holland & Hart LLP's outgoing mail in a sealed envelope addressed as follows:

Keith G. Munro, Esq.
Washoe County District Attorney's Office
1 S. Sierra Street, South Tower, 4th Floor
Reno, NV 89501

Michael P. Anselmo
655 W. 4th Street
Reno, NV 89503

/s/ Joyce Heilich
An Employee of Holland & Hart LLP

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

INDEX OF EXHIBITS

EXHIBIT 1	Second Judicial District Court Order Dismissing Petition for Genetic Marker Analysis entered on May 11, 2020	10 Pages

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

EXHIBIT 1

EXHIBIT 1

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Jacqueline Bryant
Clerk of the Court
Transaction # 7882764

CODE 2540

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL PHILLIP ANSELMO,

Defendant.
_____/

Case No: 271359

Dept. No: 6

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JACQUELINE BRYANT
Clerk of the Court

/s/N. Mason
N. Mason-Deputy Clerk

CERTIFICATE OF SERVICE

Case No. 271359

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Michael P. Anselmo (#10999)
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[1]The Court's *Inventory Order* stated:

> In pertinent detail, the Court finds persuasive the original testing of semen found in Ms. Hiler belonged to an individual who may have been sterile or recently had a vasectomy, neither of which apply to Mr. Anselmo. Thus, had genetic marker testing been available at the time of Mr. Anselmo's trial, exculpatory results **may** have dissuaded prosecution or resulted in a different verdict. Additionally, had exculpatory evidence obtained through genetic marker testing of Ms. Hiler's fingernails, pantyhose, and hairs found in her car may have resulted in a different verdict. The Court further finds Mr. Anselmo provided evidence the specific genetic marker testing requested was not available at the time of his trial in 1972. Although Mr. Anselmo previously filed a *Request* in 2005 asking for testing of evidence, the Court finds NRS 176.0918 was not enacted until October 1, 2013, therefore a change in law supports consideration of the *Petition.*

Inventory Order, p. 5, lns. 7-22). The Court did not find he has demonstrated a reasonable possibility he would not have been prosecuted or convicted.

initially testified that semen was likely not found in the sample of seminal fluid because of the degenerative nature of the substance and its presence for at least a day in the environment of a dead body. Dr. Laubscher opined the degenerative nature of the sample was the first reason semen was not found. Dr. Laubscher indicated that a second possibility existed to explain the lack of semen, and that was the contributor may have been sterile or had a vasectomy. Mr. Anselmo asserts his semen was tested and there was sperm identified in his sample. Therefore, he asserts he could not have been the source of the sterile semen found in Ms. Hiler. The jury heard evidence that Mr. Anselmo's seminal fluid was tested and contained the presence of sperm. Mr. Anselmo's counsel established in Dr. Laubscher's cross-examination that Mr. Anselmo was not sterile, and his sample contained semen. Therefore, the jury heard this exculpatory information. However, given the degenerative nature of sperm, the jury could still conclude, based on the expert testimony of Dr. Laubscher, Mr. Anselmo's semen had degenerated prior to Dr. Laubscher's collection of a sample from Ms. Hiler.

The Court also notes the felony murder theory was not the primary theory advanced by the State at trial. The thrust of the State's evidence was focused on malice and the premeditated and deliberate nature of the murder. Thus, the fact that Mr. Anselmo's DNA may or may not be found inside or on Ms. Hiler is not of consequence.

Mr. Anselmo also requests testing of hairs found in Ms. Hiler's vehicle; however, the record reveals the vehicle Ms. Hiler drove on the night she disappeared was not hers. It was a roommate's vehicle shared by several women. Mr. Anselmo admits in his *Petition* that the jury heard evidence the hairs did not match his. Thus, the jury

heard exculpatory information of the nature Mr. Anselmo claims exists now, but nonetheless convicted Mr. Anselmo.

At trial, Mr. Anselmo's counsel argued, based on the evidence presented, there was no physical evidence connecting Mr. Anselmo to the murder. Mr. Anselmo's counsel also inquired into the possibility of another male, John Soares, involvement. The jury heard the evidence on which these arguments were based.

The Court recognizes the jury made its determination and found Mr. Anselmo guilty beyond a reasonable doubt after hearing evidence of Mr. Anselmo's suspicious behavior on the night Ms. Hiler disappeared , during the searches and discovery of her body, as well after hearing evidence including his inconsistent statements and unique knowledge regarding locations of Ms. Hiler's belongings, such as the keys to the vehicle.

Mr. Anselmo asks this Court to disregard his confession, both before trial and when he appeared before the Parole Board. Mr. Anselmo's counsel challenged his pretrial confession and argued it was involuntarily made. The jury heard this information and found Mr. Anselmo guilty beyond a reasonable doubt.

Mr. Anselmo's request that his Court find his confession to the Parole Board was made for purposes other than confession to a crime he committed and provided substantial argument and information highlighting cases characterized by defendants exonerated after confessions.

The Court finds and concludes, based on its analysis and review of the record in this case, as well as the *Petition* and supporting papers, Mr. Anselmo has not demonstrated that a reasonable possibility exists that would not have been prosecuted

or convicted if DNA-tested exculpatory results had been obtained. See NRS 176.0918(3)(b).

Because the Court decided this matter on the merits, the Court finds no ruling on the timeliness of the *Petition* is required.

Accordingly, and good cause appearing,

IT IS HEREBY ORDERED that Mr. Anselmo's *Petition* is DISMISSED.

DATED this 10th day of May, 2020.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 11th day of May, 2020, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

JENNIFER NOBLE, ESQ.

MARILEE CATE, ESQ.

J. SMITH, ESQ.

SYDNEY GAMBEE, ESQ.

JOSHUA HALEN, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Heidi Boe

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Electronically
271359
2020-06-19 08:33:22 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7933614

Return Of NEF

Recipients

JENNIFER NOBLE, ESQ.	- Notification received on 2020-06-19 08:33:21.936.
SYDNEY GAMBEE, ESQ.	- Notification received on 2020-06-19 08:33:21.912.
MARILEE CATE, ESQ.	- Notification received on 2020-06-19 08:33:21.961.
JOSHUA HALEN, ESQ.	- Notification received on 2020-06-19 08:33:21.845.
J. SMITH, ESQ.	- Notification received on 2020-06-19 08:33:21.985.
DIV. OF PAROLE & PROBATION	- Notification received on 2020-06-19 08:33:21.887.

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PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE: 271359

Judge:

HONORABLE LYNNE K. SIMONS

Official File Stamp:	06-18-2020:16:47:54
Clerk Accepted:	06-19-2020:08:32:48
Court:	Second Judicial District Court - State of Nevada Criminal
Case Title:	STATE VS. MICHAEL PHILIP ANSELMO (D6)
Document(s) Submitted:	Notice/Appeal Supreme Court - **Continuation
Filed By:	Sydney R Gambee, Esq.

You may review this filing by clicking on the following link to take you to your cases.

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The following people were served electronically:

JENNIFER P. NOBLE, ESQ. for STATE OF NEVADA

JOSHUA HALEN, ESQ. for MICHAEL PHILIP ANSELMO

DIV. OF PAROLE & PROBATION

MARILEE CATE, ESQ. for STATE OF NEVADA

SYDNEY R. GAMBEE, ESQ. for MICHAEL PHILIP ANSELMO

J. ROBERT SMITH, ESQ. for MICHAEL PHILIP ANSELMO

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

JESSICA E. WHELAN, ESQ. for MICHAEL PHILIP ANSELMO

MICHAEL PHILIP ANSELMO for MICHAEL PHILIP ANSELMO

STATE OF NEVADA for STATE OF NEVADA

1310
J. Robert Smith (NSB #10992)
Jessica E. Whelan (NSB #14781)
Sydney R. Gambee (NSB #14201)
Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
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T: (702) 669-4600 / F: (702) 669-4650
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srgambee@hollandhart.com

Jennifer Springer (NSB #13767)
Rocky Mountain Innocence Center
358 South 700 East, B235
Salt Lake City, UT 84102
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jspringer@rminnocence.org

Attorneys for Michael P. Anselmo

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

MICHAEL PHILLIP ANSELMO,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 271359
Dept. No. 6

CASE APPEAL STATEMENT

---

1. Name of appellant filing this case appeal statement:

Petitioner, Michael Phillip Anselmo

2. Identify the judge issuing the decision, judgment, or order appealed from:

The Honorable Lynne K. Simons, Second Judicial District Court of the State of Nevada in and for Washoe County.

/ / /

3. Identify each appellant and the name and address of counsel for each appellant:

Appellant: Michael Phillip Anselmo.

Counsel for Appellant:

J. Robert Smith, Esq. (NSB # 10992)
Sydney R. Gambee, Esq. (NSB # 14201)
Jessica E. Whelan, Esq. (NSB # 14781)
Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134

Jennifer Springer, Esq. (NSB # 13767)
Rocky Mountain Innocence Center
358 South 700 East, B235
Salt Lake City, UT 84102

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel).

Respondent: State of Nevada.

Counsel for Respondents:

Division of Probation & Parole

Jennifer Noble, Esq.
Marilee Cate, Esq.
Appellate Division
Washoe County District Attorney
1 S. Sierra Street, South Tower, 4th Floor
Reno, NV 89501

Keith G. Munro, Esq.
Washoe County District Attorney's Office
1 S. Sierra Street, South Tower, 4th Floor
Reno, NV 89501

Office of the Attorney General (served but not appearing)
State of Nevada
100 N. Carson Street
Carson City, NV 89701

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted

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9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

All attorneys identified in questions 3 and 4 are licensed to practice law in Nevada.

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Appellant was represented by retained counsel in the district court.

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Appellant is represented by retained counsel on appeal.

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

Appellant was not granted leave to proceed in forma pauperis.

9. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed):

The petition requesting genetic marker analysis of evidence within the possession or custody of the State of Nevada was initially filed on October 31, 2018. The petition was re-filed with the affirmation required by Rule 10(7) of the Rules of Practice for the Second Judicial District Court of the State of Nevada.

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

Brief Nature of the Action:

Petitioner, Mr. Anselmo, filed a petition requesting genetic marker analysis of evidence within the custody or control of the State of Nevada, seeking genetic market analysis pursuant to NRS 176.0918. Specifically, Mr. Anselmo requested testing of the victim's brown leather purse, victim's pantyhose, fingernail clippings, hair strands, and a rape kit. In the district court proceedings, it was confirmed that the identified evidence is indeed within the custody or control of the State.

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With his petition, supplemental briefing requested by the district court, and in oral argument, Mr. Anselmo demonstrated that a reasonable possibility exists that Petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition. Mr. Anselmo's conviction rests largely on Mr. Anselmo's confession, and not physical evidence. Mr. Anselmo maintains that his confession was not voluntary, and had genetic marker testing been conducted on the identified evidence, certain details provided in his involuntary confession would have been proven false, making there a reasonable possibility that Mr. Anselmo would not have been prosecuted or convicted in light of the potentially conflicting evidence and confession.

Type of Order Being Appealed:

Order Dismissing Petition for Genetic Marker Analysis Pursuant to NRS 176.0918.

Relief Granted/Denied by District Court:

The district court denied the petition for genetic marker testing,[1] finding that Mr. Anselmo did not demonstrate a reasonable possibility that Mr. Anselmo would not have been prosecuted or convicted had the results of testing been exculpatory. In so doing, the district court improperly weighed the evidence in the record to determine that despite any potential exculpatory results, the jury would have convicted Mr. Anselmo anyway. The district court noted that the jury had heard evidence that Mr. Anselmo's confession was involuntary and convicted him anyway. However, the jury did not have the benefit of genetic marker testing of the identified physical evidence. Mr. Anselmo is only required to show that there is a *reasonable possibility* he would not have been convicted *or prosecuted* had the testing been available and the results exculpatory. Mr. Anselmo made this threshold showing, in that exculpatory genetic testing results could have challenged the credibility of Mr. Anselmo's confession in a way no other evidence presented at trial could have. Therefore, had the

[1] While NRS 176.09187 authorizes a motion for new trial if the results are favorable to the Petitioner, Mr. Anselmo did not reach this stage of proceedings. The district court denied the petition for genetic marker analysis under NRS 176.09183.

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requested testing been conducted and the results been exculpatory, there is a reasonable possibility that Mr. Anselmo would not have been prosecuted or convicted.

11. Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding:

This case (Second Judicial District Court Case No. 271359) has previously been the subject of the following appeals to the Supreme Court:

Michael P. Anselmo v. The State of Nevada, Case No. 47579

Michael P. Anselmo v. Warden, Northern Nevada Correctional Center, Don Helling, Case No. 47232

Michael Phillip Anselmo v. The State of Nevada, Case No. 7008

Petitioner has also previously commenced the following original writ proceedings in the Supreme Court:

Michael P. Anselmo v. Connie S. Bisbee, Chairman; Susan Jackson; Tony Corda, Michael Keeler, Commissioners; and the Nevada Board of Parole Commissioners, Case No. 78576

Michael P. Anselmo v. Connie Bisbee, Chairman; Susan Jackson; Tony Corda; Adam Endel, Commissioners; and the State of Nevada Board of Parole, Case No. 67619 (First Judicial District Court Case No. 14 EW 00029)

Michael P. Anselmo v. The Eighth Judicial District Court of the State of Nevada, in and for the county of Clark, and the Honorable Mark R. Denton, District Judge, Case No. 36185 (Eighth Judicial District Court Case No. A373967)

Other appeals involving this Petitioner to the Supreme Court:

Michael P. Anselmo v. Nevada Board of Parole Commissioners, and Dorla M. Salling, Case No. 53520 (First Judicial District Court Case No. 08 EW 00071 1B)

12. Indicate whether this appeal involves child custody or visitation:

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LAS VEGAS, NV 89134

No.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

N/A.

The undersigned affirms pursuant to NRS 239B.030 that the preceding document does not contain the social security number of any person.

DATED this 18th day of June, 2020.

HOLLAND & HART, LLP

/s/ Sydney R. Gambee

J. Robert Smith (NSB #10992)
Jessica E. Whelan (NSB #14781)
Sydney R. Gambee (NSB #14201)

ROCKY MOUNTAIN INNOCENCE CENTER
Jennifer Springer (NSB #13767)

Attorneys for Petitioner Michael P. Anselmo

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(a), I hereby certify that on the 18th day of June, 2020, I served a true and correct copy of the foregoing **CASE APPEAL STATEMENT** by the following method(s):

☑ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following listed below:

Division of Probation & Parole
Jennifer Noble, Esq.
Marilee Cate, Esq.
Appellate Division
Washoe County District Attorney
1 S. Sierra Street, South Tower, 4th Floor
Reno, NV 89501

☑ U.S. Registered Mail: by depositing same in the United States mail, first class registered mail postage fully prepaid to the persons and addresses listed below:

Office of the Attorney General
State of Nevada
100 N. Carson Street
Carson City, NV 89701

☑ U.S. Mail: a true copy was placed in Holland & Hart LLP's outgoing mail in a sealed envelope addressed as follows:

Keith G. Munro, Esq.
Washoe County District Attorney's Office
1 S. Sierra Street, South Tower, 4th Floor
Reno, NV 89501

Michael P. Anselmo
655 W. 4th Street
Reno, NV 89503

/s/ Joyce Heilich
An Employee of Holland & Hart LLP

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

14849363_v1 65887.0001

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Clerk of the Court
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SYDNEY GAMBEE, ESQ.	- Notification received on 2020-06-18 16:52:01.223.
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JOSHUA HALEN, ESQ.	- Notification received on 2020-06-18 16:52:01.161.
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A filing has been submitted to the court RE: 271359

Judge:

HONORABLE LYNNE K. SIMONS

Official File Stamp:	06-18-2020:16:50:21
Clerk Accepted:	06-18-2020:16:51:32
Court:	Second Judicial District Court - State of Nevada Criminal
Case Title:	STATE VS. MICHAEL PHILIP ANSELMO (D6)
Document(s) Submitted:	Case Appeal Statement
Filed By:	Sydney R Gambee, Esq.

You may review this filing by clicking on the following link to take you to your cases.

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MARILEE CATE, ESQ. for STATE OF NEVADA

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J. ROBERT SMITH, ESQ. for MICHAEL PHILIP ANSELMO

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MICHAEL PHILIP ANSELMO for MICHAEL PHILIP ANSELMO

STATE OF NEVADA for STATE OF NEVADA