The perils of parole hearings: California lifers, performative disadvantage and the ideology of insight

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ABSTRACT
Following a series of transformative political and legal battles, California's overcrowded prison system has moved in the direction of moderate decarceration. A softer stance on punishment means that thousands of previously ineligible inmates serving indeterminate sentences are now being considered for release on parole. Drawing on ethnographic observations of 20 parole hearings in one California prison, this study outlines how rehabilitation has come to be enmeshed in a logic of punitivity, as parole commissioners subject inmates to an individualizing gaze that misrecognizes the socially embedded nature of their performance. Parole commissioners are tasked with assessing dangerousness, deploying a multifaceted conception of risk that combines formalized actuarial instruments and evaluative judgments to form the inchoate and contradictory notion of "insight." Inmates are expected to demonstrate such insight if they are to be released, but what is it? Parole boards assume that insight is a valid indicator of future behavior and probable recidivism, and parole commissioners posit that successful inmates will be capable of demonstrating authentic remorse and insight, unimpeded by the constraints of an austere, chaotic, and dangerous carceral environment. However, the discretionary criteria established by the penal system are limited by the deleterious living conditions established by this same penal system.

KEYWORDS
parole; indeterminate sentencing; California Realignment; risk assessment; hyperincarceration

Introduction

"You did OK in a controlled environment," the commissioner said to the inmate sitting across from him.[1] The inmate was one of thousands of inmates sentenced to life with the possibility of parole—or an indeterminate life term—in a California state prison. Clad in the light-blue garb that is the standard outfit for a California prisoner and surrounded by two correctional officers, the inmate looked increasingly uncomfortable. His parole hearing had taken the better part of three hours and was drawing to a close. A prosecutor from the District Attorney's (DA) Office had presented an explosive final statement that seemed to knock the wind out of the defense: the inmate continued to pose a "current unreasonable risk of danger to the public," the prosecutor had said, because the inmate had not "really explored why he committed so many different crimes with so many different victims [and] with such violence." On the opposite end of the table, the state-appointed defense attorney, sluggish and haggard-looking, had made a closing statement that seemed, if anything, to weaken the inmate's case for early release. He had noted the inmate's "extensive" criminal record while attempting to extract some modicum of positive characterization from the almost wholly

[1] In this article, individuals confined in prison are described as "inmates," which is an emic category pertaining to their legal and carceral status. This is not to say that they are not "sensate, suffering, skilled, sedimented, and situated creature[s] of flesh and blood," to use Wacquant's (2015) terms. That California prisons may form less of a "controlled environment" than commissioners purport is suggested by incidents of violence and sexual victimization (see e.g. Amnesty International 2012). In 2013, more than 29,000 inmates went on hunger strike in California, which also militates against the trope of a "controlled environment."

damning clinical evaluation that had been penned by a Board-appointed psychological evaluator.

After a 15-minute recess, during which the two-member parole board deliberated in privacy behind closed doors, the hearing had now resumed. A palpable tension filled the air. After decades spent behind bars, would the inmate at last be granted his freedom? "We're not assessing whether you can be a good inmate and whether you can follow the rules in prison," said the commissioner. "We're wondering: how are you going to do back in society?" The commissioner admitted that "it looks like you are making the right choices and doing the things that make us comfortable." The inmate was "programming," that is, participating in a variety of self-help classes and rehabilitative programs, including Alcoholics Anonymous and Alternatives to Violence. Here the inmate had learned, in his own words, a "lot of things in reference to who we are, who we were" and "the deal about being a slave to alcoholism, about it being ritualistic." These efforts had resulted in a number of laudatory "chronos," or beneficial "chronological" entries placed in the all-important "C-file," the prison system's computerized central file that documented the inmate's behavior throughout long years spent circulating in and around the state's sprawling prison system. But despite taking such steps, the commissioner said, the inmate was still not ready to "get a date," in the commissioner's words, and he would not be getting a parole date today. "You have some work to do and we encourage you to stay involved in your programming, making good choices," the commissioner intoned.

To a seasoned observer, the inmate's denial was hardly surprising. This was the inmate's Initial Parole Suitability Hearing, which meant that it was only his first time before the Board of Parole Hearings (BPH), and most lifers were only released, if they were released at all, after appearing before the Board for a Subsequent Parole Suitability Hearing – often multiple time, stretched across multiple years if not decades.

Reciting the ritualistic phrases that there still existed a "nexus to current unreasonable dangerousness," the commissioner suggested that releasing the inmate would create untenable "potential risks to society." First, the inmate's risk assessment report, produced by the Board's own Forensic Assessment Division, had determined that the inmate posed a "moderate" risk of violent behavior. Moderate, the commissioner said in a matter-of-fact tone, "is not good. Moderate is not bad. It is in the middle." Another actuarial instrument, the Static-99, used to assess the risk of recidivism among male sex offenders, showed a "moderate-high" risk. Also, the inmate's PCL-R (or Hare Psychopathy Checklist-Revised) score was "above the mean of North American male inmates." Second, the inmate had failed to offer appropriate "insight," a multifarious and inchoate category denoting a satisfactory expression of knowledge about the motives and causes of a "life crime" (i.e. the crime for which a "lifer" has been sentenced to life in prison).[2] "Some of your self-exploration that you have done still causes us some pause," the commissioner said with a concerned look. Finally, the inmate had broken a number of important prison rules: on two occasions he had been caught drinking "pruno," an illicit form of alcohol manufactured by some inmates in their cells. The inmate had admitted to drinking pruno and the commissioners thanked him "for being forthcoming." Such honesty, said the deputy commissioner, was "a good thing" because it was a sign of a "prosocial attitude," before he added, almost as an afterthought: "Do you know what that means?" (The inmate timidly replied yes.) Moreover, a routine search had uncovered a cell phone among the inmate's belongings. Such behavior, the prosecutor from the DA's Office noted in their closing statement, evidenced the inmate's "mental state today."

[2] As Wattley (2013) notes, the concept of "insight" is crucial to the parole commissioners and, indeed, the wider BPH. One telling example: in the official transcripts of the 20 hearings observed in this study, the term "insight" on average appears more than seven times per hearing, for a total of 141 mentions.

The prosecutor believed the inmate was duplicitous and dangerous, "where he minimizes and tries to make himself look better."

Admittedly, the pruno incident was nearly a decade ago, and the cell phone episode was almost five years in the past. And yet by the weight the commissioner appeared to attribute to these acts, they seemed, felt, and were perceived as far more recent. Time passed more slowly in prison than it did on the outside and seemed to be evaluated along a compressed time-scale. "Lifer-time" was both experienced as passing more slowly than time on the outside—described by Medlicott (1999) as the "pains of prison time"—*and* it was deemed less worthy by the Board in comparison with "outside-time": a lifer-year was decidedly not equivalent to an outside-year.

In short, the Board had reviewed all the available evidence: psychological evaluations, disciplinary reports, vocational qualifications, therapeutic programs, and parole plans. For this initial hearing, the sum total of these impressions was not enough to make the Board feel "comfortable." They admitted that the inmate was an "articulate guy" who was able to explain himself "pretty well." Eloquence, however, while important for facilitating the appropriate level of "insight," could also be negatively construed as a mark of evasion and falsity: the Board had the power to decide whether expressions of remorse were authentic indicators of self-knowledge and regret, or whether they were the duplicitous marks of a hardened criminal. Summarizing the Board's judgment, the commissioner outlined a range of sanctions available to them:

> So did you present well today? You did. Are you a smart guy? You are. You doing good things? Yes. Are you ready to go home yet? We don't think so. So we are required to start at a 15-year denial, but we didn't make it a 15-year denial for you. You are doing the right things, like I said. So we looked at a 10-year denial, and we felt a 10-year denial was inappropriate for you, too, because you are at an age that reduces the probability of recidivism. So then we looked at a seven. We looked at a five, and we looked at a three-year denial. We gave you a three-year denial, which was the lowest we can give you.

This was their verdict, then: to remain in prison for another three years. "You have some work to do," the commissioner said, "and we encourage you to stay involved in your programming, making good choices." Accompanied by two guards, the inmate rose listlessly and shuffled back to a holding cell just outside the hearing room. Another three years of waiting, keeping out of the way of the many prison gangs that sliced and diced the prison yard into their multifarious territorial domains, resisting the dangers of solitude and desperation, keeping abreast with "programming" and whatever classes and training programs were on offer, and working to appease the Board lay before him. Three hard years.

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This study draws on ethnographic observations of 20 parole hearings that took place in one California state prison over a period of nine months in 2015 and 2016. The hearings took place inside the prison itself. In addition, the author attended five meetings by a legal aid clinic in Northern California that offered assistance to inmates in preparation for their parole hearings, five monthly Executive Board meetings by the Board of Parole Hearings (BPH) in Sacramento, California, interviewed three defense attorneys, two prosecutors, and one legal aid organization, and engaged in informal conversations with dozens of defense attorneys, prosecutors, prison officers, parole commissioners, legal experts, and activists—mainly in the many breaks that invariably took place during the parole hearings—which resulted in more than one thousand pages of ethnographic fieldnotes and over 2,500 pages of official transcripts.

All the offenders in the sample were serving indeterminate life sentences. The

minimum lower-bound sentence length was 15 years to life (or more simply, "15-to-life"), the maximum was 100-to-life, and the most frequent (mode) sentence was 15-to-life, with six inmates out of twenty serving such a sentence. Many inmates appeared old, frail, and worn-down by long years spent behind bars: nine out of 20 inmates had been confined since the 1980s, while 10 had been admitted to prison in the 1990s. One should be careful to note that many offenders had been convicted of serious crimes. The majority of inmates were convicted of murder: five inmates were serving sentences for first-degree murder while 12 inmates had second-degree murder as their "controlling offense." And some were serving time with very extensive conviction records. One inmate with a very extensive rap sheet—including Kidnapping (two counts), Robbery (four counts), Robbery and Ransom, Use of a Firearm, Oral Copulation in Concert, Rape and Resistance with Force, Sodomy in Concert, Use of a Firearm, Vehicle Theft, and Second-Degree Burglary—took the opportunity to "stipulate," that is, waive the right to a hearing, for five years, rather than face the risk of a 7-, 10- or 15-year denial. Only one inmate was a "third-striker."[3] Far more prevalent were various sentencing enhancements, such as "Use of a Firearm," which raised the minimum thresholds of the indeterminate life sentences for nine of the inmates who participated in the hearings.[4] In keeping with the disproportionate ethnoracial composition of the California (and wider U. S.) prison population, fully 90 percent of the observed inmates were non-white: 12 inmates were black (60 percent), four were Hispanic (20 percent), and two were Asian (10 percent). Two inmates were white.

Meanwhile, 25 percent of the hearings observed in this study resulted in a parole grant, 20 percent were waived (by inmates) or postponed (by the Board), and 55 percent resulted in a denial of parole, ranging from 3-year denials (36 percent of denials), 5 years (18 percent), and 7 years (63 percent). There were no 10-year or 15-year denials, even though in 2015 they made up more than 5 percent of all denials in California. The commissioners observed in this sample made *less frequent* use of 3-year denials (36 percent vs. a system-wide rate of 59 percent) and 5-year denials (18 percent vs. 26 percent) and *more frequent* use of 7-year denials (63 percent vs. a system-wide rate of 9 percent). Commissioners were in some sense therefore both more and less punitive: their grant rate was more liberal than the BPH viewed as a whole (25 percent vs. a system-wide rate of 17 percent in 2015), and the length of their denials, while avoiding the longest denial available on the penal menu, made disproportionate use of 7-year denials. This contradictory quality can perhaps be explained by the perception of the prison as, on the one hand, housing inmates who are among the "worst of the worst," while, on the other hand, being reputed for making volunteer-run rehabilitative programs widely available to inmates that could facilitate a "decent performance" in hearings.

The bulk of the material deployed in this article is derived from observing the parole hearings as they unfolded, documented in ethnographic fieldnotes and official transcripts. Fieldnotes were composed during the hearings and immediately thereafter. The analytic approach to this documentary record was that of immersive reading, consisting in repeated readings of the notebooks containing handwritten fieldnotes and printed copies of the

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[3] A "third-striker" is a person convicted under the California Three Strikes law, introduced in 1994, which raises the level of punishment for successive felony convictions (Zimring, Hawkins, and Kamin 2001). A first strike is incurred when convicted of a "serious felony." If the person is later convicted of a second "serious felony," the person receives a second strike and the sentence length for that crime is automatically doubled. If the same person is later convicted of a "serious or violent" felony, they receive a mandatory 25-year-to-life sentence. Between 1994 and 2013, any felony conviction would result in a third strike; following the enactment of Proposition 36 in 2013, however, this was revised to include only "serious or violent" felonies.

[4] Sentencing enhancements are legal modifiers that increase the amount of punishment ordinarily meted out for a crime depending on various circumstances, including whether an offender used a firearm in the commission the crime, as with the "10-20-life enhancement" (also known as "use a gun and you're done"), which can result in an additional and consecutive 10-, 20, or 25-year-to-life mandatory sentence.

transcripts and repeated returns to the same texts to generate a sense of "deep immersion" (Emerson, Fretz, and Shaw 2011: 14). This form of reading in turn facilitated a form of coding in which repeated themes were written out under analytic headings in a separate document. What is striking about these parole hearings is how monotonously repetitive they became over time, how so many of the same lines were rehearsed and repeated – in short, how homogeneous much of the material remained, a fact no doubt owing to the ritualistic nature of such legal proceedings.

Hearings were selected by the author from a roster that displayed upcoming hearings at one California state prison, and requests for observation were sent to the BPH. However, requests were routinely denied by the BPH. While hearings, like court trials, are in principle open to the public, ethnographic access was circumscribed in various ways: the sample of observed hearings is a convenience sample, but one that was convenient from the perspective of the California Department of Corrections and Rehabilitation (CDCR), usually (or so the author was told) on the basis of available staff to ensure the provision of a safe environment. One limitation of observing hearings in one prison alone is that California state prisons offer an uneven level of rehabilitative programming. However, the geographic concentration of the sample was counteracted by the fact that the author was able to observe 10 out of the state's 12 commissioners at the time (due to their geographically rotating schedules), inmates who had previously served time in a broad range of facilities up and down the state of California, and observe and speak to prosecutors from a range of counties beyond the area in which the prison was located, owing to the wide geographical distribution of crimes that had resulted in the inmates' terms of incarceration.

Transforming penality

At the beginning of 2014, some 31,470 lifers were incarcerated under the auspices of the CDCR, constituting around 25 percent of the inmate population held in California's state prisons (CDCR 2014). Around 4,700 of these inmates were sentenced to "life without the possibility of parole" (LWOP) – a true life sentence. The remaining lifers were confined on indeterminate life sentences, such as 15 years-to-life, 75-to-life, and so on. Inmates serving indeterminate life sentences have the right to appear before a parole board to determine whether they pose an "unreasonable risk of danger to the public" (CDCR 2016). Between the late 1970s and the early 2010s, an indeterminate life sentence in California usually entailed incarceration for the remainder of the inmate's natural lifespan: to appear before the Board was to face the almost certain prospect of denial. More than 2,100 suitability hearings were scheduled in the year 2000 alone throughout the state of California, but only 52 inmates were granted parole by the Board that year. Between 1990 and 2000, the Board's denial rates for all statewide scheduled lifer hearings ranged between 95.9 and 99.6 percent. Those few inmates who found themselves granted parole by the Board faced the near-inevitable prospect of the governor's reversal of those decisions.[5]

This did not, however, stop the Board from holding thousands of hearings every year from the mid-1990s and onwards. As one defense attorney told me of this period, lifers were "told by other lifers in prisons all over California, it's useless, it's a totally futile exercise, don't even bother." A spectacle of the procedural, a fetish of legal fairness: these were show trials, or rather, show hearings, which meant *oblivious hearings*, that is, hearings without listening. When an inmate's plea for release was heard by the Board, the governor stood ready to block their release. Between 2003 and 2010, Governor Schwarzenegger reversed around 75

[5] Under Proposition 89 (1988), California's governor has the right to "affirm, modify or reverse" parole decisions for inmates convicted of murder.

percent of the Board's parole grants.[6] Meanwhile, a California Supreme Court ruling in 2002 required the governor to present "some evidence" of an inmate's unsuitability for release before denying the Board's decision to grant parole; however, this legal requirement was typically met by referring to the "egregiousness of the crime" for which the inmate had been incarcerated (Hipolito 2009). Since most lifers had committed violent crimes that could be construed as "egregious," this legal standard was relatively easy to meet, and the denials and reversals of parole continued unabated.

By the early 2010s, a series of legal, political, fiscal, and cultural trends coincided to markedly improve the prospects of release (Weisberg et al. 2011). In this period, "everything changed," one defense attorney told me. "Lifers had *hope*." Court decisions contributed to paring down the state's prison population. In *Brown v. Plata* (2011), the United States Supreme Court affirmed a court-mandated reduction of the state's prison population to 137.5 percent of design bed capacity (Simon 2014). Multiple legal rulings and legislative acts benefitted California's lifer population (Wattley 2013). Following *In re Lawrence* (2008), the California Supreme Court affirmed that parole denials were to be related to the purported "current dangerousness" of an inmate and could not solely reference "egregious" past crimes (Sarosy 2014). In another case, *In re Shaputis* (2008), the California Supreme Court reiterated the importance of present-day risk, opining that the "essential question in deciding whether to grant parole is whether the inmate currently poses a threat to public safety." Assessing dangerousness would be made on the basis of at least three sources of knowledge: "the facts of the offense, the inmate's progress during incarceration, and the insight he or she has achieved into past behavior." State legislation allowed lifers who had committed their "life crime" at a young age to receive special consideration for release. Passed in 2013, Senate Bill 260 extended this right to those convicted of crimes while under the age of 18. It was followed the next year by Senate Bill 261, which enlarged the scope of youth hearings to those who had committed their crimes while under the age of 23.

The cumulative effect of these events was to soften the Board's stance. Increasing numbers of lifers were granted parole. Following the election of Governor Edmund G. Brown, Jr. in early 2011, only around 20 percent of the Board's parole grants for convicted murderers were reversed. A reduced propensity to reverse the Board's decisions under Governor Brown represented an almost complete inversion of Governor Schwarzenegger's policy of parole reversal. By 2014, the number of lifers granted parole by the Board over the course of that year alone—902 persons—exceeded the total number of lifers granted parole over the course of more than two decades: only 750 lifers had been released between 1978 and 2001.[7] A report on the minuscule recidivism rates of released lifers seemed to solidify the momentum driving increased lenience towards lifers (CDCR 2013a): a released cohort of California lifers were found to have a three-year reconviction rate of 4.8 percent (against a 51.5 percent recidivism rate for released offenders with determinate sentences). While the questionable methodology of the report did not accurately capture the probable recidivism rate of the total lifer population in California state prisons, it seemed to announce a novel willingness to consider lifers in a favorable light. Emanating from within the correctional bureaucracy, the state itself had produced a technical account that seemed to support the case for parole grants.

[6] These figures are drawn from Crime Victims Action Alliance (2016) and the author's own calculations. A handful of Board parole grants that the state governor attempted to block were later approved by court order or by *en banc* decisions by the Board. An *en banc* decision is a parole decision made by the Board's collective body of commissioners.

[7] Author's calculations, based on data from CDCR (2013b).

These limited reforms were still embedded in a regime of hyperincarceration.[8] Lenience remained modest: nearly 70 percent of lifers who appeared before the Board in 2015 were denied parole (BPH 2016a). Influential advocacy groups elaborated the alleged dangers of releasing lifers: "This is playing Russian roulette with public safety," Christine Ward, Executive Director of the Crime Victims Action Alliance, said. The Board's "change of philosophy would be "dangerous" to the state's inhabitants, the victims' rights organization contended (Elias 2014). Amidst such anxieties, a handbook published by the CDCR directed at crime victims and their families reassured its readers: "Inmates sentenced to life with the possibility of parole are not guaranteed parole and can be held in prison for life" (CDCR 2015: 2). More were getting out, but most were still locked up.

Embedded rehabilitation

One prominent strand of thought in the sociology of punishment has posited a dichotomy between rehabilitation and punitivity (e.g. Garland 2001). Rehabilitation is equated with tolerant penality while the absence of rehabilitation is taken to be a mark of retributive punitivity: declining investments in rehabilitation are said to herald the improving fortunes of punitive politics. This conceptual couplet has been adopted by a wide range of scholars. Garland (2001) proposes that the waning fortunes of a regime variously labeled "penal modernism" or "penal welfarism," premised on faith in the corrigibility of deviant subjects by science and the state, was supplanted by a culture of control, a "new crime control agenda" was launched and agents (successfully) set out to "rob rehabilitation of its appeal and tilt the balance of opinion against it" (Garland 2001: 64). For Wacquant (2009: 145) increasingly punitive parole procedures in California from the 1970s and onwards were the result of the "jettisoning of the ideal of rehabilitation" in a period when rehabilitation was "effectively replaced by a managerialist philosophy." Ward and Maruna (2007: 8-9) seamlessly conflate Martinson's (1974) work on "What Works" with the resurgence of punitivity, asserting that the latter helped "usher in an era of 'nothing works' pessimism with 'lock-'em up' punitiveness." Similarly, Beckett and Western (2001: 38) contend that beginning in the 1960s the "rehabilitative project was called into question," suggesting that its diminution was instrumental in the subsequent promotion of the "goals of incapacitation, deterrence and retribution." In the comparative penology of the US and Western Europe, non-retributive societies are said to mobilize comprehensive rehabilitative programs, while highly punitive societies are characterized by a dearth of rehabilitation (e.g. Downes 1988). Penal excess is characterized by a lack of rehabilitation, penal exceptionalism by its very prominence.

While this conceptual pair has undoubtedly sharpened much analytic work, allowing observers to attend to essential features in crowded empirical landscapes, such analytic profits come at the cost of theorizing rehabilitation in overly static terms while ignoring its recent reconfiguration (Robinson 2008). Rehabilitation is often embedded in punitivity: far from being mutually incompatible entities, rehabilitation and punitivity may intermingle in an unstable admixture (Goodman 2012). Rehabilitation and retributivism "relate to each other as reforms," suggests Gilmore (2007: 14), "not as steps away from brutality or inconsistency, but as attempts to make prisons produce social stability through applying some mix of care, indifference, compulsory training, and cruelty to people in cages." Beyond acknowledging that highly punitive societies may employ a particular language of treatment that tends to reduce rehabilitation to mere rhetoric (e.g. Lynch 2000), this therapeutic language may also be enmeshed in punitive practices: the polysemy of rehabilitation allows it to malleably insert

[8] The term *hyperincarceration* is preferable to the (more widely-used) term *mass incarceration*, because, as Wacquant (2010) points out, the US penal system is not truly a "mass" phenomena in the style of, say, the "mass media," because it does not impact all citizens equally. Instead, it targets a spatially, ethnoracially, and socioeconomically skewed sample of the population – poor, urban, and black or brown bodies.

itself into the cracks of the punitive edifice, fusing with harsh justice, strict sentencing, and carceral austerity.[9]

Thus, when inmates say they have participated in Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) programs, commissioners may test inmates, poking and prodding at their accounts by interrogating their knowledge of individual "steps" in these "12-step" programs:

> DEPUTY COMMISSIONER: Do you work the steps?
> INMATE: Yeah. We're going through them again. I've been through them already once – but I have a certificate there for that completion.
> DEPUTY COMMISSIONER: What's the fourth step?
> INMATE: The fourth step is taking inventory.
> DEPUTY COMMISSIONER: Fearless and searching moral inventory. What have you put in your inventory?
> INMATE: In my inventory – you know, really getting to know yourself.
> DEPUTY COMMISSIONER: Okay. What have you put in your inventory. [*with growing irritation*] I'll ask you a second time.
> INMATE: I don't understand.

The deputy commissioner believed there was a mismatch between the inmate's "performance" and the inmate's record of participation in programs such as Victim Awareness, NA, and AA. Inmates who undergo rehabilitation are usually said *to be programming*; sometimes there is a degree of slippage in the usage of these terms, so that programming is variously described as something one does or something one undergoes. "You started participating in programming," one deputy commissioner said approvingly to an inmate. This seemingly innocuous phrase aptly encapsulates the traditional critique of rehabilitation as involving the imposition of normalizing standards of cognition and behavior. It is almost chillingly cybernetic: inmates who are participating in rehabilitation are programming or being programmed, as if they consisted of so many lines of defective code to be rewritten by social (software) engineers or as if they themselves were the engineers of their own script and were capable of debugging their internal syntax. In discussions of rehabilitation, inmates are subjected to a moralizing-individualistic category of perception and action premised on the twin notions of a self-determinate optimization of the self (or "bootstrapping") and an antistructuralist false autonomization of individuals caught in noxious milieus and captured by deleterious social configurations. This hybridized configuration of rehabilitation and punitivity (O'Malley 1999), forged "not to punish less, but punish better" (Foucault 1995: 82), is imbued with the aura of social legitimacy, being more closely aligned with the spirit of an age.

There are two primary sources of extra-individual power that introduce conditions of heteronomy on inmates engaged in rehabilitative "programming." First, inmates must be physically able to participate in rehabilitative programs: such programs must be made available to them. However, not all prisons are equipped with rehabilitative programs. Some institutions operate numerous programs and enjoy a great influx of volunteers while others are almost devoid of such opportunities. The expectation that the individual will have completed such programs is an expectation directed at the individual inmate when it should be directed at the individual mediated through the opportunities extant in the institutional environment. One deputy commissioner complained that the inmate had not participated in enough

[9] The obverse may also be the case: punitive practices are liable to be inserted into the cracks of therapeutic or rehabilitative edifices. Notably, this has been observed in the case of the Scandinavian regimes of punishment, lauded for a humane form of "penal exceptionalism", particularly in their minimum-security, rehabilitation-oriented "open" prisons, where novel modalities of suffering have made themselves felt within a system of rehabilitation, described as "pains of freedom" (Shammas 2014).

rehabilitative programming and asked whether the inmate had given any thought to transitional housing in the event of their release from prison. But the inmate had spent more than two decades in a Security Housing Unit (SHU) in a maximum-security facility prior to arriving at their current institution. "I really don't know much about it because they never gave us any of that stuff," the inmate replied. This response met with resounding disapproval in the deputy commissioner's closing statement and was made the object of savage scorn: "You really don't have a relapse prevention awareness. You are in many ways not a grownup man," said the deputy commissioner. "You lack self-sufficiency. Your plans include just being parasitic as soon as you get out, [by] living with somebody." The inmate was *minimizing* because the right type of "programming hasn't been done yet." And yet the panel recognized that this was due to circumstances beyond the inmate's control: "[I]n fairness to you, you've been in SHU for 26 years and without a lot of access to programming," said the commissioner. Even this admission, however, was tempered by the commissioner's suggestion that "one of the benefits" of residing in a SHU—where individuals are isolated from almost all human contact in a state of mind-numbing monotony likened to torture (Amnesty International 2012)—was that "you don't have an opportunity to interact with anybody" and the inmate could therefore remain free from "violent interactions with anyone." Institutional parameters were reduced to individual performance: in this performance (in the Austinian sense) a real condition of heteronomy was denied while a condition of autonomy was artificially posited.

When another inmate recounted that he enjoyed playing dominoes and working in the prison kitchen, the deputy commissioner immediately signaled his disapproval of inadequate programming: "Any vocational or self-help at this time?" Replying, the inmate said, "No, I didn't have a strong interest in it at the time," before quickly adding, "There weren't many programs, and we were on lockdown for most of the time." This last response drew a sneer from the commissioner, who strongly disliked inmates that rationalized a lack of programming by way of institutional inadequacies – inmates were presumptively wrong or negligent, for there was always something they could have done to correct their ways.

Second, inmates must be able to communicate that they have meaningfully participated in such programs. On the one hand, this means placing before the panel a document, diploma, certificate, score, letter of recommendation or other piece of evidence confirming the inmate's participation in rehabilitation. However, prisons are complex bureaucracies; they are often chaotic, underfunded, and poorly equipped, barely squeaking by with subpar technological infrastructure where information is routinely lost or misdirected. Inmates lack resources and capacities to pursue their cases in an uninterested or hostile environment. One inmate was falsely accused of having been arrested 39 times and convicted of six prior felonies—a damning criminal record that would certainly impede the chance of being granted parole—which ultimately turned out to be an artifact of bureaucratic error. After much discussion back and forth, the commissioner was finally forced to concede, "We could not find the 39 arrests that are noted in the record." The inmate, previously frightened by this potentially damning assertion, now looked visibly relieved.

On the other hand, written certification is not sufficient evidence of personal transformation. Inmates must communicate what they have learned from the program in ways recognized as legitimate. One deputy commissioner denied the validity of an inmate's rehabilitative process: "I'm trying to understand your violence," said the deputy commissioner said. "It's good that you've started, it's a long process." This was tantamount to saying, only halfway through the hearing, that the inmate was not likely to be granted parole: "You've got some *buzzwords*," the deputy commissioner continued, a damaging devaluation of the inmate's labor of self-improvement: offering written evidence of programming was not enough: it was necessary to present these programming "buzzwords" in a manner that seemed

authentic and unscripted. Religious faith is often viewed by the Board as a proxy of pacification and introspection, the same inmate was praised for his involvement in a religious community; but when the panel discovered that the inmate had switched between different religious denominations while in prison and had engaged in an activity considered incompatible with the tenets of the latest religious affiliation—eating a hamburger—the panel grew skeptical. "I see you had a hamburger in 2009," the deputy commissioner said. "It's not the crime of the century, but I want to see where you're at in terms of your faith." Such minor acts are construed as indicators of insincerity, which could be used as a proxy for an inmate's continued dangerousness. As Foucault (2003) observed, the psychologization of legal proceedings shifts the object of punishment from crime to character. It is not so much the criminal offense that is being sanctioned as a person's aberrant aspects (Foucault 2003: 17).

Inmates must be able to talk about how they have been transformed by rehabilitative interventions. If they are unable to speak persuasively about these experiences, their participation is liable to be denied and devalued. However, these expectations hinge on a personal capacity to (i) verbally express thoughts and feelings, (ii) speak in a reflective manner, and (iii) produce linguistic utterances in a socially legitimate form. All these three capacities are non-universally allocated; they are unevenly distributed according to properties such as socioeconomic class, educational attainment, and mental and physical health. Ultimately, then, even a pragmatist acceptance of the normalizing tendencies inherent in the rehabilitative agenda must contend with the problem of participation and verification. To become a rehabilitated subject means, doubly, having participated and having been verified: participation depends on a particular extra-individual, institutional configuration that is beyond the control of the individual agent, while verification is subject to utterances, dispositions, and capacities that are unevenly distributed in social space. It is the expectations of participation and verification that forms the basis of the notion of "insight."

Individualized performances

As the Board's central "principle of vision and division" (Bourdieu 1998b: 53; Bourdieu 2014: 164-167), the notion of *insight* fundamentally structures the day-to-day operations and decision-making in parole boards across California (Wattley 2013).[10] This nebulous term mandates that inmates demonstrate a capacity to speak about criminal behavior in a way suggestive of a reformed subject who is capable of avoiding criminality in the future. Blending the capacity to perform according to particular standards of evaluative judgment, possess an institutional record free from serious rules violations, prove their participation in rehabilitative "programming," and hold a low risk score from the Board's psychological evaluators, the notion of insight has come to constitute a multivalent, polysemic, and conflicted symbolic category. Its fundamentally individualizing thrust allows parole power to focus the operations of multiple external agents and agencies—prison guards, psychologists, pedagogues, rehabilitation volunteers, and others—on a single individual, while simultaneously construing the inmate's performance as the work of an atomistic, isolated agent.

This individualizing reduction denies the embeddedness of performances in legal procedures, which in actuality are coproduced by exterior flows of social power beyond the ambit of individual personhood (Valverde 2003). This reduction of socially embedded reality to an atomistic state amounts to what Hegel, parsed by Honneth (1995), called the positing of the "being of the individual" as "the primary and the supreme thing" (cit. Honneth 1995: 12),

[10] Bourdieu's concept of *principles of vision and division* synthesizes multiple theoretical traditions, drawing on neo-Kantian oncerns with constitutive categories (see Bourdieu 2014: 164-166), Durkheim's interest in collective representations, Weber's concern with allocations of social power, and a phenomenological sensitivity to the role of percepts in the constitution of the *Lebenswelt*.

a fallacy typical to practitioners of the law. Lifers are socioeconomically and ethnoracially marginalized: around 70 percent of California lifers are black or Hispanic (Nellis 2013: 9-10) and are disproportionately drawn from the lowest rungs of the class structure (Wacquant 2009; Western 2006). This gives rise to a form of devalorized speech, a failure to speak in accordance with legitimate language (Bourdieu 1991), necessarily resulting in a situation of performative disadvantage.

In essence, the inmate must be able to show why a crime occurred, that is, to produce a causal account of the crime, and show how those causes have been curbed by a labor of self-improvement. If anger is seen to be a cause of their history of violent crime, for instance, the inmate must be able to demonstrate an ability to control their emotions, which must in turn be validated by participation in programs such as anger management classes and a "clean" prison record. If gang membership is considered a central cause of their "life crime," a record demonstrating freedom from entanglements with prison gangs could be suggestive of appropriate levels of insight. One inmate, when asked by a deputy commissioner to define insight, believed it meant showing that "I have some type of understanding of why things happened." A commissioner deployed the term to refer to a knowledge of "causative factors," and used it as grounds for denial of parole to one inmate (as indeed most commissioners do when making denials):

> This insight issue, it's a concept. There's no such thing as perfect insight. But more insight is required than what you were able to demonstrate today. Everyone in this room agrees you had a horrible childhood. We know that. But the hard work about saying well, how does that affect me and how does that translate into my extreme rage and my issue of anger and violence against women.

As all social scientists know, it is inherently difficult to produce causal accounts of human actions. University libraries around the world are filled with the written records of those methodological struggles waged over the place of causality in the human sciences. The pragmatic-realist epistemology of the Board demands the production of what it considers sufficient accounts of criminal causality with the aim of predicting and avoiding the repetition of crime. In one hearing, a commissioner considered an inmate's explanation of his crime—a gang-related murder—to be wholly unimpressive. Summarizing the inmate's account, the commissioner said the reasons offered for the murder essentially came down to the inmate feeling "threatened," the fact that his victim was a "rival gang member," and that there was "always rivalry" between the inmate's gangs and that of the victim. In the given situation, "one of the guys standing by the door had his hands in his pocket," said the commissioner, giving the inmate reason to believe his victim "had a weapon." This account left the commissioner cold: the inmate "gave some very superficial reasons for this crime" that were said to show a "lack of insight." Lacking insight is a damning indictment.

Producing sufficiently deep accounts is necessarily difficult, partly due to the constraints of epistemic uncertainty: on the one hand, the *asymmetry of information* existing between parties—what economists call "imperfect information"—and, on the other hand, the *constraints of informational scarcity* that hamper efforts to produce rich accounts of past events. Inmates are asked to recall large amounts of information about their life crime, but the events lie decades in the past, thereby becoming subject to memory slippages or even involuntary acts of repression. Inmates are often unable to study the extensive paperwork detailing their case, and they may have developed rationalizations to survive institutional life during long decades spent in prison when release seemed like—and, objectively speaking, really was—an impossibility. On the opposite side of the table, the commissioners and prosecutor have access to the documentary record with the touch of a few buttons on their computer. Strangely, then, inmates may speak less convincingly about the experiences of their own life—the commission of the crime, its circumstances and causes—than complete

strangers who were never there but who have crucial access to their case files. Another inmate was told by a commissioner that he was not required to "admit to the life crime." While strictly speaking true in the legalistic sense—inmates have the de jure right to maintain their innocence—maintaining innocence will always de facto result in a denial of parole. It is nearly impossible for an inmate to "show insight, remorse, the sort of mindset that a Panel wants to see," in the words of the commissioner, when they do not admit their guilt. Admissions of guilt, demonstrations of self-knowledge, and the appearance of pacification and self-reform are intimately interwoven. In this case, the inmate had failed to "accept responsibility" for the crime, the commissioner said:

> And that's even after he has taken courses in denial management, in criminal thinking, victims impact, substance abuse. These are courses, all of which should have helped him gain further insight into these areas of concern. But reading the Psych Report, which is just a couple of months old, there's reason to question whether or not he's fully internalized what he's gotten out of those courses. So we would certainly urge him to go back and revisit some of his coursework, take a look at his life, figure out where he went wrong, the decisions that he made, what the foundation for those decisions were […].

Participating in rehabilitative programs was not enough: successfully "programming" was only the necessary precondition for learning how to express the transformative effects these programs had on the inmate himself.

Feeley and Simon (1992) claimed that a "new penology" had caused a shift away from "moral or clinical description of the individual" towards "probabilistic calculations and statistical distributions applied to populations" in prison. But these apparently distinct regimes of risk cannot remain separated in the legal realm – this chaotic world marked by a "halfhearted commitment to truth," in Valverde's (2003: 5) memorable phrase. Any actuarial instrument demands clinical judgment: it must be wrapped in a subjective packaging if only because of its clinical context and the unavoidable need to interpret responses.

In parole hearings, a hybrid actuarial-diagnostic regime has therefore been established (see also Lynch 1998). The Board is committed to producing Comprehensive Risk Assessment for each lifer, meant to be renewed every three years. Board-appointed psychologists are tasked with interviewing and assessing inmates. These interviews—euphemistically described as mere "conversations"—include a review of an inmate's childhood history, criminal record, parole and probation history, alcohol and drug use, programming, and previous evaluations. Crucially, these assessments synthesize formal instruments with subjective evaluation. In one inmate's case, a previous psychologist had "offered the diagnosis of Alcohol Dependence in Controlled Environment, Adult Antisocial Personality Behavior, and noted Psychopathic Features on Axis II," leading them to assign the inmate a "moderate risk." The psychologist "rated" the inmate "in the moderate range on the PCL-R, and the moderate range on the HCR-20." In a more recent report, another psychologist had found the inmate to "be a low risk" if they were to be "released in the free community." The inmate's "mental health status" had "gone over," including his "substance abuse history, which we talked about." The psychologist no longer gave a "diagnosis in the area of Major Mental Disorder, Personality Disorder," as a previous psychologist had done in an earlier assessment. In this way, the psychologist deployed the diagnostic-evaluative categories of professional judgment as well as formalized-actuarial instruments of assessment to forge a comprehensive "impression" of the inmate, distilled in one single output: low, moderate, or high risk.

The apparent objectivity of psychological science—the "pretend-scientific approach adopted by psychology" (Parker's 2007: 26)—provides the Board with a valuable source of expert discourse seemingly free from the entanglements of subjectivism (Turnbull and Hannah-Moffat 2009: 535-536). Risk assessments are a veritable "antipolitical machine," in

Scott's (2012) phrase, making commissioners unassailable; (quantitative) instruments of objectivized subjectivity provide state officials with the "vital protective cover" of seemingly apolitical neutrality (Scott 2012: 121-128). Evaluative judgments shot through with subjectivism are covered with the veneer of medical-statistical objectivity. Apparently sound, irreproachable categories of diagnosis, such as "psychopathy" or an "antisocial personality disorder," mask the long labor of constructing judgment on the basis of fleeting, chaotic, and asymmetrical clinical encounters, drawing on multifarious bureaucratic sources and lopsided interviews by powerful psychologists with extremely marginalized individuals. Adding another layer of subjectivity, the Board is not even committed to heeding the judgments of their own evaluators: a panel can "determine, at its discretion, what evidentiary weight to give psychological reports" (15 CCR 2240d). And so even Science must play the handmaid to carceral power.

In this way, risk becomes a multiscalar concept to the Board, synthesizing a diverse array of inputs: psychological evaluations (composed of formalized actuarial instruments and subjective clinical impressions), disciplinary records (including 115s, 128-Bs, and gang membership reports), participation in rehabilitation ("programming"), work records and educational diplomas, "remorse letters" (signaling acceptance of responsibility and a sensitivity towards victims), bodily form (with the intersection between age, muscular build, tattoos, and corporal posture producing an immediate impression of either danger or pacification), post-release plans (including familial support, employment plans, and transitional housing) – as well as the actual "spontaneous" performance during the hearing. This latter component—a performative display before the commissioners—is the point at which all those dimensions of risk meet and commingle, giving rise to a particular "field of forces" (Hawkins 2003) in which discretionary judgment can be passed. Those who meet the Board's evaluative standards are said to "perform well" and "possess insight," allowing the commissioners to "get comfortable" and ultimately, perhaps, grant inmates their freedom. Only those who are perceived not to pose a risk will obtain this admission. Risk is always the product of the conjoined entanglement of fact and value, mixing and melding subjective impressions and formalized instruments of evaluation (see also Hannah-Moffat 2015).

As Bourdieu (2001: 8-9) reminds us, the notion of a "category" connotes both *membership in a social group* and a *principle of perception and action*, the latter tending to flow from the former: members of social categories are equipped with the perceptual categories appropriate to and stemming from their category of belonging. Most commissioners are drawn from the mutually entangled worlds of law enforcement and corrections. In 2010, out of 12 commissioners, eight shared a professional background in law enforcement, three had primarily worked in corrections, and one commissioner was a private attorney. By 2016, this balance had shifted slightly: four commissioners were drawn from the ranks of law enforcement, five commissioners had a correctional background, and three commissioners were former practicing attorneys.[11] Law enforcement and corrections constitute the Board's dominant professional categories, naturally imbuing its decisions with the logic and common sense inherent to and naturalized within those professions.

Conclusion

The Board's default inclination to deny parole can be explained along three broad lines. First, commissioners are themselves products of a field of penality characterized by "law and

[11] One commissioner is described as having "served in various other positions with CHP [California Highway Patrol] including captain commander, lieutenant, sergeant and patrol officer" for the better part of two decades. Another "worked at the […] Sheriff's Department from 1983 to 2009, serving most recently as assistant sheriff." A third "worked at CDCR from 1984 to 1999." Recent commissioner biographies are available at http://www.cdcr.ca.gov/BOPH/commissioners.html.

order": the vast majority are drawn from the correctional system or policing apparatus, making them the preeminent bearers of a particular penal worldview that posits incarceration as the default societal response to crime, premised on a belief in the essential incorrigibility of many offenders. Second, commissioners are fundamentally risk-averse. When in doubt, it is always safer to err on the side of caution: commissioners can be severely blamed for releasing one too many offenders, but only under the rarest conditions could they be blamed for releasing one too few offenders. In part this is due to the influences of political and media power that envelop their professional positions. If controversial inmates are granted parole, commissioners might find themselves in the midst of a media storm. Letting the wrong sort of inmate out of prison is liable to be sanctioned by the governor or state senate, both of which play an instrumental role in appointing and confirming the 12 commissioners that constitute the upper levels of the Board. One commissioner was strongly criticized after granting parole to a member of the infamous 1960s Manson Family, a decision immediately met with highly unfavorable media reporting (e.g. Schram 2016); a few months later, the former inmate's parole grant was rejected by the governor (Park 2016).

Finally, owing to the absence of durable social safety nets, commissioners seem genuinely concerned about releasing offenders into an unprotected community: one commissioner described lying awake at night worrying about whether they had released a dangerous offender out into the community. "I always scan for my guys," the commissioner said, indicating a scrolling gesture on an imaginary phone and wondering whether "their" parolees would commit another violent crime. In a society ill-disposed towards former convicts and lacking comprehensive state provisions for parolees, denying parole seems attractive. And in any case, as Werth (2011) has pointed out, there is little sign that the "reformed subjectivities" of parolees is ever fully recuperated by the state: even as inmates acquiesce, they continue to maintain a certain (inward) defiance and nonconformity.

One prison officer—whose job it was to provide "security" during the hearings, which really meant sitting quietly along the back wall and staring into space for however long the hearing lasted—told me about how his recent conversion to an evangelical brand of Christianity had changed his perception of the hearings. "I mean, I'm a Christian now, and I keep thinking, like, *is this how it's gonna be*? When I get up there?" He waved his hand at the hearing room down the hallway. "Is there gonna be like a guy with a long list, going, OK, this is what you did here, and here," he said, as he mimicked a ledger, moving his index finger down a long list of entries. In this eschatological vision, he had homed in on something essential: that these judgments partook of a long line of semi-theological procedures of judgment whose aim was, as Foucault (2014) would say, to engage in processes of veridiction, whose truth-content was constantly being informed by notions of goodness and authenticity.

Inmates are caught in a world torn between the ubiquitous brutality of carceral austerity and the ritualistic formalism of a legal hearing. In their everyday life, inmates must adopt a tough stance and build social alliances to avoid violence, abuse, and exploitation. In the parole hearing, however, and for the briefest of intervals during an otherwise lengthy, uninterrupted, decades-long existence behind bars, they must temporarily shed their prison persona—what Caputo-Levine (2012) calls the "yard face" of the carceral habitus—and substitute for it a pose of contemplative reflection and irenic respectability. Few inmates are equipped with the social competence necessary to successfully navigate between these diametrically opposed realms: they lack experience in performing to the standards of the law, often failing to utter sentences in an appropriately formal register, or the successful management of *diglossia*—the hardened linguistic register of the prison yard *contra* the legal formalism and psychological introspectivity demanded in the hearing room. In the words of one private defense attorney, "When you have a parole suitability hearing, you must be

adequately prepared for your hearing…You must have a *thorough* file review. If you've been in prison for 10-15 years, the file can be quite voluminous, but you need to take the time and effort to review the file" (Shouse Law Group 2015).

This is undoubtedly sound advice, but it demands a particular linguistic, scholastic competence, which is quite often thoroughly lacking among inmates, an observation supported by the generally low levels of reading comprehension evidenced by many lifers according to the state's own scholastic aptitude tests, or "TABE scores."[12] Thus, out of the 20 hearings observed above, 18 TABE scores were available with an average score of 9.6 (taken by the Board to be equivalent to a mid-9th-grade level of reading and writing proficiency). A pre-high school level of scholastic aptitude does not bode well for an inmate's ability to manage the "voluminous" records of their legal and institutional history nor engage in a "thorough file review," particularly given the very limited help most inmates receive from their (underpaid and overworked) state-appointed defense attorneys. Meanwhile, by comparison, commissioners are almost infinitely experienced, priding themselves on having "seen it all before" and having heard every ruse, line, and hustle. The commissioners are the high priests of the parole performance while inmates are their ill-equipped neophytes. To the former, hearings are routine occurrences; to the latter, they are extraordinary ceremonies.

Owing to a fundamental absence of hearing, many hearings are literally absurd, in the etymologically faithful sense of the term: from *surdus*, meaning "deafness. They are often hearings without listening. And yet they continue, in the long shadow cast by the penal regime of "hyperincarceration" (Wacquant 2009). The most difficult thing in the world, as Bourdieu (1998a: 21) says, is to describe the extraordinary ordinariness of social life. It is the routinization of the exceptionally quotidian that primarily characterizes the affectivity of parole hearings: heart-rendingly agonistic, achingly dull, tinged with the loud ideological overtones of moralizing individualization and responsibilization, often disavowed by a culture of punishment that emphasizes and elevates the hermetic capacities of the self-made person to lift themselves up by their own bootstraps, and suffused with bureaucratic pathologies, institutional shortcomings, and societal deficiencies – in short, a denial of the lessons of sociology.

[12] The TABE score offers an assessment of scholastic aptitude and is usually used as an estimated indicator of the "grade level" of inmates, approximating the level of schooling at which they are currently located.

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