Discretionary Parole - A Theory of Social Function

Intro

Why do we have discretionary parole? The process of an expert panel determining a release date by examining "whether an inmate currently poses an unreasonable risk of danger to society if released from prison"[1] - has existed for more than 120 years. What is the justification and purpose of discretionary parole? As a part of the process of punishment, does it correspond with any of its purposes, or does it serve a different, independent purpose? A comparative analysis of two case studies - Israel and California - reveals that discretionary parole serves more than a functionalist purpose. It reflects the hegemonic ideology - Zionism in Israel and Neoliberalism in California - as it constructs and reinforces society's moral boundaries and conditions of inclusion and exclusion.

In both Israel and California discretionary parole plays a crucial role, and as I will argue, offers insight into society's moral values. Although the procedures and substantive principles are comparably similar, there is a difference in context - determinate sentencing law ("DSL") in Israel versus indeterminate ("ISL") in California.[2] While in Israel discretionary parole allows an *early* release from prison, in California it serves as a *de-jure* release-from-prison-mechanism for individuals sentenced to a sentence of life with the possibility of parole.

In the following part, I turn to an in-depth discussion of the justification of discretionary parole in Israel. I explain why, in Israel, discretionary parole cannot be justified strictly on utilitarian grounds - firstly because they fail to explain the specific need for discretionary parole in a legal system that utilizes determinate sentences and administrative release. Secondly because

[1] CAL. CODE REGs. tit. 15, § 2281(a) (2016). See also Board of Parole Hearings, Parole Suitability Hearings - Information Considered at a Parole Suitability Hearing (Available at: https://www.cdcr.ca.gov/BOPH/parole_suitability_hearings_overview.html).

[2] In California, as I explain below, most new sentences are determinate, and following new legislation some of the determinate sentenced prisoners would also be eligible for discretionary parole paper-based, or hearing).

the utilitarian justifications fail to explain the systematic barring from early release of prisoners that defy the Zionist ideology.

The next part will discuss the modern jurisprudence of discretionary parole in California, that celebrated Public Safety as sole, rational, justification. I will argue that public safety fails to explain the intervention of the Governor, the increased influence of victims in the hearing and above all the rise of insight as the main factor for release.

After discussing the functionalist justifications to discretionary parole, I turn to Durkheim's methodological approach to the study of law and society and explain why the grant of parole reflects the moral sentiment of the hegemonic society.[3] To study the grant of discretionary parole is to study whom the hegemonic society may consider morally worthy for reentry (and not, as it might be suggested, "who is dangerous"). I claim that the sociological justification for the Israeli parole is the societal response to the imprisonment of a fellow Jewish Zionist, an urge to grant a chance for restitution to the Israeli society. In California, however, it aims at further reinforcing the neoliberal penal ideology. In the last part, I discuss policy reform. I will suggest that creating a more restitutive discretionary parole system requires the elimination of "penal ritual" elements from it and any element of ideological requirement as a factor for release.

1. Comparing discretionary parole policy in Israel and California

Israel has a determinate sentencing scheme for all crimes except for intentional, willful and premeditated murder which is punished with a life sentence with the possibility of parole

[3] Here I use the distinction "within/outside society" to distinguish between "not-being/being incarcerated." As my discussion later turns to Durkheim, I should clarify that for him, "the normal offender is not outside society. Punishment is a process *within* society." See, Roger Cotterrell, *Justice, Dignity, Torture, Headscarves: Can Durkheim's Sociology Clarify Legal Values?,* 20(1) SOCIAL & LEGAL STUDIES 3, 11-12 (2011).

("life sentence").[4] After a person is incarcerated, there are three separate possibilities for early release: Discretionary parole, administrative release, and pardon. After an incarceration period of no less than two-thirds of the overall sentence period, all fixed-sentence prisoners are eligible to be considered for parole by the parole board. If granted parole, the prisoner is released from custody and remains under parole supervision for the remainder of his or her original sentence period. In comparison, in California discretionary parole is possible almost exclusively for prisoners that are serving an indeterminate sentence, or "life with the possibility of parole" (also referred to as "lifers").[5] The California Board of Parole Hearings ("the board") decides not only when an inmate would be released from prison (as is the case in Israel) but if the prisoner would be released at all.

Both discretionary parole institutions share the same official purpose - predict future dangerousness, or, "suitability". Both are designed to determine whether an inmate would pose a risk to society should he or she be released; both have almost unlimited discretion to examine any evidence they deem relevant; both consider the same broad set of considerations. However, the two case studies combined allow us to *gain insight* into the two forms of discretionary parole - in a mixed ISL-DSL sentencing system (California) and in a strictly DSL one (Israel).

[4] Individuals that face a life sentence must first get their sentence "fixed" by a special board of release from prison, and then they face early release possibilities as all other prisoners do.

[5] Lately, discretionary parole became more significant: Prop. 57 for determinately-sentenced nonviolent offenders who have served the full-term of their primary offense (https://www.cdcr.ca.gov/proposition57/docs/FAQ-Prop-57-nonviolent-parole-process-Dec-2018.pdf); SB 9 for inmates who were convicted as juveniles (CAL. PENAL CODE § 1 170(d)(2) (West 2016).

a. Israel - Background and Theory

Discretionary parole is usually associated with an indeterminate sentencing scheme.[6] In Israel, however, discretionary parole is combined with determinate sentencing and all prisoners are eligible to be considered for parole after serving two-thirds of their maximum sentence term. The parole board has full discretion whether to grant parole or to deny it, and there are no parole guidelines. Hence, in theory, every prisoner in Israel might be released from prison earlier than the original sentence mandates, if the parole board decides so.

Parole "shaves off," for many, as little as a few days of incarceration.[7] In this chapter, I will explore the question: what is the justification for discretionary parole in Israel?

Until 2001, parole boards were regulated by an unusual combination of court precedents, rules, and regulatory guidelines, which included the Prisons Ordinance Act, the Penal Code, and the Penal Regulations. The conditions and considerations the board had to consider were not stated, and there was a lack of coherence and uniformity between the different sources of regulation.[8] As a result, in 1991 a special committee appointed to examine discretionary parole published its report,[9] which recommended to regulate the parole board's activity in one act which would detail the considerations for the board to consider and turn the process into *a cohesive and clear legal system*. A decade later, in 2001, a new bill was passed ("The Conditional Release from Prison Act"), which embraced these recommendations and stated that the purpose of the

[6] Under indeterminate sentencing, a process of individual assessment must take place, because the reason indeterminate sentencing exists is to perform ongoing evaluation of the prisoner. See, e.g., Joan Petersilia & Jimmy Threatt, *Release from Prison*, THE ENCYCLOPEDIA OF CORRECTIONS (2017).

[7] Data on parole releases is scarce, however, the problems with delayed hearings and releases are well known. See, e.g., THE PUBLIC COMMITTEE TO EXAMINE PUNISHMENT AND TREATMENT, POLICY REPORT (2015) [Hebrew].

[8] *Id.*, at 40.

[9] COMMITTEE ON EARLY RELEASE OF PRISONERS BY THE PAROLE BOARD, Report (1991) [Hebrew].

new act would be to create *a uniform process, to decrease disparity and to make the substantive conditions for parole clear and transparent.*[10]

In comparison to the situation that prevailed before its enactment, the new act includes several reforms. First, the act outlined the exact considerations that parole boards should consider. Before the enactment of the act, the boards made decisions given the considerations outlined in the case law up to that time. Prior to the enactment of the new law, parole boards were highly criticized for being arbitrary; for example, in the matter of *Asias*,[11] Justice Barak expressed the position that a criterion should be enacted if we wish to promote *uniformity* and allow *judicial and public review*. Another basis for this position is in the Israeli "Basic Law: Human Dignity and Liberty," which demands that a justification for the continued denial or suspension of liberty be met by the conditions set forth in the law: "The rights under this Basic Law shall only be violated by a law which is appropriate to the values of the State of Israel, which is intended for a proper purpose, and to an extent no greater than is required."

Consequently 2001 marks the Israeli system of parole pivotal moment of positivation and rationalization. No more vague guidelines and mysterious procedures, discretionary parole now has its own suitable act, which is properly named and is clear, concise and legally legitimized.

i. Utilitarian Justifications for Discretionary Parole in Israel

1. Regulating Prison Population Rate

In mid-2017 the Israeli Supreme Court ruled that the state should increase the allocated space available for each prisoner to 4.5 square meters until the end of 2018.[12] This meant one of

[10] See EARLY RELEASE FROM PRISON BILL 2979, 534 [Hebrew].
[11] APP 2/83 Parole Board v. Asias PD 36(2) 688, 689 (1983) (Isr.) [Hebrew].
[12] HCJ 1892/14 The Association for Civil Rights in Israel v. Minister of Public Security (06.13.2017) (Isr.) [Hebrew].

two options – more prisons or fewer prisoners. The decision caused quite a stir as the administration searched for the right solution. Although some suggested increasing the rate of parole release decisions,[13] it was decided that any solution should not include intervention in any form of administrative discretion (of the parole board, or otherwise). The short time frame required immediate solutions, and in August 2018 the legislature approved a notable increase in the application of administrative early release, allowing for up to 30 weeks of administrative early release.[14]

The administrative release is an early release from prison procedure that takes place when the number of total prisoners exceeds the official limit for the maximum possible number of persons incarcerated in Israel. It was first enacted in 1990 following harsh criticism over prison overcrowding.[15] The procedure consists of a nominal decrease in the original sentence, according to a calculation that is determined in law.[16] It ranges from 8 weeks up to 30 weeks decrease in the original sentence length. Only prisoners that are serving a sentence shorter than four years are automatically eligible for administrative release (the rest should first be granted parole and then their release date is calculated in accordance to the administrative release date).

According to data by the Israeli Prison Service, in 2017 74% of convicted individuals were sentenced to 12 months in prison or less, the average prison sentence was 11 months (excluding nine individuals who were sentenced to life with the possibility of parole) and the

[13] Policy Report, *supra* note 7.

[14] *The Interior Committee approved the extension of administrative release periods: early release of hundreds of prisoners,* Knesset Announcements (8.1.2018) [Hebrew] (available at: https://m.knesset.gov.il/news/pressreleases/pages/press01.08.18a.aspx).

[15] Bill 1975 - Amendment 12 to the Prisons Order (1990) (available at: https://fs.knesset.gov.il//12/law/12_ls1_291458.PDF) [Hebrew].

[16] Amendment 54 to the Prisons Order (2018) (available at: https://fs.knesset.gov.il/20/law/20_lsr_519393.pdf?fbclid=IwAR2NcP_AIfFMyAyXp0Ccpt07afOagqHq5qgkXAfNfsA1KRO_K37FYbA06-4) [Hebrew].

median sentence length was six months.[17] Most importantly from the administrative release perspective, 96.7% were sentenced to 48 months or less.[18] Hence, the quantitative significance of administrative early release cannot be overstated.

Compared with discretionary parole, the justification for administrative early release is purely bureaucratic. In its essence, it is a compromise, not a willful release (which is the case for parole), but a release that the state is coerced to grant. If the state had the option, meaning more space in prison, it would be reluctant to release the prisoner. Administrative release involves no individual judgment and requires no discretion. It is a technical procedure, with a straight-forward justification – adjusting the number of prisoners in prison.

2. Prison Management

Discretionary parole can be justified as one of the prisons authority's tools to promote good behavior in prison. It provides the prison authorities an additional resource for rewarding good behavior and punishing inmates that break the prison rules. This approach emphasizes minimizing misconduct, not necessarily promoting rehabilitation.

One overlooked difference between the discretionary parole process prior to the 2011 act and the process that replaced it, is that the administrative ownership of the process changed from the Israel Prison Service (IPS) to the ministry of justice, and a prerequisite condition of "good behavior" was excised from the 2001 act. The IPS lost its responsibility of the administrative aspects of the parole hearings, and lost its ability to influence the decision-making process, as the

[17] Research Division, Israel Prison System - Distributions of Imprisonment Lengths, Prison Admissions Report 2017; See also Implementation of "Dorner Report," The Prosecution's Report, 31 (2018) [Hebrew] (available at: https://www.justice.gov.il/Units/StateAttorney/Documents/Lemberger_Report.pdf).

[18] *Id.*, at 5.

act sought to eliminate any conflict of interest from the process.[19] Further, during the legislative discussions over the new act, it was explicitly stated the purpose of discretionary parole would not be to aid the IPS with prison management.[20]

3. Public Safety

The two conditions for the grant of parole - whether the prisoner poses a danger to public safety and whether the prisoner is worthy of being released - were interpreted by the Israeli Supreme Court as two aspects of the same governing principle:

> These two are one and the same, and the same data and considerations will feed them ... the individual worthiness and the public safety are interdependent. The chances of the prisoner's rehabilitation and the risks to public safety and security are intertwined, and their examination must be done by clarifying the variables that are relevant to the matter.[21]

The act also emphasizes the importance of public safety in article 9 that states: "In deciding whether a prisoner should be released on probation, the Committee shall consider the anticipated risk of the prisoner's release, including his family, the victim of the offense and the security of the state, the chances of the prisoner's rehabilitation and his behavior in prison."

However, because prison sentences in Israel are determinate, dangerousness is not a condition for release from prison. Hence, denying early release on the basis of dangerousness does not affect the eventual release from prison. Further, many parole hearings are held a few months, or even weeks, before the date of the official release.[22] The question arises: why would

[19] For a discussion on this change and its ramification see Protocol 289 from the meeting of the Constitution, Law, and Trial Committee (3.28.2001).

[20] *Id.*

[21] HCJ 4681/97 Attorney General v. Parole Board - Northern Bloc, PD 4(679) 684 (1997) (Isr.) [Hebrew].

[22] POLICY REPORT, *supra* note 7, at 46.

we even bother with the struggle of determining future dangerousness in a determinate sentence system?

Additionally, when a person is granted parole he is placed under community supervision until the end of his original sentence. However, if community supervision supposedly increases public safety (or rehabilitation, which I discuss next), then why would only those that are deemed the *least* dangerous be supervised? Moreover, if the legislature believes that a parolee should be under supervision until the end of his original sentence term, then why was this person released, to begin with? Precautionary supervision emphasizes the perceived importance of parole – society is willing to take a chance, but why?

4. Rehabilitation

The Ministry of Justice offers a different possible explanation that justifies discretionary parole in Israel as an incentive for rehabilitation:

> …why prisoners should be released early if a court determines that they must serve a punishment for a certain period? The idea that the legislator had when it enacted the Conditional Release from Prison Act was to rehabilitate the prisoner who in any case will return to society at some stage. Many times, knowing that a prisoner can obtain early release encourages him to begin a process of rehabilitation during his imprisonment[23]

This reasoning is compelling, yet insufficient. Firstly, If rehabilitation requires incentives, then why must it be an early release which challenges the legitimacy of the court's original verdict? In prison, there are countless policy possibilities for incentivizing the prison population,

[23] STATE ATTORNEY, PAROLE BOARDS [Hebrew] (available at: http://www.justice.gov.il/Units/StateAttorney/Criminal/Pages/Parole-hearing.aspx).

such as vacations, money and other privileges that do not require taking the risk of an early release from prison for a dangerous prisoner.

Secondly, surely if an early release is required to incentivize rehabilitation in prison, then every prisoner entitled to be considered for early release would also be allowed to participate in rehabilitation programming in prison. Alas, this is not the case. The Israeli legislature limited participation in prison rehabilitation programming to Israeli citizens and residence alone,[24] and did not limit the possibility of early release accordingly.

Lastly, the incentives logic requires a different procedure if it is genuinely effective, namely a procedure with minimum discretion where a specific combination of rehabilitative programs, acquired skills, test scores, and other objective data would enable early release. The act, however, does not consider any objective progress in prison as definitive and the prisoner population remains to wonder "what works," as they try to piece together theories for why prisoner X was denied parole while prisoner's Y parole was granted.

ii. Parole Boards - Penal Experts or Clairvoyants?

The supreme court of Israel has interpreted the goal of the parole board's decision-making process, as "*strike a proper balance* between the *personal aspect* and the *general public aspect*, between the weight of the prisoner's *personal circumstances* and the *public's interest* in ensuring that the offenses and violations of the law are not repeated."[25] The discretionary parole decision is thus constructed as a manifestation of Beccaria's equation – the parole board ensures that indeed the suffering of the prisoner is no more than it is necessary to ensure the minimization of

[24] PRISONS ORDER § 11d (1971) [Isr.] ("The Prisons Commissioner will examine the possibility of rehabilitating a prisoner who is an Israeli citizen or resident of Israel and will take steps to ensure maximum integration in rehabilitation activities within the prison."); See also Protocol 537 from the Interior Committee (5.7.2012): "The state should not invest in those that are not her citizens".

[25] HCJA 1942/05 Muhammad Abu-Zalek v Israel State (6.16.2005) (Isr.) [Hebrew].

crimes. Therefore, Israeli discretionary parole allows the convicted to reduce his suffering, and increase his liberty if it would not put society in danger. If deterrence suffers no adverse impact, [26]is this the perfect Beccarian punishment calibration instrument? It might have been, were it not for discretionary parole's ambiguous and unpredictable nature. It is part legal and part clinical, and not entirely either. It, therefore, might belong to a different sphere, closer to the realm of pardon and clemency, which is beyond legal fact and legal rights.

However, if a pardon is the action of the sovereign, which is beyond legal reason, then parole is rule-governed, and applies equally to all. This distinction reveals the great puzzle - discretionary parole in Israel, hence, might be rational only in the sense that is governed by rules. The 2001 turn to positivation and rationalization of the discretionary parole system is revealed to be only rational in the sense that it is positivistic. In other words, it is empty positivism, without substantive rationality. The legislature lauded the 2001 act for "systematizing, organizing and professionalizing" the discretionary parole process - not for promoting any specific utilitarian end. Discretionary parole remains a high discretion process with low predictability. A prisoner knows that the board will consider "dangerousness" and "worthiness," but the prisoner does not know, nor can the prisoner know, who is considered dangerous and who is worthy.

The next part discusses how excluding anti-zionist prisoners from a fair chance of early release might be suggestive towards discretionary parole's broader social function.

iii. Security Prisoners

An additional challenge for the Israeli discretionary parole system presumed rational impartiality is that it is a system that systematically discriminates against a specific class of

[26] For a theoretical discussion on the connection between discretionary parole and deterrence, see Kevin R. Reitz, *Questioning the Conventional Wisdom of Parole Release Authority, in* FUTURE OF IMPRISONMENT (Michael Tonry ed., 2006).

prisoners. In Israeli prisons, there is a group of inmates that differs from the rest - "security prisoners." These are prisoners that were convicted of a crime that, by its characteristics and circumstances, impinged upon the security of the state, or that had nationalistic motives.[27] Prisoners are classified as security prisoners not by law but by an inner regulation of the IPS. This definition has consequences such as the location of the inmate's prison, the inmate's reduced right for vacations and phone calls, and other procedures relating to the inmate's life behind bars. Security prisoners are also denied access to rehabilitation programs. Security prisoners were indicted and sentenced just like any other prisoner, and in theory, they can also be granted discretionary release on parole. The discretionary parole act does not distinguish between security prisoners and other prisoners.

Nevertheless, when an inmate is defined by the IPS as a "security prisoner", the inmate faces a unique hurdle. In addition to the usual conditions, considerations and evidence that apply to all inmates, the parole boards and the courts ruled that security prisoners must also demonstrate "a 'significant and tangible change' in relation to the ideological concept on which the offenses for which he was convicted were committed."[28] This requirement, however, is practically impossible to fulfill thanks to the supreme court's rulings discussed next

The Supreme Court of Israel held that: "When it comes to a nationalistic-ideological offense, *there is no need to provide evidence that the prisoner poses a risk to the public in the sense that he will commit a certain offense if he is released.* Moreover, *no expression of regret can indicate a change in the ideology* that was at the basis of a serious offense."[29] The supreme court also upheld the administrative court's ruling that "there is no necessary correlation between

[27] ORDER OF THE COMMISSION 04.05.00 [Hebrew].
[28] HCJA 5555/14 Salhab Na'al v. The Parole Board (12.8.2014) (Isr.) [Hebrew].
[29] HCJ 1920/00 MK Galaon v. The Parole Board, P.D. 54(2), 313, 325 (2000) (Isr.) [Hebrew].

organizational affiliation and ideology"[30] thus it would *not* be enough for the prisoner to show that he is no longer affiliated with any ideologically hostile organization.

The biggest challenge that the ideological-change condition poses to the allure of a rational process is that it is impossible to overcome it. In a sense, it is unfalsifiable. In reality, a security prisoner that proves his regret and de-affiliation with the hostile organization would still *not* be considered as if he had a significant and tangible ideological change. Even if there is no evidence that points to the prisoner's risk to public safety, the ideological hurdle trumps. The Court turned the requirement into *a legal presumption of unsuitability*, which cannot be verified. From a perspective of risk, a managerial category such as "security prisoner" should not be the decisive factor.[31]

Moreover, from a risk and suitability perspective, if ideology or "worldview" were rationally important for the individualized decision about one's level of threat to public safety, then there would be no special need to rule that they are *only* important for a specific group of prisoners. It would have been just part of the normal process.

b. <u>California - Background and Theory</u>

Similarly to Israel's system, California's discretionary parole also seeks to predict future behavior, however, it takes a different approach. Firstly, after many years of discretionary release from prison as the main release mechanism, California limited discretionary parole to a subset of

[30] HCJA 119/19 John Doe v. The State of Israel (4.14.2019) (Isr.) [Hebrew].

[31] Karl Popper, the famed philosopher of science, introduced the concept of Falsifiability (or Refutability). He contrasted psychoanalysis with physics, and concluded that while Einstein's theory of relativity can be falsified "nothing could, even in principle, falsify psychoanalytic theories." Hence, some psychoanalysis theories "have more in common with primitive myths than with genuine science." Whether or not the Israeli discretionary parole process as a whole survives the Falsifiability challenge is a matter for a different research. Here, it is presented merely to highlight the irrationality of the ideological requirement - under the current jurisprudence it is impossible to falsify it.

people convicted mostly of murder. Secondly, California's system went from focusing on the act of the offense to emphasizing the vocalization of "insight"[32] as the main factor in answering the "threat to public safety" question. Thirdly, discretionary parole in California gradually became more public and transparent - the victim has a voice in the hearing, the governor has a voting\veto role, and the hearings' calendar and transcripts are all available to the public.

The first discretionary parole law in California was enacted in 1893[33] while California had a determinate sentencing statutory structure.[34] Policy-makers and politicians turned to discretionary parole as a means of reducing excessive sentences and relieving prison overcrowding.[35] It went through two amendments in 1901 and 1909 that substantially increased its influence over the incarcerated population and their ability to gain freedom.[36] After the enactment of the Indeterminate Sentencing Act in 1917[37] and a further reform that created the Adult authority in 1944,[38] discretionary parole became even more entrenched in California's criminal justice system: The parole board was the final decision-makers on the matters of the length of imprisonment and the parole supervision period.[39] In 1976, the Determinate Sentencing

[32] The term and its meaning would be discussed below.

[33] Act of Mar. 23, 1893, 1893 Cal. Stat. 183, *reprinted in* CAL. PENAL CODE app. at 694 (Deering 1897).

[34] Kara Dansky, *Understanding California Sentencing*, 43 U.S.F L. REV. 45, 50 (2008).

[35] *Id.,* at 58.

[36] The numbers presented by Messinger et al are telling: "In the ten years from fiscal 1894 through fiscal 1903, 155 prisoners were released on parole; in fiscal 1909 alone, the number was 188. In fiscal 1903, 5 percent of those released by parole or discharge were paroled; by 1909, 22 percent. In 1914, the approximate end of the founding period of parole in California, 520 prisoners were paroled; 527 prisoners were, by comparison, directly discharged from prison." Sheldon L. Messinger et al., *The Foundations of Parole in California*, 19 LAW & SOC. REV. 69, 95 (1985).

[37] California Penal Code section 1168. May 18, 1917, ch. 527, § 1, 1917 Cal. Stat. 665 (current version at CAL. PENAL CODE § 1160 (West 2004)). For a thorough discussion of the enactment of the indeterminate sentencing law, see Paula A. Johnson, *Senate Bill 42-The End of the Indeterminate Sentence*, 17 SANTA CLARA L. REV. 133 (1977).

[38] Philip E. Johnson & Sheldon L. Messinger, *California's Determinate Sentencing Statute: History and Issues*, 1 DETERMINATE SENTENCING: REFORM OR REGRESSION 13 (1978).

[39] Id.

Act (DSL)[40] was enacted and signed into law by Governor Brown, bringing to an end the rule of the Adult Authority over the length of all sentences, and replacing it with the Board of Parole Hearings (or "parole board").

i. Public Safety and Insight

During the 1970s the Adult Authority faced pressure from both the public to make its decisions more consistent and uniform, and from the Court to base its decisions on demonstrated rehabilitation.[41] Subsequently, the legislature repealed ISL as the sentencing policy of choice, and abolished the Adult Authority. The enactment of a new DSL aimed at eliminating unwarranted disparity, enhancing transparency and stated that the purpose of imprisonment is retributive, instead of rehabilitative.[42] Accordingly, discretionary parole got off the table for the vast majority of convicted individuals. Excluding most of the prisoners from discretionary parole fitted well with the change of penological discourse (from rehabilitation to retribution) but also symbolized the growing public and political resentment towards excessive discretion.[43] At the twilight of the ISL era, discretionary parole came to embody the presence of disparity, arbitrariness, bias, and obscurity of the criminal justice system for society in California.

Currently, discretionary parole is alive and kicking. Although the vast majority of new sentences are determinate, the number of prisoners serving an indeterminate sentence is alarmingly growing. Additionally, discretionary parole experiences a recent resurgence through new legislation that allows inmates serving determinate sentences to receive a discretionary

[40] Uniform Determinate Sentencing Act, ch. 1139, 1976 Cal. Stat. 5062 (current version at CAL. PENAL CODE § 1170 (Deering 1993)). (also referred to as "Senate Bill 42").

[41] Kara Dansky, *Understanding California Sentencing*, 43 U.S.F L. REV. 45, 66, 50 (2008).; Johnson & Messinger, *California's Determinate Sentencing Statute, supra* note 38, at 22.

[42] Johnson & Messinger, *California's Determinate Sentencing Statute, supra* note 38, at 14.

[43] The DSL, accordingly, included many statutes defining the terms for each offense, in an effort to limit sentencing discretion.

parole hearing date as well. According to some estimations, about half of all persons currently behind bars in California will face the parole board at a certain point. The clear denouncement of rehabilitation in favor of retribution in the late 1970s, coupled with the disillusionment from the individualized punishment ideal, begs the question: how discretionary parole survived as a legal institution, and why?

During the current era of discretionary parole, four major decisions of the Supreme Court of California help clarify its uniqueness compared to its predecessors and will serve as a guide in search of its socio-legal justification.

ii. Political Influence, and Culpability vs. Suitability

The California Constitution grants the Governor, under article V, section 8(b), the discretion to "affirm, modify, or reverse the decision of the parole authority." The Governor's parole review power is the result of Proposition 89, which was voted into law in 1988.[44] Proposition 89 followed the public controversy over the release of Archie Fine.[45] In 2002, the Court ruled on *In re Rosenkrantz*[46], in which the court granted review to decide the question of "whether a decision of the Governor finding a prisoner unsuitable for parole is subject to judicial review."[47] The court held that "a Governor's decision granting or denying parole is subject to a limited judicial review to determine only whether the decision is supported by 'some evidence'". [48] The court, in this ruling, added fuel to the "discretion-fire", further affirming the Governor's

[44] Governor's Parole Review. California Proposition 89 (1988) (available here: https://repository.uchastings.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2005&context=ca_ballot_props).

[45] See, e.g., JOHN HURST, Prop. 89, Plan to Give Governor Parole Veto Power, Expected to Win, LA Times (Oct. 28, 1988) https://www.latimes.com/archives/la-xpm-1988-10-28-mn-340-story.html.

[46] *In re Rosenkrantz* 29 Cal.4th 616 (Cal. 2002).

[47] *Id., at* 625.

[48] *Id*.

hold over the final grant of parole for inmates convicted of murder. Although the arguments in favor and against Proposition 89 focused on the question of the politicization of the parole process, highlighting the fact that the governor has no relative advantage in making a parole release decision compared to the parole board, the Court in *Rosenkrantz* did not comment on the substantive issue.

The governor might be last to decide, but his vote is no "rubber stamp." Data shows that the governors' rate of approving parole grants fluctuates and is immensely significant in influencing the actual number of releases from prison: Governor Grey Davis upheld 2.8% of parole grants, Governor Schwarzenegger upheld 28.8% of parole grants, and in 2015 Governor Brown upheld approximately 86.5% of grants.[49]

In addition, the Court expressed its own interpretation of the issues of how to regard the original offense in relation to the board's mission of predicting future dangerousness (as opposed to punishing). the Court held that: "In some circumstances, a denial of parole based upon the nature of the offense alone might rise to the level of a due process violation - for example where no circumstances of the offense reasonably could be considered more aggravated or violent than *the minimum necessary* to sustain a conviction for that offense."[50] Applying this standard, the court ruled that in this case there were acts "beyond the minimum necessary to sustain a conviction."[51] three years later, ruling on *In re Dannenberg*, 104 P.3d 783 (Cal. 2005), the Court repeated the same general reasoning.

[49] Kathryne M. Young, Debbie A. Mukamal and Thomas Favrebulle, *Predicting Parole Grants: An Analysis of Suitability Hearings for California's Lifer Inmates,* 28(4) FEDERAL SENTENCING REPORTER 268 (2016).
[50] *Rosenkrantz*, *supra* note 46, at 683.
[51] *Id.*

After the Rosenkrantz and Dannenberg decisions, most of the parole denials were based on the circumstances of the committed offense[52] and one court noted after reviewing over 3,000 parole hearing transcripts that parole boards applied the label "heinous, atrocious or cruel" to 100% of cases.[53]

iii. Personal Responsibility, Culpability, and Public Safety

The next time the Supreme Court addressed the issue of guiding the discretionary parole decision-making, was in the twin-decisions of *In re Lawrence*, 190 P.3d 535 (Cal. 2008) and *In re Shaputis*, 190 P.3d 573 (Cal. 2008) ("*Shaputis I*"), and later in *In re Shaputis*, 265 P.3d 253, 275 (Cal. 2011) (*Shaputis II*). Those three decisions marked the rise of "insight" as the decisive factor for the parole board to consider, and emphasized risk to public safety as the sole criteria for the board to consider:

> … before we decided *Lawrence* and *Shaputis I*, most parole denials by the Board and the Governor were based on the gravity of the commitment offense. (See Lawrence, supra, 44 Cal.4th at p. 1206.) After *Lawrence*, which held that the circumstances of the offense justify a denial of parole *only if they support the ultimate conclusion that the inmate continues to pose an unreasonable risk to public safety* (id. at p. 1221), and *Shaputis I*, which held that petitioner's failure to gain insight into his antisocial behavior was a factor supporting denial of parole (*Shaputis I*, supra, 44 Cal.4th at p. 1260), a great many parole denials have

[52] Carrie Hempel, *Lawrence and Shaputis and Their Impact on Parole Decisions in California*, 22 FED. SENT'G REP. 176, 177 (2010).

[53] Keith Wattley, *Insight into California's Life Sentences*, 25 FED. SENT'G REP. 271, 272 (2013) n.20 (citing Order dated August 30, 2007, In re Criscione, Santa Clara County Super. Ct., Case No. 71614 (2007) (2013).

focused on the inmate's lack of insight. Other Courts of Appeal have noted this development.[54]

Insight is a term absent from any statutory framework and is highly ambiguous. Nonetheless, it is "a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety."[55] Insight might be described as "self-awareness and the ability to characterize the commitment offense without minimizing personal responsibility."[56] Justice Liu argued in his *Shaputis II* concurring opinion that a lack of insight may suggest either a denial of committing the crime or its official version or an insufficient understanding of the causes which led them to commit the crime.[57]

The rise of "insight" as the go-to factor in the discretionary parole decision-making process was accompanied by the courts insisting on the inmate's potential for recidivism as the only legitimate determination the board ought to make. A good example of how discretionary parole fits with the public safety justification is the new AB-1448 Elderly Parole Program, which seems to follow the empirical consensus of old age as a good proxy to reduced criminal behavior. When considering the possibility of parole for Inmates who are 60 years of age or older and who have served a minimum of 25 years of continuous incarceration, the board would "give special consideration to whether age, time served, and diminished physical condition, if any, have reduced the elderly inmate's risk for future violence." Assuredly, recent empirical data

[54] *In re Shaputis*, 53 Cal. 4th 192, 217 (2011).
[55] *Shaputis II*, 53 Cal. 4th 192, 218 (2011).
[56] Lilliana Paratore, *"Insight" Into Life Crimes: The Rhetoric of Remorse and Rehabilitation in California Parole Precedent and Practice*, 21(1) BERKELEY J. CRIM. L. 95 (2016). See also Wattley, *supra* note 53, at 272-73.
[57] *Shaputis II*, *Supra* note 55, at 275-76.

from a Stanford research showed that "an increase of ten years in age made an inmate anywhere from 1.3 to 5 times more likely to be granted parole."[58]

iv. The Public Safety and Insight Myths

In California, discretionary parole's justification shifted as the legal institution continued to morph. In its inception, when discretionary parole was an extension of executive clemency, its purpose was characterized in terms of equity and relied on the assumption of innate criminality. By diverging from the rules, parole offered a remedy for those prisoners that were "good at heart." Later, when prison overcrowding first emerged as a problem in California, discretionary parole first assumed its utilitarian justification, offering a cost-effective solution to the problem. In the age of ISL, under the progressive paradigm of rehabilitation, discretionary parole re-emerged, presumably, as the manifestation of the Beccarian ideal - optimizing punishment to fit the individual needs and the general interest. The Supreme Court's 1975 *Rodriguez* decision painted the perfect picture of the Adult Authority executing a science of punishment - the sentence limit is to be decided according to the criminal act, and the actual length of imprisonment is to be tailored to fit the offender perfectly.[59] All of this changed with the 1976 adoption of DSL.

Currently, discretionary parole is proclaimed to be all about public safety. However, justifying the current structure of discretionary parole in terms of maximizing public safety fails to explain some of its unique characteristics and relies on dubious assumptions. Firstly, Aviram's analysis of parole's transformation in the context of the Manson cases elucidates the fact that it was shaped by "the emotional response to a redball crime."[60] Secondly, there analytical

[58] Young et al. *supra* note 49, at 272.
[59] *In re Rodriguez*, 14 Cal.3d 639 (1975).
[60] HADAR AVIRAM, YESTERDAY'S MONSTERS, Ch. 2 (2020).

challenges to the purely functional claim - how does expressing insight have anything to do with public safety? How does the presence of the victim and the active role of the governor promote public safety?

Perhaps public safety requires discretionary parole for some offenders but not for others, because some crimes are so hideous that the mere chance of them reoccurring requires discretionary parole as an additional safety valve before society is willing to take the chance of reentry. Norvel Morris famously remarked:

> We can in this manner prevent some serious crimes of violence - and those who pay the cost of the gradual capital punishment that is protracted imprisonment are not particularly valuable citizens anyhow. The community seems prepared to meet the relatively small costs of providing the prison cages; it seems, if anything, quite pleased to do so.[61]

Nevertheless, from the point of view of public safety and risk assessment, there is probably little difference between violent crime and non-violent crime as categories.[62] Recidivism rates are especially low for those convicted of murder, compared to other types of offenses.[63] Because of felony murder laws, some individuals sentenced to ISL are the "victims" of moral (bad-) luck. They did not intend to commit murder, rather their crime began similarly to the crimes of many others that were sentenced under DSL but escalated. Thus, aprioric, their *risk* to public safety is mostly indistinguishable from other DSL offenders, which challenges the

[61] Norval Morris, *The Future of Imprisonment,* 72(6) MICHIGAN L. REV. 1161, 1177 (1974).

[62] For example, age seems to be a far more important criterion. See, e.g, JOHN PFAFF, LOCKED IN (2017), arguing that violence is "a phase, not a state" and that we can release everyone convicted of a violent crime out of prison on their forties and there would be little risk for the rest of us.

[63] Robert Weisberg, Debbie A. Mukamal & Jordan D. Segall, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California*, Stanford, CA: Stanford Criminal Justice Center, 2011.

rationale of public safety and the separation of ISL and DSL seem artificial. In addition, research shows that long sentences can decrease public safety because of the collateral effects of imprisonment of the family and community of the incarcerated person.[64]

Moreover, empirical research fails to find any evidence for the parole boards' advantage in predicting future crime: "predictions of avoidance of conviction after release are no more likely to be accurate on the date of release than early in the prison term... Neither the prisoner's avoidance of prison disciplinary offenses nor his involvement in prison training programs is correlated with later successful completion of parole or with later avoidance of a criminal conviction."[65] Indeed, the defunct Adult Authority was notoriously bad at predicting future violence.[66] In addition, according to Reitz: "It may seem counterintuitive that long observation of an inmate can yield no reliable information about his future conduct. Yet it is not wholly paradoxical that a prisoner's ability to navigate in the structured and artificial prison environment should tell us little about his functionality outside."[67]

Public safety as a justification also struggles to account for the rise of insight as the focus of the parole hearings. Justice Liu candidly remarked that "the social science literature does not support a generalization that an inmate's lack of insight into the causes of past criminal activity or failure to admit the official version of the commitment offense is itself a reliable predictor of

[64] See, e.g., NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (Committee on Causes and Consequences of High Rates of Incarceration, J. Travis, B. Western, and S. Redburn, e ds., Committee on Law and Justice, Division of Behavioral and Social Sciences and Education, 2014).

[65] NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 35 (1974).

[66] See, e.g., Wenk, Robison & Smith, *Can Violence Be Predicted?*, 18 CRIME & DELINQUENCY 393 (1972).

[67] Reitz, *supra* note 26, at 346.

future dangerousness."[68] Why then, is the utilitarian logic that requires imprisonment as a safety measure, requires insight to be key for a parole release decision?

Lilliana Paratore suggested that insight can be interpreted as a proxy to emotions that share a causal relationship to low risk of recidivism.[69] Regret, shame, and remorse, presumably, are at the core of true insight, and identifying them allows the board to predict the potential for recidivism. However, as Paratore herself acknowledges, there are a few challenges to overcome if we are to accept this justification. Firstly, there is no reason to believe that insight indeed means guilt, shame, and remorse. Secondly, if indeed discretionary parole is about identifying these emotions, why do we intrust former law enforcement officers with this job? Thirdly, Paratore echoes Norval Morris long-standing critic of discretionary parole as "schools of dramatic arts": "troublingly, however, the requirement of 'insight' appears to be more about an inmate's ability to create a particular artificial narrative about him or herself rather than about providing an objective insight into the truth underlying the causes of their criminal history or fostering genuine self-reflection and change."[70]

Furthermore, other aspects of the legal institution seem to require a more holistic explanation - why is the governor needed? Why is the governor rescinding many of the grants? Why is the victim allowed to participate in the hearing? It is possible to argue that public safety is the main justification, while other ingredients of the discretionary parole process are add-ons that have their own, separate, justifications? For example, we might suggest that the rights of the victim are an independent justification for the victim's participation in the process and that the

[68] *Shaputis* II, *supra* note 55, at 277.
[69] Paratore, *supra* note 56.
[70] *Id.,* at 125.

governor's intervention in the final decisions is justified through its own independent explanation about parole's distant relation to executive clemency, or a general distrust in the parole board.

Under a sober look at the legal institution, justifying discretionary parole on public safety terms means, justifying exceedingly long imprisonment terms. The use of "public safety" then becomes increasingly cynical - it hinders on the safety of the incarcerated people, and it disregards the safety of the communities of the incarcerated. "Public" is revealed to be the privileged public, and safety is better understood as isolation.

c. <u>Interim Conclusion</u>

150 years ago discretionary parole was thought of as a legal mechanism separating the good-at-heart prisoners from the inherently criminal. Then, it turned to a measurement instrument of the prisoner's success at rehabilitation. Later, its decision-making factors became retributional, and finally, insight became its primary focus. Likewise, in Israel, we have seen how discretionary parole could not be conformed with any specific utilitarian justification, and instead of being an impartial, professional mechanism of early release, it too might reflect a moral ideology of deservedness. We have seen how addressing discretionary parole as a mixture of different phenomena and justifications is not satisfactory, and misses its social meaning. As Garland writes:

> ... institutions are never fully explicable purely in terms of their 'purposes'. Institutions like the prison, or the fine, or the guillotine, are social artefacts, embodying and regenerating wider cultural categories as well as being means to

serve particular penological ends. Punishment is not wholly explicable in terms of its purposes because no social artefact can be explained in this way.[71]

Here I wish to suggest a different theoretical framework that regards discretionary parole as a "social artefact"[72] and goes beyond any instrumental purpose. In the next part, I suggest that Durkheim's sociological theory of the purpose of punishment can advance our understanding of California's and Israel's different manifestations of this legal institution. I argue that at its core, discretionary parole is a legal institution that mirrors a society's distinct form of solidarity. Through examining the different layers of discretionary parole that situat it within each society's legal system we can peek into the social inclusion and exclusion practices of each society, those that justify its unique system of discretionary parole.

2. Durkheim and the Sociological Method

In this part, I argue that discretionary parole should be thought of in sociological terms, without dismissing its penological purposes and effects.[73]

Aiming to peek into the future, and basing a decision mostly on hunch and discretion reveals the Israeli parole board as a modern-day clairvoyant, under a cloak of rationality and expertise. In California, discretionary parole as a legal institution does not fit entirely within the boundaries of public safety, nor did it within the rehabilitative ideals of the progressive era or as

[71] DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 19 (1993).

[72] P. Q. Hirst, LAW, SOCIALISM AND DEMOCRACY 152 (1986) ("... means of punishment are artefacts of social organization, the products of definite institutional, technical and discursive conditions ... Artefacts can be explained not by their individual "purpose" alone but by the ensemble or conditions under which such constructions or forms become possible.")

[73] Garland writes similarly about punishment and the endeavor of the study of punishment and society: "Thinking of punishment as a social artefact serving a variety of purposes and premised upon an ensemble of social forces thus allows us to consider punishment in sociological terms without dismissing its penological purposes and effects. It avoids the absurdity of thinking about punishment as if it had nothing to do with crime, without falling into the trap of thinking of it solely in crime-control terms. We can thus accept that punishment is indeed oriented towards the control of crime-and so partly determined by that orientation-but insist that it has other determinants and other dynamics which have to be considered if punishment is to be fully understood." GARLAND, *supra* note 69 at 20.

a tool to reduce the prison population. How are we to make sense of this ostensibly senseless system of parole? Durkheim offers a different methodological route, which begins by viewing law (broadly defined) as empirical fact. Durkheim argues that to uncover social meaning, a sociologist should start with the social facts, which are "the facts of moral life."[74] [75]

> … the totality of beliefs and sentiments common to *the average members of a society* forms a determinate system with a life of its own. It can be termed the *collective common consciousness*. … it is diffused over society as a whole, but nonetheless possesses specific characteristics that make it a distinctive reality.[76]

Durkheim's concept of Collective Consciousness requires attention - is there, for the sake of an inquiry of values and norm, an "average member of society"? Modern societies are complex and include vast levels of stratification and diversity, but Durkheim, it appears, neglects the power and status relationship between competing groups in society.[77] Similarly to how the "reasonable person" legal standard is "a creature of the law's imagination,"[78] the Collective Consciousness seems to be the creature of Durkheim's imagination (under a descriptive reading of Durkheim). Also, much like the reasonable person legal standard, Durkheim's Collective Consciousness taken at face value is at risk of eliminating the complexity of actual society, normalizing social sentiments, allowing the majority or the most vocal faction of the population to set the tone as to society's beliefs and sentiments.[79]

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[74] EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 3 (Free Press, paperback, 2014).

[75] *Id.*, at 52.

[76] *Id.*, at 63.

[77] GARLAND, *supra* note 69, at 51. For discussion, see also ROGER COTTERRELL, EMILE DURKHEIM: LAW IN A MORAL DOMAIN 204–207 (1999).

[78] James Fleming Jr., *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. (1951).

[79] See, e.g., Max Radin, *Legal Realism*, 31 COLUM. L. REV. 824, 825 (1931) ("I have no hesitation in declaring my belief that a realist examination of existing social and economic facts indicates defects in our social structure and that where a judgment will have the result of enlarging or lessening this defect, it is unrealistic to pretend that this is not so and that it is no business of the judge to consider that fact."). See, e.g., Duncan Kennedy,

Theodor W. Adorno offered another critique of Durkheim's notion of the collective conscience. According to him, Durkheim's methodology, focused on the idea of "social facts" "may well express a truth about *the state of the actual societal reality,* but it does not imagine that this reality could be different from what it already is."[80] Hence, "Durkheim's moral thought lacks 'criteria to distinguish between what a society truly is, and what it believes itself to be.'"[81] Hagens, concludes that the "conscience collective is expressive of the self-perception of someone who is *in agreement with the predominant sociality*"[82]

Following Adorno's criticism and distinction between what society believes itself to be and what it truly is, I suggest adhering to Durkheim's methodological theory while accepting Adorno's critique. A critical appraisal of the notion of collective consciousness - a binding value system - reflects that it must be "the outcome of an ongoing process of struggle and negotiation." [83] When a social group becomes dominant and succeeds at overcoming its ideological opposition, then the collective consciousness would be better termed as Ruling Morality or, Hegemonic Consciousness. There is always a moral struggle within society, and social order is continuously debated and shaped. Thus, history and context become crucial to unravel any given nuance of an existing Ruling Morality, as it depends on the realities of social order.

Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976); Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUDIES 351 (1973).

[80] Tobias Garde Hagens, *Conscience collective or false consciousness?: Adorno's critique of Durkheim's sociology of morals,* 6(2) JOURNAL OF CLASSICAL SOCIOLOGY 215, 221 (2006).

[81] Id., at 222.

[82] "[Durkheim fails to] make the distinction between 'what a society truly is' and 'what it believes itself to be.'" *Id*., at 223.

[83] GARLAND, *supra* note 69, at 51.

a. Solidarity and Law

Durkheim's argument aims to describe a change of societal structure and sentiment over time that correlates with a change in the legal institutions. His Historicism and empirical claims were widely challenged and criticized.[84] However, scholars have since written to justify and explain the contribution of Durkheim's theory to current academic enquiry.[85] Here, I emphasize Durkheim's analysis of ideal types of solidarity and legal institutions, as I consider their explanatory value to be independent of their role in Durkheim's chronological argument[86] as I explain below.

The foundations of Durkheim's theory are effectively described using binaries. He distinguishes between two prototypical types of societies; the first are societies in which social relations are based on resemblance and the second are societies in which social relationships are based on Division of Labor. He detects the former in less advanced societies, which he identifies as homogeneous because their "beliefs and sentiments [are] common to all the members of the group."[87] This kind of society is identified as having a Mechanical Solidarity that stands in contrast with individualism.[88] On the other end of the spectrum, Durkheim detects Organic Solidarity, which he identifies with modern, highly individualistic and specialized societies.[89] In

[84] See, e.g., Leon Shaskolsky Sheleff, *From Restitutive Law to Repressive Law: Durkheim's The Division of Labor in Society revisited,* 16(1) EUROPEAN JOURNAL OF SOCIOLOGY 16 (1975).

[85] See, e.g., ROGER COTTERRELL, LAW's COMMUNITY 178-203 (1997) ("Emile Durkheim's presently underestimated writings on law are important because of his consistent attempt to find links between law and contemporary moral conditions. While his lack of attention to questions of political power is initially hard to understand, it is explicable in terms of Durkheim's single-minded concern with moral frameworks of social solidarity."); KENNETH SMITH, ÉMILE DURKHEIM AND THE COLLECTIVE CONSCIOUSNESS OF SOCIETY: A STUDY IN CRIMINOLOGY (2014).

[86] GARLAND, *supra* note 69, at 27.

[87] DURKHEIM, *supra* note 72, at 101.

[88] *Id.*

[89] *Id.*, at 102.

the latter societies, although individuals vary in their beliefs and traits, they take part in social life because they are interdependent to a large extent.

Durkheim also distinguishes between two prototypical categories of law, which correspond to the two types of social solidarity. There are the repressive sanctions of the penal code,[90] and there are the restitutive sanctions that "do not necessarily imply any suffering on the part of the perpetrator."[91] Restitutive laws "consists in restoring the previous state of affairs, reestablishing relationships that have been disturbed from their normal form."[92] Repressive sanctions characterize societies with mechanical solidarity, and restitutive sanctions correlate with organic solidarity.

Durkheim's empirical claims were that in preindustrial societies repressive law was not only common, but *necessary and central*, and vice-versa for modern societies. This empirical argument opened the door to criticism, arguing that "in primitive societies … there was much division of labor and very little repressive law."[93] However, Durkheim's socio-legal approach remains powerful because it sees the law as an expression of morality. As such, it enables an exploration of the moral expressive potential of law, in a time when the law has been increasingly understood in purely instrumental terms.[94] Durkheim's theory power may lay in its question marks, not its full stops. What makes certain laws repressive and others restitutive?

[90] *Id.*, at 55.
[91] *Id.*
[92] *Id.*
[93] Ellsworth Faris, Book Review, ap. American Journal of Sociology, XL 367 (1934).
[94] Roger Cotterrell writes: "the idea that sociology might help to clarify certain legal values is at least worth considering ... especially in times when uncertainty exists about their substance and grounding, and the appropriate direction of their development. The issue is: in what sense, if any, can law be more than merely an instrument to achieve any chosen governmental or private end? A sociology of legal values would thus be an enterprise of seeking law's moral meaning, not philosophically but in terms of the empirically identifiable conditions of co-existence of individuals and groups in a certain time and place; that is, in the circumstances of a particular kind of society at a particular point in its historical development." *Justice, Dignity, Torture, Headscarves: Can Durkheim's Sociology Clarify Legal Values?,* 20(1) SOCIAL & LEGAL STUDIES 3, 5 (2011)

Why does a legal institution become repressive? Can a legal institution change its character, and how? What can we learn about society's moral order from its laws?

In formalistic terms, discretionary parole falls under the legal category of administrative law, which Durkheim posits under the category of restitutive law.[95] Moreover, it lacks any prescription of sanctions - to be denied parole under DSL, does not mean that your sentence is prolonged. It is not repressive law, as it defines under what conditions to diminish harm, and through which process. The process of discretionary parole in Israel is not open to the press, nor to the public. It represents its operation "in neutral, technical terms and adopts a managerial posture rather than a moral one."[96] Furthermore, in accordance with the 2001 act, the aspiration is that prisoners would be evaluated in managerial terms rather than moral or legal[97] - the hope is that the board would neutralize the public sentiment as it "see themselves not as moral condemners but as impartial managers, committed to un emotive conduct and bureaucratic regimes."[98]

In contrast, California's system of discretionary parole seems to be described better as a system of repressive law. In California, discretionary parole does not offer the hope of *early release*, instead, the question it poses is "should this person spend *more* time in prison?" The language of the law in California suggests that the grant of parole is the baseline assumption,[99] yet this choice of words obstructs from the reality: the decision to grant or deny parole in California is a decision about *imposing more suffering* on the individual. In addition, under the

[95] DURKHEIM, *supra* note 72, at 96.
[96] GARLAND, *supra* note 69, at 72.
[97] "... as good or bad prisoners, and low or high risks, rather than as 'criminals' who have perpetrated evil acts" *Id.*
[98] *Id.*
[99] CAL. PENAL CODE § 3041 (a).

guise of transparency and victim's rights, discretionary parole in California embraced an element of a passionate spectacle. When a victim attends the hearing and opposes the grant of parole it is an additional public denunciation of the prisoner. The inclusion of the governor in the process was heavily influenced by the desire that the public's feelings become more influential.[100] The Governor became a "*prosecutorial executive*," and the act of blocking a grant of parole became yet another spectacle of championing victims and isolating offenders.[101]

In California, the rhetoric of the hearing shows no disdain of moralistic terms, often emphasizing shame and regret,[102] "phrasing the issues in emotive moral terms and resorting to denunciatory diatribes and open condemnation."[103] Beneath the externality of victims' rights and the Governor as "protector of the public" lays "the 'community interest' and 'community feelings' [which] are continually invoked."[104] The result might hence be described as a type of penal ritual.

In Israel, it is a decision about relieving some of the individuals pre-determined suffering, and in California, it is about how much more suffering to impose and the spectacle of pain. In the next part, I discuss the social significance of discretionary parole, under our new insights of the repressive-restitutive spectrum. I argue that when discretionary parole is limited by DSL or constitutional limitations of the length of sentences, it edges closer to fulfill its restitutive potential. However, considering the incarcerated person's ideology introduces repressiveness to the discretionary parole process.

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[100] See Governor's Parole Review. California Proposition 89 (1988). (available here: http://repository.uchastings.edu/ca_ballot_props/1006) (arguments in favor: "... the public has a right to be protected… any decision to parole a convicted killer should be carefully scrutinized… ").

[101] JONATHAN SIMON, GOVERNING THROUGH CRIME, ch. 2 (2006).

[102] Wattley, *supra* note 53.

[103] GARLAND, *supra* note 69, at 72.

[104] *Id.*

b. Punishment's Social Meaning and the Lessons for Parole

Discretionary parole is part of the individual's social experience of punishment and imprisonment. Durkheim refutes the functionalist explanation of punishment, asserting concisely that punishment "does not serve, or serves only very incidentally, to correct the guilty person or scare off any possible imitators."[105] He concludes that punishment's "real function is *to maintain inviolate the cohesion of society* by sustaining *the common consciousness* in all its vigor."[106] Punishment, for Durkheim, *expresses and regenerates society's values*. Punishment has two faces - one facing the individual, and the other of a condemnatory ritual, facing the community.

By allowing a prisoner the grant of parole, the board has the power to bring back *to society what it has lost.* The grant of parole, *at its ideal*, might be the corresponding counter-reaction to the crimes of inhumane imprisonment. Seeing from a sociological lens, if punishment has the function of healing the wounds of the crime, parole, in turn, can serve to heal the wounds of imprisonment.

Embracing Durkheim's social perspective, I suggest that in Israel there are two discretionary parole processes - one that seeks to reestablish what the punishment of imprisonment has disrupted, and another, that seeks to reaffirm the exclusionary force of punishment by the introduction of the ideological condition for release. In contrast, in California discretionary parole evolved to become a penal ritual that serves the growth of mass imprisonment, and in its current form is best understood as another symptom of the modern chronic social problem of penology.

[105] DURKHEIM, *supra* note 72, at 83.
[106] *Id.*

i. Israel – (almost) A Restitutive Reaction to Imprisonment

Durkheim, in his conclusion to *The Division of Labor in Society*, strays at last from his purely descriptive account of society, and offers a normative statement: repressive and restitutive sanctions both are *equally moral* because both are "a source of solidarity."[107] In modern society, imprisonment is both a source for solidarity and impinges on it. Imprisonment, while allowing the safeguard of the common consciousness, creates trauma[108] and violates collective sentiments. In these times of mass incarceration and punitive excess, imprisonment refutes society's inherent interdependence,[109] as it disrupts family, community and even democratic bonds.[110] Thus, imprisonment calls for another passionate response – a restitutive response - when a society shares a similar moral consciousness.

The reason discretionary parole and imprisonment became mutually inclusive in the Israeli criminal justice system - there is no imprisonment without hope for parole - may be not just practical, but moral to a large extent. Imprisonment is a (flawed) source for solidarity, as it displaces individuals that disrupt the moral sentiment. Israeli discretionary parole, in its ideal, can likewise be a source for solidarity as it reifies society's mutual dependence. A few characteristics of the Israeli system (for non-security prisoners), made salient after comparison with California, demonstrate why it may actually offer restitution for society (although, just the hegemonic society, as discussed later). Firstly, in Israel discretionary parole is an option for

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[107] *Id.*, at 310.

[108] See, Mika'il Deveaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257 (2013).

[109] DURKHEIM, *supra* note 72, at 311.

[110] See, e.g., the existence of Felony Disenfranchisement laws: https://www.sentencingproject.org/issues/felony-disenfranchisement/; NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES, *supra* note 145; Alec Ewald & Christopher Uggen, *The Collateral Effects of Imprisonment on Prisoners, Their Families, and Communities, In* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS OXFORD UNIVERSITY PRESS (2012).

every incarcerated individual, no one is excluded from the hope for early release. If you are taken away from your community and put behind bars - you can get a parole hearing and you have a chance at early release.

Secondly, the denial of parole holds no repressive element. Discretionary parole potential for repressiveness is held back by DSL. As the sentence is a fixed sentence, and as every prisoner is eligible for a hearing every six months, the parole board does not punish but offers a different possibility of healing a society, by reinstituting a person that imprisonment took away. Just as punishment expresses *who is unworthy*, the grant of parole expresses *who is deserving.* The discretionary parole process is a manifestation of the moral response, and the reason for parole is to create and re-create the modern social cohesion.

Thirdly, the board consists of a judge and an additional two professional experts, that must be from different fields of expertise. Under the guise of expertise in decision-making, we might notice a manifestation of Organic Solidarity, that recognizes the interdependent functioning in modern society. Within the division of labor, society is less homogenous, as each is devoted to a particular social activity. The professional experts are termed "public representatives," and do not perform any special diagnostic or write a special opinion. Their perspective aims to be holistic, and as such not limited by any law enforcement bias or “tunnel vision.”[111]

Nevertheless, there is also, informally, another system of discretionary parole in Israel. This “other system” was established through the courts and applies only for security prisoners - prisoners that their crimes involve a nationalist motive. This ostensibly hidden system is different

[111] Why then are the “public representatives” required to hold professional expertise in these fields if they do not perform any professional work? This question is an issue for a later study.

in only one important aspect - its major decision-making factor. It requires prisoners to demonstrate an ideological change. Mixing issues of ideology with risk exclude specific people from the potential restitutive power of early release, thus exemplifies how discretionary parole can offer restitution only to those that share the hegemonic, ruling morality.

Examining the use of ideology as a factor that enables it to deny almost all parole requests (while maintaining the externality of fair inclusion) will allow us to further distinguish between a discretionary parole system that restitutes society and a system that represses its subjects. The following discussion suggests that the examination of discretionary parole reveals what David Garland described as *Ruling Morality*, instead of Durkheim's perhaps all too optimistic Collective Conscience.[112]

1. Security Prisoners

In the hearing, the security prisoner bears the burden of proof.[113] However, as long as an inmate is classified as a security prisoner it is practically impossible for the inmate to claim that he or she had "a significant and tangible change" in his worldview.[114] It comes as no surprise to learn that the data shows that security prisoners rarely are granted release on parole - less than 1%.[115]

In other words, the security prisoner would only stand a chance at parole if he succeeds at becoming a "normal" prisoner - if he embraces the Ruling Morality. The abandonment of the prisoner's ideological identity and the acceptance of the Zionist ideology is a precondition for

[112] GARLAND, *supra* note 69, at 52.
[113] HCJA 9837/03 Garcia v. The Parole Board (1/20/2004) (Isr.).
[114] Abir Bahar, *Palestinian Prisoners Between the Community and the Individual - an Inside Look*, 8 MA'ASEI MISHPAT 95 (2016) [Hebrew].
[115] Center for Research and Information, The Knesset, Aspects of the Parole Board's Activity (3.14.2017) (available at: http://din-online.info/pdf/kn167.pdf) [Hebrew]. We do not have data for more recent years.

receiving any restitution. Holding an anti-Zionist ideology is not a crime, yet the parole board plays a social role in defining society's moral boundaries and uses an ideological factor to exclude from early release those that are outside of the hegemonic morality.

Why is it that security prisoners face this impossible prerequisite for the grant of parole? They must renounce their identity and prove that they embrace the ideological identity of their capturer.[116] This goes to show how from the study of discretionary parole we learn about society's moral boundaries. With individuals that are outside of the hegemonic group - in the case of israel this would be those that oppose the Israeli national Zionist narrative - there is no solidarity. Discretionary parole aims at offering restitution for the society for what society had lost, and in the case of individuals that are "outside of society" to begin with, discretionary parole reifies the oppressive nature of the sentence.

An example that illustrates how security prisoners are outside of society is the fact that the IPS does not include them in its official statistics, even though they are by law identical to every other prisoner.[117] Indeed, when the recent change in the administrative release was implemented, the media reported in surprise and shock that security prisoners are affected by it just like every other prisoner. As a result, the Knesset amended the amendment and excluded from the new administrative release (hence, from the possibility of a few weeks shorter sentence) some categories of prisoners that have some correlation with the artificial category of security

[116] Bahar, *supra* note 112, at 104.

[117] Oren Gazal Ayal, *The Misleading Graph of Incarceration Rates in Israel* (9.6.2016) [Hebrew] (available here: https://www.the7eye.org.il/217419) ("According to the IPS chart, which appears in Israeli media reports, prison rates are quite reasonable and fairly average, however according to the American graph, Israel is in the second place of indecent proportion of the prison population to 100,000 residents of the OECD countries. … In the graph of the IPS, the data on Israel was changed, instead of 256 prisoners per 100,000 residents, the graph includes only 147 prisoners. ... the IPS simply reduces all illegal immigrants and security prisoners. Since no other country is diluting its prison population in a similar manner, a misleading comparison is created.").

prisoners.[118] In addition, there are constant legislative efforts to exclude security prisoners from the discretionary parole process altogether.[119]

Discretionary parole reflects and reifies social structures. Understanding punishment as promoting the Ruling Morality rather than the Collective Conscious leads to new insights about the social importance of discretionary parole. It "should be regarded as a ritualized attempt to reconstitute and reinforce already existing authority relations."[120] In Israel, "*the state of the Jewish people*," it seems that a specific type of solidarity is in place. It is a solidarity based on hegemony. Not on "beliefs and sentiments [that are] common to all the members of the group," but on the shared identity of the Jewish people, as in the famous words of the old Hebrew idiom: "All of Israel are Responsible for One Another" (meanings, all Jewish people are responsible for the sins and wellbeing of their fellow Jews).[121]

We have seen that the Israeli discretionary parole reflects the ruling morality of "the Jewish state." It does so through its restitutive attitude toward "regular" prisoners and repressive function toward security prisoners. In the next part, I argue that California abandoned all restitutive aspirations. The first step was when in the 1970s it gave up on the possibility to fulfill the court's decision in Rodriguez, and the second step was the embracement of "insight" as the main decision-making principle. What emerged is a discretionary parole system that is similar to the Israeli security-prisoner system - because both are designed to repress and exclude a specific

[118] Joshua Breiner, Jonathan Liss, Haaretz - News (11.5.2018) [Hebrew] https://www.haaretz.co.il/news/politics/1.6626884
[119] Kipa - News (10.31.2018) https://tinyurl.com/y3q4zqx4.
[120] Garland, *supra* note 72, at 80.
[121] Another interesting example for the difference if solidarity with prisoners between Israel and California is that in Israel prisoners can vote, while in California they cannot.

social group in the name of a misguided ideology - while in California there is no legal principle that limits this insidious repressive power.

ii. California - "you don't have to do the crime"

I have argued that under Durkheim's conception of punishment, discretionary parole in California turns out to be more repressive than restitutive. It offers no relief, only deliberates the addition of pain; It became more public through open access to hearing transcripts, victim's participation, and the Governor's intervention; all suggest that it is more a "bizarro" version of sentencing than a negative picture of it.

Here I wish to suggest that the social meaning of discretionary parole in California currently depends on the requirement of insight. Except for people that were sentenced to die in prison, there is no other group of people further marginalized and excluded from society such as lifers - and the use of insight in discretionary parole is yet another cog in the exclusion machine. Most of the lifers already came from backgrounds of class and racial marginalization - communities rife with poverty, violence, and the notorious mix of over-and-under policing.[122] These communities are by definition outside of the hegemonic society, as they struggle with continuous political efforts meant to weaken and distance them from opportunity.

In 1975, the Supreme Court of California introduced principles of Due Process to govern over, and limit, the discretion of the Adult Authority to essentially impose unreasonably long sentences. This could have been the beginning of a new, restitutive era for discretionary parole in California - ISL would be limited by the constitutional principles of "cruel and unusual punishment" and the application of the *Lynch-Foss*[123] analysis.

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[122] JOHN IRWIN, LIFERS Ch. 2 (2009).

[123] The court articulated three distinct standards for determining whether a punishment "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions

However, by eliminating discretionary parole soon after the Rodriguez decision for most of the newly imprisoned people, the legislature expressed its intent that the length of imprisonment should depend - for non-lifers - more on the nature of the crime than on the individual characteristics of the offender.[124] Nevertheless, for lifers, the length of imprisonment still congruences with their personal attributes. To earn freedom, lifers are required to show insight, which includes as a prerequisite the condition of *responsibility*.[125] Without the basic act of vocalizing full responsibility for the prisoner's own situation as an incarcerated person[126], it is unlikely that the prisoner would be granted parole.

Individual responsibility, the idea that we are always in control hence we can be held accountable for our actions as they are the direct and sole result of our free will has deep roots in the American ethos. It is closely related to economic laissez-faire (French for "Let people do as they choose") ideology, and at its core, it implies that hard work is a virtue that results in success, while failure is attributed to the shortcomings of the individual's character. The penal equivalent would be "a narrative of social fortune consistent with the uplifting promise of

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of human dignity."' (1) An examination of the seriousness of the offense and the culpability of the offender. (2) A comparison of the challenged punishment with punishments imposed within the same jurisdiction for other offenses. (3) A comparison of the challenged punishment with punishments prescribed in other jurisdictions for the same offense. *In re* Lynch, 8 Cal. 3d 410 (1972). A recent application of the *Lynch-Foss* technique is demonstrated in *In re Palmer II* (Apr. 5, 2019 A154269).

[124] Johnson & Messinger, *California's Determinate Sentencing Statute, supra* note 38.

[125] "Insight is a term used by the Board to describe the degree to which a person has taken responsibility for past criminal conduct and has understood his own particular causative factors that led to that conduct." Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions,* 31, 77 (October 4, 2018). Forthcoming in HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW. Available at SSRN: https://ssrn.com/abstract=3228681. See also Victor L. Shammas, *The Perils of Parole Hearings: California Lifers, Performative Disadvantage, and the Ideology of Insight,* PoLAR 1 (2019) ("It is the routinization of the exceptionally quotidian that primarily characterizes the affectivity of parole hearings: heartrendingly agonistic, achingly dull, and tinged with the loud ideological overtones of moralizing individualization and responsibilization.")

[126] According to the personal and professional experience of Keith Wattley, there are cases when the prisoner was granted parole while still maintaining his innocence regarding the life-crime, and the key (paradoxically enough) was taking responsibility for being in prison nonetheless.

success for those with discipline and the infamy of prison punishment for those who engage in wrongdoing."[127]

Needless to say, a neoliberal penal-ideology can, and possibly did, justify social inequalities. Blake Emerson writes:

> In the case of criminal justice policy, this ideology of individual responsibility plays a crucial role in justifying otherwise alarming increases in incarceration rates, as well as severe disparities in incarceration across racial divisions. Concerns about the wisdom and fairness of a criminal justice system that imprisons 1 percent of the entire population—and imprisons African Americans at seven times the rate it imprisons whites—are eclipsed by the core belief that criminals must be held responsible for their actions.[128]

The neoliberal penal ideology is present at all corners of the criminal justice system. As ethnographic research elucidated in recent years:

> ...forged through the hyper-individualistic correctional narrative of personal change and redemption, the former prisoners I followed blame only themselves for their past and present circumstances, which they systematically attribute to their own choices — never to the structural dynamics of class and racial oppression that constrained their life opportunities since childhood …. the emergence of any kind of political consciousness as members of a subordinated social group targeted by structural oppression, social inequality, and racial

[127] Jonathan Simon, *Mass Incarceration: From Social Policy to Social Problem, in* The Oxford Handbook of Sentencing and Corrections 40 (Petersilia and Reitz eds., 2012) (referencing Dario Melossi, CONTROLLING CRIME, CONTROLLING SOCIETY: THINKING ABOUT CRIME IN EUROPE AND AMERICA (2009)).

[128] Blake Emerson, *Criminal Justice and the Ideology of Individual Responsibility, in* RACE, CRIME, AND PUNISHMENT: BREAKING THE CONNECTION IN AMERICA (Keith O. Lawrence ed., 2011).

> discrimination is effectively prevented through the stubborn behaviorist ideology that is actively promoted at every turn of these populations' journey through the criminal legal system—from arrest to pretrial detention, from plea bargaining to sentencing, from incarceration to reentry.[129]

In parole hearings, the prisoner must assume full responsibility for every aspect of the crime and any following prison incidents. Nevermind the personal circumstances, American social history, or pernicious social policy, the prisoner must assume full responsibility as "the prisoner had a choice." A significant portion of the hearing is also spent discussing the prisoner's conduct in prison and any rule violation is treated similarly to the life-crime - the prisoner is expected to vocalize insight and responsibility as if *living in prison* had no effect at all on the prisoner's actions. A prisoner that spends too much time making a connection between his life-crime and childhood trauma, the influence of friends, economic hardship, or (god forbid) the effects of structural racism and social segregation, would be criticized and probably denied parole.[130]

The neoliberal-penal ideology might even be a crucial moral foundation of mass incarceration. It gives it moral credibility, as prisons continue to fill up with the poor and the minorities. As Emerson writes, "Racist ideologies and the ideology of individual responsibility thus enjoy a symbiotic relationship, together forming a worldview in which racial disparity in incarceration is explicable, justifiable, and necessary."[131]

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[129] Alessandro De Giorgi, *Back to Nothing: Prisoner Reentry and Neoliberal Neglect,* 44(1) SOCIAL JUSTICE 83, 111 (2017).

[130] Shaputis II, *supra* note 55, at 216.

[131] Emerson, *supra* note 126, at 66.

Fostering the ideology of the individual through the criminal justice system had been justified by scholars. For example, Richard C. Boldt argued that "criminal adjudication and sentencing work together to create and reinforce an ideology in which autonomous individuals are understood as relevant subjects for the ascription of responsibility. ... By creating autonomous individuals and representing them to the community as reality, the criminal process teaches each community member to view himself or herself as "the author of his [or her] actions." This definitional work is essential in ordering satisfactory relationships in contemporary society because it produces the shared common characteristic of individual free will, which is a prerequisite to the construction of clear communal boundaries."[132]

Now we begin to understand the current substance of discretionary parole's social function in California. As Durkheim explained, the Collective Conscience has to "react against violators, reaffirm its claims, uphold its authority, and so on."[133] Through our new understanding of Collective Conscience as Ruling Morality, or a Hegemonic Morality, we realize that the requirement of insight as an approval of the neoliberal penal ideology is an ideological work that reaffirms the ruling morality:

> … any 'given' moral order is in fact actively constructed by social forces, in a context of competing alternatives. It thus draws attention to the ideological work that has to be done to maintain a particular moral order in dominance - the need for ruling ideas to be persuasive and to establish their hegemony over oppositional value systems. … [Durkheim] fails to acknowledge that an equally persistent

[132] Richard C. Boldt, *Restitution, Criminal Law, and the Ideology of Individuality,* 77(4) THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 969, 979 (1986).

[133] Garland, *supra* note 69, at 52.

concern on the part of the authorities is to avert the challenge of competing moralities and competing social groups.[134]

Discretionary parole can heal, and I argued that when it is in the form of early release (coupled with DSL, or other effective limitation on sentencing length), offered to all, and does not involve a requirement to embrace the ideology of the hegemonic punisher, then it offers a restitutive counter-response to penal excess. In California, however, discretionary parole was captured by the same forces that alleviated prisons to their ruling position over the criminal justice system. Punishment, realized through Durkheim, has a "system-maintaining function"[135] and when discretionary parole embraces the ruling morality as a condition for release back to society, it too upholds the hegemonic moral order.

3. Policy Suggestions

To paraphrase a famous phrase: "it is easier to imagine the end of the world than the end of prisons." Likewise, it might be easier to imagine a more efficient, or cheap, criminal justice system than a more humane and dignified one. Here I wish to suggest some thoughts about policy reforms that seek to bring a social conscience reform to discretionary parole, instead of a utilitarian one. I focus on organizing the pragmatic implications of realizing discretionary parole as either a possible source of solidarity or a penal ritual. The following policy suggestions would focus on the possibility of a reform that eliminates (or, at least, alleviates) repressive elements while maintaining and cultivating inclusionary ones. The novelty of the following policy suggestions is that their purpose is not to advance any aggregated utilitarian justifications, rather

[134] Garland, *supra* note 69, at 52.
[135] *Id.,* at 58.

they are the result of a new perspective on discretionary parole - a legal institution that can restore solidarity between the incarcerated and society.

The guiding principle would be to eliminate any of the discussed characteristics of punishment from discretionary parole. The key to achieving a legal institution that "restitutes" society of the dignity lost to excessive punitiveness is to rethink discretionary parole as an *early release* mechanism, which is tolerant to critical narratives of social structure. The following policy reforms are offered: (1) constitute limits on prison term lengths; (1.2) offer a chance of discretionary release to as many incarcerated individuals as possible; (2) enforce a uniform standard for the considered release factors, and eliminate any subjective or ideological considerations; (2.1) make the process less public and less prone to political influence.

a. Institutional Level: Limiting Discretionary Power and Opening the Gates

A principle of "checks and balances" must be implemented into the discretionary parole process. As it currently stands in California, the parole board has almost unlimited power over the release from prison of indeterminately sentenced prisoners. It might seem contradictory to the essence of discretionary parole to have limits on the maximum prison length of "lifers." Yet discretionary parole can co-exist with limitations over its power. My discussion of the Israeli system, and of California's own jurisprudential history proves this point.

In Israel, discretionary parole functions within a system of determinate sentencing. An incentive of early release proves to be sufficient to encourage meaningful participation in the discretionary parole and rehabilitative process. It is not just the comparison with Israel that defies our assumptions that discretionary parole cannot be limited, but a look back at the Supreme

Court of California's 1975 Rodriguez decision reveals a similar principle. As discussed in part above, the Court held that a "primary term" is required for any punishment to comply with constitutional principles. The primary term "must reflect the circumstances existing at the time of the offense. Both the Eighth Amendment and article I, section 17, proscribe punishment which is disproportionate to the particular offense."[136]

The counter-argument is that making discretionary parole the only possible door back to society is necessary for public safety. Nevertheless, although the former claim can be examined and countered on empirical grounds, my counter-argument is normative. Under the realities of mass incarceration, when more than 30,000 lifers incarcerated, determining an individual limit for the maximum sentence length a prisoner can serve, is necessary for creating a "condition of dignity."[137] A discretionary parole process that operates under the assumption that the prisoner must eventually be released, is a more dignifying process because the prisoner is no longer at the mercy of the board. The board no longer serves only to repress and prolong the sentence but operates under the assumption of *relieving pain.* The board is no longer the sole decider on "who is in and who is out." The power of the board, and the discretionary parole process as a whole, to exclude a person from the society indefinitely is taken away, and we are left with a process that can promote the healing of society, or at least not harm it more than it was already harmed.

A limited in power discretionary parole process would perhaps still reflect the Ruling Morality in a manner that prevents it from being "fully restitutive" (as is the case with the

[136] Rodriguez, *supra* note 59, at 652.

[137] Jonathan Simon, *Knowing What We Want: A Decent Society, a Civilized System of Justice, and a Condition of Dignity*, available here: https://static1.squarespace.com/static/5b4cc00c710699c57a454b25/t/5c9296e30d92973fb5ee589c/1553110756236/Simon.pdf

security prisoners in Israel). Yet, it is still a necessary condition for inching towards a less repressive discretionary parole process.

A final aspect of this policy suggestion is that early release should become an option for every prisoner, whether the original sentence is determinate, or limited by Due Process principles. It might come as a surprise that I call for more discretionary parole instead of less, as it is a highly problematic process, that more often than not assumes the repressive form.[138] Yet, as a legal institution that holds the potential to counter punitiveness, I suggest that it should become more prevalent. Done right, discretionary parole becomes an institutional opposite to the sentencing condemnatory phase. It offers the prisoner a fair chance of returning back to society, with the blessings of the criminal justice system. But, this depends on the decision-making process, as I explain next.

b. Individual Decision-Making: Criteria and Process

Decision-making in the discretionary parole process should "meet the prisoners where they are". Meaning, the process should adopt the individual viewpoint of the prisoner, as empathically as possible. The board should "put themselves in shoes" of the unique socio-economic background of the prisoner. Otherwise, discretionary parole, as a highly subjective process, is in the risk of reflecting the ruling morality - hence excluding from society any person that challenges it.

Previously, I argued that it is the reflection of the Ruling Morality in the process of the board's decision-making that impinges on the process' restitutive potential. In israel, the Zionist

[138] For a discussion in the multiple essential ways discretionary parole must be "fixed" so it "could play an equally important part in helping to end the era of mass incarceration" see Edward E. Rhine, Joan Petersilia, and Kevin R. Reitz, *The Future of Parole Release: A Ten-Point Reform Plan, in* 46 CRIME AND JUSTICE: A REVIEW OF RESEARCH 279 (Michael Tonry ed., 2017).

ideology influenced the creation of an unprintable barrier to early release for security prisoners. In California, the main decision-making factor, insight, turns out to reflect a neoliberal penal ideology that forces the prisoners to dismiss all social and structural injustices that contributed to their condition of incarceration.

To achieve better decision-making we can use the example of the Israeli decision-making process for non-security prisoners (it is not perfect, as I will claim, but it serves as an important guide in the search of a better decision-making process). For non-security prisoners, the decision to grant or deny parole does not address any political or ideological concerns. The decisive factors are aiming to be as objective as possible - disciplinary violations in prison, successful participation in rehabilitative programming, and a satisfactory employment record. Indeed, scholars have criticized the effect of maintaining innocence on the chances of early release,[139] and that an exception in the law that allows the board to consider the "public sentiment" in unusual cases fosters regret aversion bias,[140] yet we should still strive to make the decision-making process as objective as possible.

Objectivity in the decision-making process requires, firstly, that the Israeli board would cease to require security prisoners to prove the unprovable, and that the California board would embrace a decision-making process which relies less on interviewing the prisoner and more on quantifiable, external metrics. Secondly, it requires that the parole board would become tolerable to critical accounts of social order, which do not necessarily suggest that the person holding them is a danger to society. In California, the board should allow, and even encourage the prisoner to

[139] Rabeea Assy & Doron Menashe, *The Catch-22 in Israel's Parole Law*, 41(21) CRIMINAL JUSTICE AND BEHAVIOR 1422 (2014).

[140] Dvir Yogev & Ayelet Carmeli, *Decision-Making in Parole Boards: A Critical Perspective*, Justice in the Legal System? Criminal Law and Criminal Procedure in Israel (Law, Society and Culture, Alon Harel Ed., 2018) [Hebrew].

recognize the social injustices he or she might have experienced. As social injustices continue to be a condition of reality, recognizing and discussing them might even suggest that the prisoner is better prepared for the challenge they pose.

Another condition for objectivity in decision-making is independence - both from political influence and from public opinion. Contrary to some suggestions to make the process more public,[141] I argued that a public process duplicates the "penal ritual" and prevents it from distinguishing itself as the opposite of punishment. Thus, the process should remain behind closed doors, and the transcripts should only be available to relevant parties.[142] Regarding the freedom from political influence, Rhine, Petersilia, and Reitz argued that:

> The institutional structure and composition of parole boards should be reconstituted to ensure members possess the requisite education, expertise, and independence relative to release decision-making. ... Parole Board members should be recommended for appointment by a special nonpartisan panel subject to gubernatorial approval. Their terms of appointment should be defined by law, with conditions for removal governed by a protocol administered by the special panel.[143]

Adopting these reform suggestions is meant to make the hearing a space of empowerment, even in a denial of parole. The prisoners are already being punished for their crimes, and the hearing should not shame or blame them for being who they are and the life they had. Dignity and respect in decision-making should mean that the board operates in an

[141] See, e.g., Kathryne M. Young, *Parole Hearings and Victims' Rights: Implementation, Ambiguity, and Reform,* 49 CONN. L. REV. 431, 490-6 (2016).
[142] Who should be considered as a relevant party is a matter of future debate.
[143] *The Future of Parole Release, supra* note 136, at 282.

institutional condition that enables it to identify and empathize with the prisoner, by realizing that people are more than their worst mistakes, and that crime can reflect social hardships.[144] On a pragmatic level, I suggested that the board should consider only objective, quantifiable factors. However, the board must process these factors under the conditions of the prisoners own conditions of life. For example, institutional behavior should be processed under the realization that living inside prison is complex.

4. Conclusion

A prisoner in California denies the crime but agrees that he deserved his punishment - the board believes him and grants him parole.[145] The Israeli board hears the case of a Security Prisoner and confirms that there is no evidence of future dangerousness - yet parole is denied.[146] How are we to make sense of these cases? My aim was to shift the attention from the utilitarian discourse to a broader and deeper social one. It is a call to recognize discretionary parole as an institution that also holds a symbolic dimension which is in dialect with society's values and norms. Shifting the attention reveals an insight about the decision-makers refusal to conform to a functional purpose. Instead, discretionary parole is shaped to satisfy the society's ruling morality through the decision-makers' moral values.

I argued that the discretionary parole process in Israel and California reflects and sustains a hegemonic ideology - Zionism and Neoliberal-penology, accordingly. Just like punishment, discretionary parole has a social role, but unlike current imprisonment practices - discretionary parole can also be morally restorative. In Israel, it is closer to a negative image of sentencing, but

[144] Bryan Stevenson's memoire JUST MERCY (2015) illustrates these truths well.

[145] Subsequent Parole Consideration Hearing, State of California, Board of Parole Hearings - CDC D-97093 (Sep. 16, 2009). A copy of the Transcript is with the author.

[146] HCJA 119/19, *supra* note 30.

for security prisoners it remains out-of-reach. Compared with Israel's restitutive ideal (and partial application), in California it is a penal ritual, another layer of punishment, and it is repressive as such.

I end on an optimistic note. Emphasizing the social significance through the comparison of California and Israel reveals clear steps for policy-makers to take in the right direction. If every prisoner would receive a fair chance of early release, we can eliminate punitiveness out of discretionary parole and construct a restorative decision-making process. The potential to counter the sentencing phase and have a restitutive influence - on the community and the prisoner alike - exists, and we can achieve it.