
AN IMPOSSIBLE STANDARD: THE CALIFORNIA PAROLE BOARD PROCESS FOR INMATES WITH COGNITIVE IMPAIRMENTS

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INTRODUCTION

How can one be expected to demonstrate something they are incapable of, and what if that something meant the difference between freedom and remaining in prison? Thousands of inmates in California face this issue, and many are kept incarcerated for life without any recognition of their cognitive capabilities.

Take Maria’s story,¹ for example; she is a client I became familiar with as a student working in the University of Southern California Gould School of Law’s (“USC”) Post-Conviction Justice Project (“PCJP”).²

1. Maria’s name and some facts have been changed to protect her identity and maintain confidentiality. Maria is the inspiration behind my note.

2. PCJP is a clinical program that represents male and female prisoners incarcerated in California state prisons. Among its clients, PCJP represents parole-eligible inmates serving indeterminate life sentences and juveniles sentenced to life without the possibility of parole.

Maria had extensive cognitive impairments that went undiscovered while incarcerated in a California prison for nearly three decades. Because of this, Maria was denied parole an astounding six times with the parole board citing lack of “insight” each time. Maria’s continued denials persisted despite state-issued psychological evaluations concluding that her intellectual functioning was minimal.

Unfortunately, Maria’s predicament is not uncommon. There are several similarly situated inmates who are unable to effectively advocate for themselves due to their cognitive impairments, yet they are not provided with necessary accommodations. As a result, individuals are denied parole even though they do not pose a current danger to society. This culminates in the gravest deprivation of liberty without due process—denial of their freedom.³

In 2015, only 17% of California inmates were found suitable for parole.⁴ In 2016, it dropped slightly to 16%.⁵ The chances of release are even less for incarcerated individuals with cognitive impairments. This Note will provide an outline of the California parole process and explore the ways by which people with cognitive impairments⁶ are disadvantaged by the current system.

First, this Note will explain the basic process of parole hearings in California and how an inmate may be found suitable for parole. Next, I will outline the current requirements that must be met for a person to be considered disabled in California’s prisons and discuss some of the groundbreaking California cases regarding inmates with disabilities. In order to provide proper context, I discuss the disabled population in prison,

3. See U.S. CONST. amends. V, XIV.

4. See CAL. DEP’T OF CORR. AND REHAB., PAROLE SUITABILITY HEARINGS 1 (2015), <http://www.cdcr.ca.gov/BOPH/docs/Parole-Suitability-Hearings-updated-9.29.pdf> (“In 2015, the Board held 5,300 parole suitability hearings and granted parole to 906 inmates.”).

5. Jazmine Ulloa, *More California Inmates Are Getting a Second Chance as Parole Board Enters New Era of Discretion*, L.A. TIMES (July 27, 2017), <http://www.latimes.com/politics/la-pol-ca-parole-board-proposition-57-20170727-htmlstory.html>. These statistics indicate that the likelihood of being found suitable for parole in California still remains quite low; however, it is significantly better than the past. In 2007, “less than 2%” of inmates were found suitable for parole. *Id.*

6. For purposes of this Note, I use the language “cognitive impairments” to differentiate between individuals who are formally identified as developmentally disabled in California prisons and those individuals who are not encompassed within that bright-line definition. The Center for Disease Control (“CDC”) defines an individual with a “cognitive impairment” as “a person [who] has trouble remembering, learning new things, concentrating, or making decisions that affect their everyday life.” CTR. FOR DISEASE CONTROL, A COGNITIVE IMPAIRMENT: A CALL FOR ACTION, NOW! 1 (2011), https://www.cdc.gov/aging/pdf/cognitive_impairment/cogimp_poilicy_final.pdf. Much thought was given to the sensitivity surrounding the usage of the word “impairments,” and the term is intended only to be construed as the actual definition from the CDC.

however, the primary focus of this Note is on the portion of California inmates that are not encompassed under the California Department of Corrections and Rehabilitation's ("CDCR") definition of developmentally disabled ("DD").

Ultimately, this Note argues that California's current parole system is legally impermissible due to the overlooked disadvantages it creates for inmates with cognitive impairments who do not fall within CDCR's definition of disabled. As a result of CDCR's exclusionary and limiting definition of a cognitive disability, numerous inmates are left with no access to accommodations that could help mitigate the unfairness their impairments present. Among the impairments inmates face are processing disorders, low cognitive functioning, and minimal formal education. Individuals who face impairments form a large population of potentially non-violent individuals who could be found suitable for parole, but because they have some cognitive limitation(s) that inhibit them from reaching the parole board's specific standard, they cannot, and likely may never, meet the rigid suitability standards.

This Note argues that reform must come from re-envisioning the manner in which the parole process is administered and by applying a truly individualized approach. To be clear, the legal standard of current dangerousness is not at issue; it is the *process* by which the parole board determines a given inmate's current danger that needs reform. Although many have evaluated the intersection between the DD population and the criminal justice system—including, for example, the often-unfair treatment and lack of opportunities at parole hearings for DD inmates⁷—few have studied inmates that fall into a "grey area." That is, individuals who do not fall within the DD classification, but who cannot successfully meet the requirements of parole without a more personalized assessment.

I will advocate for a system that better identifies inmates that may not qualify as DD by the CDCR standard but still have limitations that preclude them from effectively self-advocating. For individuals who are identified, I argue that reasonable accommodations must be provided. In addition, I recommend the following changes: (1) increasing commissioner and correctional officer training for CDCR staff; (2) placing less emphasis on insight during a parole hearing; (3) providing a psychologist who can testify at each inmate's parole proceeding; and (4) giving greater weight to

7. See generally JOAN PETERSILIA, *DOING JUSTICE? THE CRIMINAL JUSTICE SYSTEM AND OFFENDERS WITH DEVELOPMENTAL DISABILITIES* (2000) (discussing the "frequent victimiz[ation]" of inmates with developmental disabilities in the California parole process).

an inmate's score on their test for basic adult education ("TABE"). Although the parole board is required to assess each inmate's suitability for parole on a "case-by-case"⁸ basis, this current system does not adequately account for an individual's cognitive impairments.

In sum, to remedy this impermissible system that results in discriminatory parole denials because of an individual's cognitive impairment, inmates must be assessed at *their* ability-level and the formal, rigid standards currently in place must be changed.

I. LAWS GOVERNING CALIFORNIA PAROLE HEARINGS

A. BACKGROUND INFORMATION

CDCR is the entity responsible for operating the California state prison and parole systems.⁹ Upon completion of a prison sentence—either from the expiration of a determinate sentence or as a result of a parole suitability finding—an individual is "released to either state supervised parole or county-level supervision" pursuant to the California Penal Code.¹⁰ Typically, individuals who commit more serious or violent crimes are released into state parole custody, and the less violent offenders receive county supervision.¹¹ As of January 31, 2018, CDCR had 129,557 individuals in its custody.¹² Of that number, 117,427 were housed and living in institutions.¹³

B. DETERMINATE AND INDETERMINATE SENTENCES

In California, most offenders are sentenced to a specified amount of time under the Determinate Sentencing Law ("DSL").¹⁴ This means that after an individual serves the imposed time—for example, seven years—he or she is released from prison on parole. Sometimes, an individual with a determinate sentence will become eligible for a parole suitability hearing

8. *In re Powell*, 755 P.2d 881, 886 (Cal. 1988).

9. See generally *Cal. Dep't of Corrections and Rehabilitation*, CA.GOV, <http://www.cdcr.ca.gov> (last visited Aug. 20, 2018).

10. *Sentencing, Incarceration, & Parole of Offenders*, CAL. DEP'T OF CORRECTIONS AND REHABILITATION, http://www.cdcr.ca.gov/victim_services/sentencing.html (last visited Aug. 20, 2018).

11. *Id.*

12. CAL. DEP'T OF CORR. AND REHAB: DIV. OF INTERNAL OVERSIGHT AND RESEARCH, MONTHLY REPORT OF POPULATION AS OF MIDNIGHT JANUARY 31, 2018, 1 (2018), https://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOPIA/TPOP1Ad1801.pdf.

13. *Id.*

14. See *Sentencing, Incarceration, & Parole of Offenders*, *supra* note 10.

prior to their scheduled release date.¹⁵

If an individual does not receive a determinate sentence, they are likely to receive an indeterminate sentence pursuant to the Indeterminate Sentencing Law (“ISL”).¹⁶ An indeterminate sentence will be a term of life, with the possibility of parole, such as fifteen-years-to-life or twenty-five-years-to-life. These individuals are more commonly referred to as “lifers.” An individual serving a life term with the possibility of parole cannot be released from prison until the Board of Parole Hearings (“BPH”) determines they are ready to be reintegrated back into society.¹⁷

This Note primarily focuses on inmates serving indeterminate sentences because inmates with determinate sentences rarely face a parole board. In 2013, there were approximately 32,000 inmates in California serving life sentences with the possibility of parole and an additional 3,200 inmates sentenced to life without the possibility of parole.¹⁸ As of April 2013, California had more than “three times as many lifers” as any other state.¹⁹

C. PAROLE SUITABILITY

A life-term inmate must serve a certain statutory period before becoming eligible for a parole suitability hearing.²⁰ When an inmate becomes eligible for parole, BPH administers a parole hearing.²¹ BPH then makes a legal determination concerning whether an inmate poses a “current, unreasonable risk of danger to the public.”²² The language of California Penal Code section 3041 is unambiguous when it states that the parole board, or panel, “shall grant parole to an inmate unless . . . consideration of the public safety requires a more lengthy period of incarceration.”²³ This mandatory language is what creates a “constitutionally protected liberty interest” in parole.²⁴ Despite this “statutory mandate,” an indeterminately sentenced California inmate is

15. *Id.*

16. *Id.*

17. *Id.*

18. Keith Wattley, *Insight into California’s Life Sentences*, 25 FED. SENT’G REP. 271, 271 (2013).

19. *Id.*

20. *Lifer Parole Process*, CAL. BD. OF PAROLE HEARINGS, http://www.cdcr.ca.gov/BOPH/lifer_parole_process.html (last visited Aug. 20, 2018).

21. PAROLE SUITABILITY HEARINGS, *supra* note 4.

22. *Lifer Parole Process*, *supra* note 20.

23. CAL. PENAL CODE § 3041(b)(1) (West 2018) (emphasis added).

24. *See Board of Pardons v. Allen*, 482 U.S. 369, 374 (1987). *See also Swarthout v. Cooke*, 562 U.S. 216, 218 (2011).

granted parole “less than 1 percent” of the time at their initial suitability hearing and “roughly 18 percent” overall.²⁵

A panel consisting of two individuals—a presiding commissioner and a deputy commissioner (collectively, “the Board”)²⁶—will together consider “[a]ll relevant, reliable information” to make a parole suitability determination.²⁷ Commissioners are appointed to three year terms by the governor of California, subject to confirmation by the state senate.²⁸ California has fourteen Governor appointed commissioners.

Title 15 of the California Code of Regulations (“CCR”) sets out a list of factors to be considered in determining an inmate’s suitability for release on parole, although it is not exhaustive.²⁹ The Board is tasked with balancing these suitability and unsuitability factors.

There are nine enumerated factors that indicate circumstances tending to show suitability: (1) no juvenile record; (2) stable social history; (3) signs of remorse; (4) motivation for crime; (5) battered woman syndrome; (6) lack of criminal history; (7) age; (8) ability to understand and plan for the future; and (9) institutional behavior.³⁰ Additionally, and with much significance, the California Supreme Court held that “insight bears more immediately on the . . . present risk to public safety” of an inmate, in comparison to other suitability factors considered.³¹

Factors weighing toward unsuitability are: (1) the commitment offense—particularly if the prisoner “committed the offense in an especially heinous, atrocious or cruel manner;”³² (2) previous record of violence; (3) unstable social history; (4) sadistic sexual offense; (5) psychological factors; and (6) poor institutional behavior.³³

These factors, taken in their entirety, determine the outcome of a parole hearing. Further, the California Supreme Court held, with regard to parole decisions, that whether an inmate is found suitable and thus released

25. Wattlely, *supra* note 18, at 272.

26. *Lifer Parole Process*, *supra* note 20.

27. CAL. CODE REGS. tit. 15, § 2281 (West 2018).

28. CAL. GOV’T CODE § 12838.4 (West 2018).

29. CAL. CODE REGS. tit. 15, § 2402 (West 2018).

30. *Id.*

31. *In re Shaputis*, 265 P.3d 253, 271 (Cal. 2011).

32. CAL. CODE REGS. tit. 15, § 2402 (West 2018). This can be a particularly challenging factor for individuals who have committed violent crimes. Many have argued and litigated that a murder, for example, may always be considered “heinous” or “atrocious” and thus it provides the Board with an ability to deny parole on grounds that do not have a “rational nexus” to an inmate’s current dangerousness.

33. *Id.*

on parole, or instead given a three-to-fifteen-year set-off depends on the Board's nearly unlimited discretion.³⁴ Given this wide range of discretion, coupled with virtually unlimited unsuitability factors, the possibility of being released on parole is slim.³⁵

For individuals with cognitive impairments, moreover, the odds of being granted parole are even worse.³⁶ For example, inmates with cognitive impairments can face particular difficulties with demonstrating insight because insight-based questions often require the articulation of abstract ideas, an ability that inmates with developmental disabilities may not possess. In addition, certain cognitive disabilities significantly affect subjective emotional cues, making expressions of remorse more challenging.

Ultimately, being found suitable for parole is not only dependent on how effectively an inmate can verbally communicate and articulately respond to multi-faceted questions at an actual hearing, but also on their behavior in prison and even their record prior to incarceration.³⁷

D. INFORMATION EXAMINED PRIOR TO A PAROLE HEARING

Before a parole hearing, the Board receives an inmate's central file ("C-File"), results of the inmate's Comprehensive Risk Assessment (commonly referred to as "psych evals"), all rule violations in prison, vocational and educational certificates, letters supporting and opposing parole, and victim-impact statements.³⁸ In addition to written statements, the victims and victims' families are permitted to attend and speak at the parole hearing.³⁹

"Marsy's law" is responsible for a wide expansion of victims' rights.⁴⁰

34. *In re Rosenkrantz*, 59 P.3d 174, 203 (Cal. 2002).

35. PAROLE SUITABILITY HEARINGS, *supra* note 4.

36. *See generally* PETERSILIA, *supra* note 7.

37. CAL. CODE REGS. tit. 15, § 2281(c)(5)–(6) (West 2018).

38. ROBERT WEISBERG ET AL., STAN. CRIM. JUST. CTR., LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA 7 (2011).

39. CAL. PENAL CODE § 3043 (West 2018).

40. *See* David R. Friedman & Jackie M. Robinson, Note, *Rebutting the Presumption: An Empirical Analysis of Parole Deferrals Under Marsy's Law*, 66 STAN. L. REV. 173, 198 (2014). Marsy's law was enacted after Ms. Marsalee (Marsy) Nicholas was murdered by her ex-boyfriend. A week after Marsy was killed, Marsy's mother and brother encountered Marsy's ex, the accused murderer in a grocery store. Marsy's family was not informed that he had been released on bail. Because of the bill's passage, courts now must consider the "safety of victims and families when setting bail and release conditions." *See About Marsy's Law: Justice with Compassion*, MARSY'S LAW, <https://marsyslaw.us/about-marsys-law> (last visited Aug. 20, 2018). In addition, family members are

In particular, Marsy's law allows victims or representatives of victims to make statements at an inmate's parole hearing, in which they "reasonably express their views concerning the prisoner, including . . . the effect of the crimes on the victim's family, and the prisoner's suitability for parole."⁴¹ Some argue that the presence of victims at parole hearings increases the chance of receiving a denial.⁴²

E. PAROLE HEARING

The parole hearing itself is normally several hours long, occurs on-site where the individual prisoner is incarcerated, and is typically administered by the Board asking the inmate several questions.⁴³

Parole hearings traditionally follow a similar structure, in which the inmate is asked about his or her life in chronological order.⁴⁴ The inmate's childhood, adolescence and, if applicable, adulthood are discussed. After that, the commitment offense is discussed, often at great length. The commitment offense, a static factor that cannot be changed despite the passage of time, can prove challenging for inmates, especially those with heinous or violent crimes.⁴⁵ Thereafter, the inmate's time while incarcerated is discussed, including both negative factors, such as rule violations, and positive factors, such as programming and certificates that document good behavior.⁴⁶ Lastly, parole and relapse prevention plans are discussed.

All inmates are entitled to legal counsel at their parole hearing.⁴⁷ California is required to provide counsel for inmates who want representation, but otherwise do not have an attorney. The state, however, only compensates parole-appointed attorneys a "maximum \$400 per case."⁴⁸

legally entitled to attend all bail hearings, pleas, sentencing and parole hearings. *Id.*

41. *Victim's Bill of Rights Act of 2008: Marsy's Law*, CAL. BD. OF PAROLE HEARINGS, http://www.cdcr.ca.gov/BOPH/marsys_law.html (last visited Aug. 20, 2018).

42. See WEISBERG ET AL., *supra* note 38, at 20.

43. *Id.* at 22.

44. See *id.* at 7–8. See also CAL. DEP'T OF CORR. AND REHAB., PAROLE SUITABILITY PROCEEDING HANDBOOK: INFORMATION FOR VICTIMS AND THEIR FAMILIES 8–9 (2016).

45. CAL. CODE REGS. tit. 15, § 2402 (West 2018).

46. See WEISBERG ET AL., *supra* note 38, at 7–9.

47. *Lifer Parole Process*, *supra* note 20.

48. Beth Caldwell, *Creating Meaningful Opportunities for Release: Graham, Miller and California's Youth Offender Parole Hearings*, 40 N.Y.U. REV. L. & SOC. CHANGE 245, 267 (2016). To competently prepare for a parole hearing, an attorney will need to spend much more than \$400 worth of time. Preparation should include reviewing the inmate's entire C-File which can be hundreds to thousands of pages long, as well as other pertinent documentation such as childhood and medical

In addition to the two commissioners, the inmate, and his or her attorney (if the inmate elected to have one present), a District Attorney from the prosecuting county of the controlling offense can be present to ask clarifying questions as well as to make a statement about the inmate's suitability for parole.⁴⁹ Almost always, the District Attorney opposes the inmates release on parole.

After an hours-long hearing is conducted, the commissioner and deputy commissioner privately deliberate to make a parole determination.⁵⁰ In rare cases, a hearing may be continued, but almost always an inmate will either be found suitable for parole, known as receiving a grant, or the inmate will be denied parole.⁵¹ If the inmate is found unsuitable for parole, the Board "shall schedule the next hearing . . . [f]ifteen years after," unless "clear and convincing" evidence exists to schedule the next hearing in either ten, seven or three years.⁵² Thus, the default denial of parole in California results in a fifteen year set-off, which itself indicates the gravity of parole hearings.⁵³ Prior to the passage of Marsy's Law in 2008,⁵⁴ the governing statute presumed a set-off of only one year and allowed commissioners to set a maximum denial of five years.⁵⁵

After the Board issues its decision on the day of the hearing, BPH has 120 days to review and finalize the decision.⁵⁶ Once the Board's decision has been finalized, the presiding California governor has thirty days to review the decision.⁵⁷ For homicide offenses, the governor may "affirm, modify, or reverse" the Board based on the same factors the Board considers.⁵⁸ In every other case, the Governor is "limited to remanding the case back to the Board for reconsideration."⁵⁹

records. In addition, the lawyer *should* visit the client multiple times to moot and prepare for the difficult questioning at the hearing.

49. *Lifer Parole Process*, *supra* note 20.

50. *See* PAROLE SUITABILITY PROCEEDING HANDBOOK, *supra* note 44, at 9.

51. PAROLE SUITABILITY HEARINGS, *supra* note 4.

52. CAL. PENAL CODE § 3041.5 (West 2018).

53. *Id.*

54. Victims' Bill of Rights Act of 2008: Marsy's Law, CAL. CONST. art. I, § 28.

55. Friedman & Robinson, *supra* note 40, at 180.

56. *Lifer Parole Process*, *supra* note 20.

57. CAL. PENAL CODE § 3041.2 (West 2018).

58. Friedman & Robinson, *supra* note 40, at 181.

59. *Id.*

F. APPEAL OF PAROLE DECISION

In the event of a denial or grant reversal by the Governor, an inmate may file a habeas corpus petition in a California state court to challenge the denial.⁶⁰ As determined by the California Supreme Court, the decision to grant or deny parole is “subject to a limited judicial review to determine only whether the decision is supported by ‘some evidence.’”⁶¹

The “some evidence” standard has been widely contested but consistently reaffirmed by California courts.⁶² In accordance with California’s Constitution and statutes, the executive branch is vested with the decision to grant parole to an inmate in CDCR’s custody.⁶³ The California Supreme Court stated in *In re Shaputis* that “[i]t is the job of a reviewing court” to apply the “deferential ‘some evidence’” standard to the parole determination.⁶⁴ Justice Corrigan acknowledged that the court may be skeptical of the stated reasons of the Board for a parole denial; however, “considerations of judicial restraint and comity between the executive and judicial branches counsel against including mere suspicions in the court’s opinion.”⁶⁵ As a result of this deferential standard, parole denials are commonly upheld.

G. CALIFORNIA’S PAROLE LAWS DISADVANTAGE INMATES WITH COGNITIVE IMPAIRMENTS

The stringent requirements of the California parole board process disadvantage inmates with cognitive impairments both prior to and during their parole hearings. As it currently stands, the parole process demands certain abilities. A parole hearing moves quickly with several abstract, complicated questions asked in an unforgiving manner. Processing disorders, minimal education, and the inability to retain or recite information can each jeopardize an inmate’s possibility of being found suitable for parole. Because of the inflexible structure and immutable demands placed on inmates at parole hearings, it ultimately amounts to a process that systematically disadvantages inmates with cognitive

60. U.S. CONST. art. I, § 9, cl. 2. California inmates have a right to file a federal habeas corpus petition challenging their parole denial. *Swarthout v. Cooke*, 562 U.S. 216, 219–22 (2011) (“[T]he responsibility for ensuring that the constitutionally adequate procedures governing California’s parole system are properly applied rests with California courts.”).

61. *In re Rosenkrantz*, 59 P.3d 174, 183 (Cal. 2002).

62. *In re Shaputis*, 265 P.3d 253, 264–68 (Cal. 2011). *See also In re Lawrence*, 190 P.3d 535, 538–39 (Cal. 2008); *In re Rosenkrantz*, 59 P.3d at 183.

63. *In re Shaputis*, 265 P.3d at 264–68.

64. *Id.* at 270–71.

65. *Id.*

impairments.

II. INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES IN CALIFORNIA PRISONS

A. STATISTICS CONCERNING INMATES WITH DISABILITIES

The Bureau of Justice's statistics state that "1 in 5 prison inmates have a serious mental illness."⁶⁶ In addition, the Bureau states that individuals in federal prisons are almost "three times as likely to report having a disability as the nonincarcerated population."⁶⁷ Among the most common inmate-reported impairments are "Down syndrome, autism, dementia, intellectual disabilities, and learning disorders"⁶⁸ The most commonly reported impairments nationwide were impairments with learning, with 23% of all state inmates saying that they struggled with learning.⁶⁹ Improper testing for disabilities and a lack of self-reporting also affects these statistics.⁷⁰ These statistics indicate that individuals in prison are more likely to be suffering from some sort of mental disorder than the non-incarcerated population.⁷¹ In addition, further distortion of these numbers occurs due to a lack of self-reporting and when, "in most instances, the [developmentally disabled] inmate is not identified, and so is mainstreamed with the general . . . prison population."⁷²

In addition, the statistics are influenced because inmates may be hesitant to admit to having a cognitive impairment, fearing the stigmatization that comes with such an admission. Given the choice, many inmates would prefer to avoid being labeled as disabled, or seen as different, even if it means sacrificing the possibility of being successful at a future parole hearing. This is especially true for inmates who do not formally meet CDCR's DD definition. In such cases, an inmate who admitted having an impairment may face stigmatization, yet, under current law, no additional assistance would be provided to this inmate.

66. Rebecca Vallas, *Disabled Behind Bars: The Mass Incarceration of People with Disabilities in America's Jails and Prisons*, CTR. FOR AM. PROGRESS (July 18, 2016, 12:01 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/07/18/141447/disabled-behind-bars>.

67. *Id.*

68. *Id.*

69. Laura M. Maruschak, *Medical Problems of Prisoners*, BUREAU OF JUST. STAT. (last revised Aug. 20, 2018), <https://www.bjs.gov/content/pub/html/mpp/mpp.cfm>.

70. *See id.*

71. *See, e.g.,* Vallas, *supra* note 66.

72. *See* PETERSILIA, *supra* note 7, at 46.

B. CDCR'S DEFINITION OF A DEVELOPMENTAL DISABILITY

As defined by CDCR, an individual is considered to have a DD if the disability “originates before an individual attains the age of 18, continues—or can be expected to continue—indeinitely, and constitutes a substantial handicap for that individual.”⁷³ The disabilities noted include cerebral palsy, epilepsy, and autism. In addition, an individual is considered to have a developmental disability if they have “disabling conditions found to be closely related to mental retardation”⁷⁴

The *Clark* Remedial Plan⁷⁵ states that criteria for inclusion in the Developmental Disability Program (“DDP”) are: (1) “[l]ow cognitive functioning (usually IQ of 75 or below); and (2) [c]oncurrent deficits or impairments in adaptive functioning.”⁷⁶ Both elements must be met to qualify as a DD individual under CDCR’s standard.⁷⁷ Being classified for inclusion in the DDP is pertinent to whether a person has access to the treatment and accommodations that may be necessary for an eventual parole suitability finding.

During intake, CDCR assesses all inmates for potential inclusion in the DDP.⁷⁸ Certain characteristics that may present in an individual with developmental disabilities include concrete reasoning, limited or below age-level communication skills, a short attention span, and difficulty retaining information. In addition, people with developmental disabilities may exhibit noncompliant behavior and struggle to understand the consequences of their actions.⁷⁹

C. THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (“ADA”) was signed into law on July 26, 1990 with the intent to protect the rights of individuals with disabilities from pervasive discrimination.⁸⁰ The rights afforded in the ADA extend to state prisoners.⁸¹ In accordance with the ADA, along with

73. See CAL. DEP’T OF CORR., *CLARK V. CALIFORNIA: REMEDIAL PLAN 1–2* (2002), <https://www.cdcr.ca.gov/BOPH/docs/ADA-Resources/CLARK%20Remedial%20Plan.pdf>.

74. *Id.*

75. *Sentencing, Incarceration, & Parole of Offenders*, *supra* note 10. See *infra* Section III.A.

76. See *CLARK V. CALIFORNIA: REMEDIAL PLAN 1*, *supra* note 73, at 2.

77. *Id.*

78. See KATIE RILEY ET AL., *ADA OVERVIEW—INMATES WITH DISABILITIES 19* (2013), https://www.cdcr.ca.gov/BOPH/docs/Attorney_Orientation/PP%20-%20Inmates%20with%20Disabilities%20-%206%20slides.pdf.

79. *Id.*

80. 42 U.S.C. § 12101–12213 (2012).

81. *Id.* § 12131 (defining “public entity” as “any department, agency, special purpose district, or

the Rehabilitation Act of 1973, an institutional staff member is required to meet with an inmate to identify “any disability-related accommodations needed for the [parole] proceeding.”⁸² The findings and requests by the inmate are memorialized in BPH’s 1073 form, which is titled a “Notice and Request for Assistance at Parole Proceeding.”⁸³

Despite the mechanisms currently in place to help account for an individual’s disability, CDCR and BPH have faced notable class action suits challenging the notion that proper accommodations exist and are enforced.⁸⁴ The most note-worthy cases of this kind are *Armstrong v. Wilson*,⁸⁵ *Armstrong v. Schwarzenegger*⁸⁶, and *Clark v. California*.⁸⁷ These cases are discussed in further detail in the Sections that follow.⁸⁸

1. *Armstrong v. Wilson*

In *Armstrong v. Wilson*, the court stated that the ADA *does apply* to state correctional facilities.⁸⁹ The ADA plainly states: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination *by any public entity*.”⁹⁰ Thus, California prisons must abide by the provisions in the ADA.⁹¹ Two years after the decision in *Armstrong v. Wilson*, the Supreme Court ended ongoing circuit splits on this issue by holding in *Pennsylvania Department of Corrections v. Yeskey* that “the plain text of Title II of the ADA unambiguously extends to state prison inmates.”⁹²

other instrumentality of a State or States or local government” and thus reaching states’ correctional facilities).

82. *Resources for Persons with Disabilities*, CAL. BD. OF PAROLE HEARINGS, http://www.cdcr.ca.gov/BOPH/Attorney_Resources/ADA_Resources.html (last visited Aug. 20, 2018).

83. *Id.*

84. *See id.*

85. *Armstrong v. Wilson*, 942 F. Supp. 1252, 1258 (N.D. Cal. 1996), *aff’d*, 124 F.3d 1019, 1021 (9th Cir. 1997).

86. *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1063 (9th Cir. 2010). This case began when Schwarzenegger’s predecessor was in office, Governor Davis, and has continued since Schwarzenegger left office, under Governor Brown.

87. *Clark v. California*, 739 F. Supp. 2d 1168, 1173 (N.D. Cal. 2010).

88. *See infra* Sections II.C.1–3

89. *Wilson*, 942 F. Supp. at 1258.

90. Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 (2012) (emphasis added).

91. *See Wilson*, 942 F. Supp. at 1258.

92. *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998).

2. *Armstrong v. Schwarzenegger*

On June 29, 1994, inmates with disabilities filed suit against CDCR and the Board of Prison Terms (“BPT”),⁹³ alleging that they were being deprived of their required accommodations due to their disabilities.⁹⁴ Initially, this class action suit did not include individuals with developmental disabilities, but was amended in January 1999 to include them.⁹⁵ The parties agreed to bifurcate the proceedings into two separate litigations—one involving CDCR and another with BPT. CDCR entered into a settlement agreement premised on a finding of the *Armstrong* court that the ADA and Rehabilitation Act of 1973 extend to prisons—as noted above, the court ruled in *Armstrong v. Wilson* that both statutes apply to state prisons.⁹⁶

The claims against BPT were litigated in a bench trial beginning in April 1999.⁹⁷ Included in the plaintiffs’ evidence were stories about a deaf prisoner being “unable to communicate with a sign language interpreter because he was shackled” and a “blind inmate left without assistance to read complicated written materials.”⁹⁸ In March 2001, the court issued a permanent injunction ordering California to comply with the ADA and the Rehabilitation Act of 1973.

After an appeal by the State in November 2001, the court entered a Revised Permanent Injunction on February 11, 2002.⁹⁹ The injunction required the State to:

create and maintain a system for tracking prisoners and parolees with disabilities, take reasonable steps to identify prisoners and parolees with disabilities prior to parole proceedings, and provide reasonable accommodations to prisoners and parolees with disabilities at all parole proceedings, including parole revocations

93. In July 2005, the Board of Parole Hearings (“BPH”) replaced the Board of Prison Terms (“BPT”) as the agency responsible for determining whether and when lifers are released on parole. See S.B. 737 (Cal. 2005) (enacted) (adding California Government Code section 12838.4, eliminating the Board of Prison Terms, and creating the Board of Parole Hearings, which are now under the umbrella of the CDCR).

94. See *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1062 (9th Cir. 2010) (“More than a decade and a half ago, disabled prisoners and parolees brought this action against the California officials with responsibility over the corrections system and parole proceedings.”); *Armstrong v. Davis*, 275 F.3d 849, 854–55 (9th Cir. 2001). See also *Case Profile: Armstrong v. Schwarzenegger*, C.R. LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=572>.

95. *Case Profile: Armstrong v. Schwarzenegger*, *supra* note 94.

96. *Armstrong v. Wilson*, 942 F. Supp. 1252, 1258–59 (N.D. Cal. 1996).

97. *Case Profile: Armstrong v. Schwarzenegger*, *supra* note 94.

98. *Id.*

99. *Id.*

and revocation extensions, life prisoner hearings, mentally disordered offender proceedings, and sexually violent predator proceedings.¹⁰⁰

After failing to comply fully with the injunction, the plaintiffs sought and were awarded an enforcement motion against BPT on May 30, 2006.¹⁰¹

In January 2007, a separate injunction was issued after a finding that “despite extensive monitoring of CDCR Institutions,” the state of California was “continuing to severely violate the rights of prisoners with disabilities.”¹⁰²

3. *Clark v. California*

On April 22, 1996, two inmates incarcerated in California with developmental disabilities filed a class action lawsuit citing discrimination due to their disabilities.¹⁰³ In 1998, prior to the start of trial, the two parties negotiated an interim agreement.¹⁰⁴ As a result of this negotiation, the Clark Remedial Plan (“CRP”) was issued on March 1, 2002.¹⁰⁵ This plan details the DDP in California prisons.¹⁰⁶ It includes policies pertaining to the “identification, appropriate classification, housing, protection and nondiscrimination of inmates/parolees with developmental disabilities.”¹⁰⁷

In July 2009, the defendants—the state of California, California Governor, CDCR, and prison officials—filed a motion to “terminate the Settlement Agreement & Order,” known as the CRP, arguing that continued relief was no longer necessary.¹⁰⁸ The court denied the State’s motion for relief and granted, in part, the prisoners’ motion for further relief.¹⁰⁹

100. See *id.* See also Stipulation and Order on Revised Injunction, *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001), enforced *sub nom.* *Armstrong v. Schwarzenegger*, 622 F.3d 1058 (9th Cir. 2010).

101. Case Profile: *Armstrong v. Schwarzenegger*, *supra* note 94.

102. *Id.*

103. See *Clark v. State*, No. C96-1486-FMS, 1996 U.S. Dist. LEXIS 21630, at *2–5 (N.D. Cal. Oct. 1, 1996), *aff’d*, 123 F.3d 1267 (9th Cir. 1997). See also Case Profile: *Clark v. Wilson*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=576>.

104. Case Profile: *Clark v. Wilson*, *supra* note 103.

105. *Sentencing, Incarceration, & Parole of Offenders*, *supra* note 10.

106. Case Profile: *Clark v. Wilson*, *supra* note 103.

107. *Id.*

108. See *Clark v. California*, 739 F. Supp. 2d 1168, 1174 (N.D. Cal. 2010).

109. See *id.* at 1173.

III. ARGUMENT

In California, there exists only one mechanism—a parole hearing—for an inmate to demonstrate that they no longer pose a current danger to society and thus should be granted parole.¹¹⁰ This current system for determining if parole should be granted or denied is dependent not only on whether an inmate possesses the necessary factors supporting parole, but also on their ability to clearly articulate these factors.¹¹¹ Given many inmates’ low cognitive abilities—whether labeled as disabled by CDCR standards or not—it is much more difficult for these individuals to clearly interpret and process questions asked at their Comprehensive Risk Assessment and their parole hearing and to articulate answers to questions about insight and remorse. From the parole hearing structure, to a lack of accommodations, to sub-par training for commissioners and correctional officers, the current California parole system is impermissible and ultimately unconstitutional for individuals with cognitive impairments.¹¹²

There are numerous studies which indicate that inmates who are developmentally disabled will be “unlikely to be able to follow general prison rules, participate in work or treatment programs,” and face “a higher risk of victimization than higher-functioning inmates.”¹¹³ Further, “[t]heir failure to comply with the prison routine” and difficulty or inability “to read and to understand prison rules and to advocate effectively for themselves, contributes to them more often being denied parole.”¹¹⁴ In fact, research demonstrates that “inmates with mental retardation tend to serve longer sentences because of their higher frequency of infractions in prison and have greater difficulty securing parole.”¹¹⁵

From these research results about inmates who are recognized as DD, we can infer that individuals with cognitive impairments that are undiagnosed are just as likely to experience these issues, ultimately resulting in a parole denial. Because the Board does not adjust its suitability standard for inmates with cognitive impairments, individuals with cognitive

110. CAL. PENAL CODE § 3041(b)(1) (West 2018).

111. See *supra* Part I.

112. Procedural due process requires a fair process which typically includes an unbiased decision-maker and notice of the government’s actions before a person may be deprived of their life, liberty or property. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972). See also U.S. CONST. amends. V, XIV. If an individual, due to cognitive impairments, is incapable of conforming to parole board standards, the hearing itself does nothing to ensure that due process is being afforded. Inmates remain incarcerated solely as a result of their disability.

113. PETERSILIA, *supra* note 7, at 46.

114. *Id.* at 29.

115. *Id.*

impairments may end up staying in prison for far longer, resulting in arguably unconstitutional sentences. To remedy this, commissioners at parole hearings should not only be required to consider an inmate's level of cognitive functioning, but also be mandated to run parole hearings in accordance with the inmate's ability-level.¹¹⁶

A. FACTORS CONSIDERED IN PAROLE SUITABILITY HEARINGS

Below is a list of factors, though not exhaustive, that are considered during a parole suitability hearing. These statutorily mandated factors tend to disadvantage individuals with cognitive impairments because each of them requires some level of advanced processing and communication ability.

1. Comprehensive Risk Assessment

Prior to a parole suitability hearing, the Forensic Assessment Division of BPH issues a Comprehensive Risk Assessment to all inmates.¹¹⁷ The purpose of the risk assessment is to help identify an inmate's "potential for future violence and protective factors that could minimize his or her risk if released to the community."¹¹⁸ When performing the evaluation on the inmate, the assessment may include inquiries into the inmate's "commitment offense, institutional programming, past and present mental state, and analysis of static and dynamic risk factors" as well as "emotions and attitudes, and perceptions and attributions."¹¹⁹ The inmate can receive a "final risk ratings of low, moderate, or high risk for violence"¹²⁰ Assessments are administered every five years.¹²¹ For a realistic chance at parole, an inmate should receive a "low" score on their risk assessment.

116. The parole board has always been tasked with ascertaining an inmate's potential current danger on an individualized basis. "In determining whether or not an inmate is suitable or unsuitable for parole, '[t]he relevant determination for the Board . . . is, and always has been, an individualized assessment of the continuing danger and risk to public safety posed by the inmate.'" *In re Lewis*, 91 Cal. Rptr. 3d 72, 82-83 (Ct. App. 2009) (quoting *In re Lawrence*, 190 P.3d 535, 564 (Cal. 2008)). However, the individualized assessment is simply concerned with the inmate's current danger and not their cognitive-ability level which could impact how they are able to demonstrate their rehabilitation.

117. *Forensic Assessment Division*, CAL. BD. OF PAROLE HEARINGS, <http://www.cdcr.ca.gov/BOPH/fad.html> (last visited Aug. 20, 2018).

118. *Id.*

119. *Id.*

120. BOARD OF PAROLE HEARINGS' REVISED FINAL STATEMENT OF REASONS 15 CCR § 2240, CAL. BD. OF PAROLE HEARINGS 23 (2012), https://www.cdcr.ca.gov/boph/docs/revised_final_statement_reasons_original.pdf [hereinafter FINAL STATEMENT OF REASONS].

121. CAL. CODE REGS. Tit. 15 § 2240(b) (West 2018).

Anything higher gives the Board greater discretion to deny parole.¹²²

Pursuant to CDCR's rules, an inmate is unable to appeal the results of their Comprehensive Risk Assessment.¹²³ The inmate, along with his or her attorney, can, however, contest the findings of the assessment at their parole hearing.¹²⁴ The hearing panel, at its discretion, will determine how heavily to weigh the Comprehensive Risk Assessment.¹²⁵ In practice, the commissioners often place substantial weight on the findings contained within the Comprehensive Risk Assessment.

The susceptibilities of the Comprehensive Risk Assessments should be examined more closely, given how heavily the Board relies upon such assessments. The atmosphere, pressure, nervousness, and potential confusion of questions being asked can lead an inmate to present poorly. It is administered in prison, and the inmate goes into the assessment with an acute awareness of the implications of the score they receive. Thus, before the assessment even begins, there is heightened pressure on the inmate. These external factors can be especially damaging to those who have undiagnosed cognitive impairments.

2. Rule Violations

For the primary purpose of safety—for the correctional officers, other employees, and fellow inmates—prison policies are very strict.¹²⁶ The majority of inmate rule violations occur and are documented as either a custodial counseling chrono, also known as a “128,” or a more serious rule violation report, referred to as a “115.”¹²⁷

Violations that constitute a 128 include: “[p]ossession of contraband other than controlled substances,” “[m]isuse of food,” “[o]ut-of-bounds presenting no threat to facility security,” “[m]isuse of telephone privileges,” “[m]ail or visiting violations,” “[f]ailure to meet work or program expectations,” “[l]ate for or absent without authorization from a work or program assignment,” “[u]se of vulgar or obscene language,” and “[f]ailure to comply with departmental grooming standards.”¹²⁸

122. See CAL. PEN, CODE § 3041(b)(1) (West 2018). The higher the risk assessment score the better able the Board is to find that “consideration of the public safety requires a lengthier period of incarceration for this individual.” *Id.*

123. FINAL STATEMENT OF REASONS, *supra* note 120, at 4.

124. *Id.* at 4.

125. *Id.* at 26.

126. See, e.g., CAL. CODE REGS. tit. 15 § 3270 (West 2018).

127. *Id.* § 3312 (a)(2)–(3).

128. *Id.* § 3314.

An inmate may receive a 115, a more serious write-up, for “[t]he use or threat of force or violence against another person,” “[a] breach of or hazard to facility security, “serious disruption of facility operations,” “introduction, use, or possession of controlled substances or alcohol,” “[p]ossession of dangerous contraband,” and “[a]ny felony offense.”¹²⁹ The high demands placed on inmates may make it very difficult to avoid receiving disciplinary citations despite an inmate’s best effort to do so.

The extensive list of rules inmates must follow at all times while incarcerated exists for purposes of efficiency, management, and promoting safety.¹³⁰ For inmates with cognitive impairments, non-adherence to obscure and sometimes unknown rules that result in rule violation write-ups can be exceptionally detrimental at a parole hearing. Navigating the prison system requires a level of savviness that many DD inmates simply do not possess.

At a parole hearing, any rule violation received while incarcerated will be discussed.¹³¹ In addition, the Board will critically assess more recent rule violations and write-ups from the year leading up to the hearing—so these can be especially damaging.¹³² Rule violations are heavily relied upon as a basis for denying parole.¹³³

For inmates classified as having a developmental disability or a documented mental health disorder, a slightly modified procedure is followed.¹³⁴ If, at the time of a citation “the inmates behavior was so strongly influenced by symptoms of mental illness or developmental disability/cognitive or adaptive functioning deficits,” the mental health staff can recommend that the rule violation be documented in an “alternate manner.”¹³⁵ After review by the correctional officer captain, he or she can choose to ignore the recommendation and still give a write-up or can decide to place a memorandum in the inmate’s file documenting the reason not to issue the 128 or 115.¹³⁶ Ultimately, however, a record will exist discussing the incident and may be inquired into at a parole suitability hearing.

Despite this specific regulation aimed to help the DD prisoner

129. *Id.*

130. *Id.*

131. WEISBERG ET AL., *supra* note 38, at 5.

132. CAL. CODE REGS. tit. 15 §§ 2281 (c)(5)-(6). (West 2018).

133. *Id.*

134. CAL. CODE REGS. tit. 15 § 3317.1 (West 2018).

135. *Id.*

136. *Id.*

population better navigate the system and prevent unfair violations, the inmate must still be able to discuss the rule violations they receive, along with any similar incidents, in an articulate and insightful manner at a parole hearing. Not only must the prisoner admit to their improper conduct, but they must also explain the motivations behind such behavior. People with cognitive impairments are expected to answer these questions despite the fact that their ability to process and communicate is often compromised as defined by their disability.¹³⁷

3. Programming

During an individual's parole suitability hearing, a part of the hearing is dedicated to assessing the programming they have engaged in while incarcerated.¹³⁸ The Board will look for programming relevant to a problem an inmate may have had prior to incarceration, especially if the inmate's commitment offense was related to the problem. For example, if an inmate's offense was gang-related, the inmate will almost certainly need to have programmed with Criminal Gangs Anonymous ("CGA") or a similar gang-prevention program. In addition, inmates with addiction issues will likely need programming with Narcotics Anonymous ("NA") or Alcoholics Anonymous ("AA"). Inmates will often be asked to recite the twelve-steps at their hearing and discuss how each step has helped with their sobriety.¹³⁹ The ability to retain and recite the steps and to explain how each step impacted an inmate's sobriety may simply be beyond the ability-level of inmates with certain cognitive impairments. Therefore, recognizing an inmate's limitations is essential for purposes of a fair proceeding.

In addition, access to programs can be limited—especially for males at higher-level security prisons—and knowing which programs to take can be hard—especially for someone with cognitive impairments. Even if an inmate successfully participates in programs, they must also be able to precisely detail what they learned and how it changed their internal thinking. For an inmate who functions at a lower cognitive level, this specific type of articulation may be unachievable. The Board, however, does not account for that inability.

137. *Facts About Developmental Disabilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/developmentaldisabilities/facts.html#ref> (last visited Aug. 20, 2018).

138. CAL. PEN. CODE § 3043 (West 2018).

139. *About the Narcotics Anonymous (NA) 12-Step Recovery Program*, RECOVERY.ORG (Aug. 13, 2018), <https://www.recovery.org/topics/about-the-narcotics-anonymous-na-12-step-recovery-program>.

4. Insight

Insight is defined as “the power or act of seeing into a situation,”¹⁴⁰ or “[t]he capacity to gain an accurate and deep understanding of someone or something.”¹⁴¹ The concept of “insight” has increasingly influenced California jurisprudence concerning prisoners’ parole hearings.

For example, in 2008, the California Supreme Court issued its opinion in *In re Lawrence*, which affirmed a California Court of Appeal’s finding that the Governor’s reversal of a parole grant was improper. In its decision, the Court relied heavily on the inmate’s *insight*, stating that upon incarceration she “lacked emotional insight;” however, over time, she gained “substantial insight” in relation to “both the behavior that led to the murder and her own responsibility for the crime.”¹⁴² Since then, the Board has focused immensely on insight at parole hearings.¹⁴³ A lack of insight is one of the most common reasons cited supporting the Board’s denial of parole.¹⁴⁴ As predicted, a denial or reversal by the Governor due to “lack of insight” has been substantially litigated.¹⁴⁵ The success of these petitions, however, has been limited given the “some evidence” standard used by courts to challenge Board denials.¹⁴⁶

As stated by the California Supreme Court, “expressions of insight and remorse will vary from prisoner to prisoner and . . . there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior.”¹⁴⁷ Lack of insight supports a parole denial when it is rationally indicative of the central issue of an inmate’s current dangerousness when considered in light of the full record.¹⁴⁸

Courts have recognized the obstacles faced by inmates accused of a

140. *Insight*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2016).

141. *Insight*, OXFORD DICTIONARY (3d ed. 2011).

142. See *In re Lawrence*, 190 P.3d 535, 541, 563 (Cal. 2008). See also *In re Shaputis*, 190 P.3d 573, 584–85 (Cal. 2008).

143. *Wattley*, *supra* note 18, at 273.

144. *Shaputis*, 190 P.3d at 584. See *Wattley*, *supra* note 18, at 273. When parole is denied, there are typically multiple reasons cited. “Within 20 days following any decision denying parole, the board shall send the inmate a written statement setting forth the reason or reasons for denying parole, and suggest activities in which he or she might participate that will benefit him or her while he or she is incarcerated.” CAL. PEN. CODE § 3041.5 (b)(2) (West 2018).

145. *In re Ryner*, 126 Cal. Rptr. 3d 380, 392 (Ct. App. 2011). See *In re Rodriguez*, 122 Cal. Rptr. 3d 691, 699–700 (Ct. App. 2011).

146. *In re Rosenkrantz*, 59 P.3d 174, 182–83 (Cal. 2002).

147. *Shaputis*, 44 P.3d at 584–85 n.18.

148. *Id.* See also *Rodriguez*, 122 Cal. Rptr. at 702–03; *In re Twinn*, 118 Cal. Rptr. 3d 399, 417–18 (Ct. App. 2010).

lack of insight, since the assertion of a lack of insight can be “shorthand for subjective perceptions based on intuition or undefined criteria that are impossible to refute.”¹⁴⁹ There is also the concern that insight has become the “new talisman” for denying parole.¹⁵⁰ When an inmate is denied his or her constitutional right for parole based on a lack of insight, the Board must find a “factually identifiable deficiency in perception and understanding” of the criminal conduct or its causes that is probative of current dangerousness.¹⁵¹

When . . . undisputed evidence shows that the inmate has acknowledged the material aspects of his or her conduct and offense, shown an understanding of its causes, and demonstrated remorse, the Governor’s [or Board’s] mere refusal to accept such evidence is not itself a rational or sufficient basis upon which to conclude that the inmate lacks insight, let alone that he or she remains currently dangerous.¹⁵²

For example, in *In re Denham*, petitioner was denied parole based on a lack of insight because the Board speculated that he played a larger part in the commitment offense than he testified to.¹⁵³ The court concluded that “the Board cite[d] no evidence establishing that Denham’s participation in the crime was anything other than what he described at the 2010 parole hearing.”¹⁵⁴ Thus, the Court concluded that the Board reached its conclusion through improper speculation.¹⁵⁵

The Court also held in *In re Twinn* that the Governor’s parole reversal violated due process because the Governor failed to establish a rational nexus between the prisoner’s alleged lack of insight and his current dangerousness.¹⁵⁶ Twinn was imprisoned after being convicted of second-degree murder.¹⁵⁷ Twinn had consistently denied his intention to kill the victim and clearly expressed remorse and accepted responsibility for his actions.¹⁵⁸ The Court reversed the governor’s denial, stating there was no “rational nexus” between Twinn’s description of his role in the murder and

149. *Ryner*, 126 Cal. Rptr. 3d at 391.

150. *Id.* at 390. See also *In re Shippman*, 110 Cal. Rptr. 326, 354 (Ct. App. 2010) (Pollack, J., dissenting).

151. *Ryner*, 126 Cal. Rptr. 3d at 392.

152. *Id.*

153. *In re Denham*, 150 Cal. Rptr. 3d 177, 187–88 (Ct. App. 2012).

154. *Id.* at 188.

155. *Id.*

156. *In re Twinn*, 118 Cal. Rptr. 3d 399, 415 (Ct. App. 2010).

157. *Id.* at 402–03.

158. *Id.* at 414.

current danger to public safety—especially when taking into account Twinn’s remorse, acceptance of responsibility, and good behavior.¹⁵⁹

Though California courts, in some cases, have recognized that a “lack of insight” has become a prevalent reason for denying parole,¹⁶⁰ the courts’ very deferential “some evidence” standard for review of Board (and Governor) decisions leaves courts with limited ability to address any issues stemming from the Board using this reason.¹⁶¹ Extensive focus geared towards the “proper” demonstration of insight poses particular issues for inmates with certain cognitive disorders. Further, this heightened emphasis on insight is particularly odd given that “insight” is not even listed as either a suitability or unsuitability factor in the statute.¹⁶² Courts nonetheless have “accepted the presence or absence of insight as a relevant factor within the Board’s authority,” even going as far as to qualify it as a “significant factor.”¹⁶³ This immense focus on an advanced concept like insight proves to be particularly damaging to individuals who cannot function or think at a highly abstract level.

5. The Board’s Discretion

Further, and perhaps most significant, is the power granted to commissioners to make parole suitability determinations.¹⁶⁴ The law, both statutorily and as interpreted by courts, affords commissioners extensive discretion to grant or deny parole.¹⁶⁵ The Board is tasked with assessing an inmate’s suitability on a case-by-case basis attempting to “balance . . . the interests of the inmate and of the public.”¹⁶⁶ With this broad discretion, commissioners are equipped with numerous bases on which to deny parole. For individuals who cannot conform to the Board’s precise expectations, a parole denial is a hearing’s most likely result.

An individual’s cognitive abilities are essential to processing and communicating information.¹⁶⁷ Therefore, prior to and during a parole hearing, an individual with impaired cognition will have a harder time than

159. *Id.* at 417–18.

160. *See, e.g., In re Ryner* 126 Cal. Rptr. 3d 380, 390 (Ct. App. 2011).

161. *In re Rosenkrantz*, 59 P.3d 174, 183–84 (Cal. 2002).

162. CAL. CODE REGS. tit. 15 § 2402 (West 2018).

163. Wattley, *supra* note 18, at 273.

164. *See In re Powell*, 755 P.2d 881, 885–86 (Cal. 1988).

165. *Id.*

166. *Id.*

167. Alice Medalia & Hadine Revheim, *Dealing with Cognitive Dysfunction Associated with Psychiatric Disabilities*, N.Y. OFF. OF MENTAL HEALTH, https://www.omh.ny.gov/omhweb/cogdys_manual/cogdysfdbk.htm (last visited Aug. 20, 2018).

an individual without a cognitive disability to follow prison rules, excel in recommended or required programming, and communicate insight to the Board, thus, resulting in a higher likelihood of parole denial.¹⁶⁸

B. ADDITIONAL EXTERNAL FACTORS AFFECTING PAROLE SUITABILITY HEARINGS

There are several external factors that, although not often captured during a parole proceeding, have significant implications for receiving a grant. Many of these factors begin far before an individual enters CDCR's custody. They can start as early as birth, or during childhood, when an individual with a disability is improperly diagnosed or not diagnosed at all. In addition, impairments can develop or worsen if an individual is granted limited access to education. In CDCR custody, cognitive impairments that were not addressed prior to a prisoner's incarceration may continue to go unacknowledged, leading to challenges in prison that are similar to those the individual experienced outside of prison. Ultimately, this lowers that individual's chance at parole.

1. CDCR's Narrow Definition of a Developmental Disability

CDCR's determination of whether an individual falls within the DDP has far reaching implications. As currently written, CDCR's narrow definition of a DD fails to encompass many inmates affected with impairments.

The Center for Disease Control ("CDC") defines developmental disabilities as "a group of conditions due to an impairment in physical, learning, language, or behavior areas. These conditions begin during the developmental period, may impact day-to-day functioning, and usually last throughout a person's lifetime."¹⁶⁹ CDCR has a similar, but arguably stricter, definition.¹⁷⁰ Although there are still claims made by inmates with recognized developmental disabilities regarding unmet necessary accommodations, the arguably more difficult challenge lies with the thousands of inmates who do not fall within CDCR's strict definition of DD, but have cognitive processing disorders or other intellectual impairments.

CDCR has several regulations designed to assist inmates who are

168. PETERSILIA, *supra* note 7, at 61.

169. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 137.

170. *See supra* Section III.B.

included in the DDP.¹⁷¹ For example, at a parole hearing of a person who falls within the DDP, staff assistance will be provided.¹⁷² The assistance is usually a DDP counselor who does not provide legal advice, but can assist an inmate in understanding and participating in the parole hearing process.¹⁷³ However, inmates who have impairments but do not fall within CDCR's DDP, such as an individual with a learning disorder, do not receive extra assistance at their parole hearing.¹⁷⁴

Understandably, CDCR does not want to differentiate between inmates in the non-disabled group. For efficiency purposes, as well as cost concerns, treating all non-disabled inmates alike is alluring to prison officials. The problem, however, is that this practice is unjust and unreasonable. For example, cognitive impairments that preclude an inmate from effective, abstract thinking do not necessarily make them a "current danger" (the legal standard), yet time and again, an inmate in this position will be denied parole for "lack of insight."¹⁷⁵

At the crux of my argument lies a fundamental concept that the disability community commonly tries to convey—impairments, challenges, and disabilities are on a spectrum and cannot be defined or captured in a single definition easily.¹⁷⁶ The convenience of a bright-line definition for who qualifies as DD is understandably appealing to CDCR, but those who fall outside the bright-line definition, yet still possess cognitive impairments, must be provided a way in which their limitations will be identified, acknowledged, and considered during incarceration and at their parole hearing.

2. Learning Disorders

An example of the impact of CDCR's limiting definition of a DD individual is demonstrated through its treatment of people with learning disorders. CDCR defines a learning disorder as "a cognitive disorder that affects the ability of persons with normal intellect to learn academic and social information."¹⁷⁷ Examples of learning disorders include dyslexia and

171. See, e.g., RILEY ET AL., *supra* note 78, at 19.

172. *Id.* at 23.

173. *Id.*

174. *Id.*

175. See generally *In re Shaputis*, 190 P.3d 573 (Cal. 2011); *In re Lawrence*, 190 P.3d 535 (Cal. 2008).

176. See, e.g., CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 137 ("Developmental disabilities are a group of conditions due to an impairment in physical, learning, language, or behavior areas.").

177. RILEY ET AL., *supra* note 78, at 23.

dyscalculia. CDCR does not test for learning disorders, but instead, an inmate *may* be considered to have one if they have a TABE score that is under 4.0.¹⁷⁸

At a parole hearing for an inmate with a learning disorder, the only advocate is the inmate's lawyer (inmates are entitled to have a lawyer present). No other assistance is provided to help mitigate the struggles that this individual could face.¹⁷⁹ CDCR states in all caps on their website that, "THE ATTORNEY IS THE BEST ACCOMODATION" for inmates with cognitive impairments.¹⁸⁰ Lawyers, however, are not professionally trained to best accommodate individuals with impairments and, as such, likely do not possess the required skills to properly address these unique challenges.

3. TABE Assessment

Another factor that is not statutorily mandated to be considered, and thus is often overlooked, is an inmate's TABE score. Pursuant to the California Penal Code, all individuals housed in CDCR custody are issued a TABE after being placed in state custody.¹⁸¹ The TABE is a diagnostic assessment that helps to determine an individual's ability in English, math, and reading.¹⁸² The TABE is used by CDCR, as well as other public service agencies, to help guide its determinations for what educational programs are needed for a given individual.¹⁸³

CDCR divides its adult basic education ("ABE") classes into three levels: ABE I classes are for individuals who score between zero and 3.9 on the reading portion, ABE II is for inmates who fall between 4.0 and 6.9 on the reading portion, and ABE III is for inmates who score between 7.0 and 8.9 in reading.¹⁸⁴ The California Penal Code states that the "department shall offer academic programming throughout an inmate's incarceration that shall focus on increasing the reading ability of an inmate to at least a 9th grade level."¹⁸⁵

178. *Id.* A TABE score reflects grade level skills achievement. A TABE score of under 4.0 would indicate an individual is performing below a fourth-grade level in the tested subject.

179. *Id.*

180. *Id.* at 25.

181. *Adult Basic Education (ABE) I, II, and III*, CAL. DEP'T OF CORR. & REHAB., <http://www.cdcr.ca.gov/rehabilitation/ABE.html> (last visited Aug. 20, 2018).

182. *TABE Test*, STUDY GUIDE ZONE, <https://www.studyguidezone.com/tabetest.htm> (last visited Aug. 20, 2018).

183. *Id.*

184. *Adult Basic Education (ABE) I, II, and III*, *supra* note 181.

185. CAL. PEN. CODE § 2053.1 (West 2018).

4. Unconstitutional Denial of Liberty Without Due Process

There are several problems with CDCR's approach to the segment of inmate population that does not qualify as developmentally disabled, but nonetheless has impairments. For one, a lawyer, though required by law to represent their client to the best of their ability,¹⁸⁶ may be simply unfamiliar with the inmate's impairments and not able to best accommodate them. Further, a parole hearing is not an official judicial proceeding, and thus, inmates are not afforded the same rights they would have in a court of law.¹⁸⁷ Inmates are expected and required to speak on their own behalf with little intervention from their attorneys.¹⁸⁸ Individuals who have cognitive impairments may not be able to adequately respond or engage at a parole hearing. As a result, a large segment of the prison population may be in need of supplemental resources even though they are not classified as DD.

Because there exists a wide array of cognitive impairments that inmates face and often those impairments are not formally acknowledged, many inmates who do not pose a current danger to society will remain in prison after attaining parole eligibility. This denies the inmates their due process rights.

IV. RECOMMENDATIONS FOR THE CALIFORNIA PAROLE PROCESS WITH REGARD TO PRISONERS WITH COGNITIVE IMPAIRMENTS

People with cognitive impairments, especially those that are undiagnosed or not properly and thoroughly addressed, get in trouble more often in prison and have higher Comprehensive Risk Assessment scores. They also do not articulate insight and remorse as eloquently as non-disabled individuals. Because of this, and because the Board does not adjust its suitability standard for inmates with cognitive impairments, those individuals who no longer pose a danger to society may end up staying in prison for longer, ultimately resulting in unconstitutional sentences.¹⁸⁹

186. See generally MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR. ASS'N 2016).

187. 3 WITKIN, CAL. CRIM. L. & PUNISHMENT § 731 (4th ed. 2012). See also *In re Lugo*, 80 Cal. Rptr. 3d 521, 533 (Ct. App. 2008) ("By its nature, the determination whether a prisoner should be released on parole is generally regarded as an executive branch decision. The decision, and the discretion implicit in it, are expressly committed to the executive branch.").

188. WITKIN, *supra* note 187.

189. *Wattley*, *supra* note 18, at 271. See also *Swarthout v. Cooke*, 562 U.S. 216, 219–20 (2011); *Bd. of Pardons v. Allen*, 482 U.S. 369, 373–81 (1987).

A. EXPANDED DEFINITION OF DEVELOPMENTALLY DISABLED

CDCR's current definition of developmentally disabled is extremely limiting.¹⁹⁰ I recommend expanding the definition to include those individuals who have cognitive impairments and are currently excluded. The DD population by its nature is extremely diverse. A more inclusive definition could help certain individuals receive the accommodations they require. While I respect the need to have a bright-line definition for administrative purposes, I think a more encompassing definition will capture some of the currently excluded inmates with little increase in administrative burden.

B. INCREASED COMMISSIONER AND CORRECTIONAL OFFICER TRAINING

Though CDCR, by definition, is a department that is supposed to focus on corrections and *rehabilitation*, its correctional officers and commissioners are inadequately trained to serve and promote the prisons' rehabilitative functions. Currently, all of the commissioners and deputy commissioners that conduct parole hearings must, "[w]ithin 60 days of appointment and annually thereafter undergo a minimum of 40 hours of training in . . . educational, vocational, mental health, medical, substance abuse, psychotherapeutic counseling, and sex offender treatment programs."¹⁹¹ Although the training includes a portion on mental health, it does not focus specifically on developmental disabilities or the many nuances of the DD population. Further, forty hours of training per year is woefully inadequate to cover the numerous topics that are particularly pertinent to the prison population.

Similar to parole commissioners, the "corrections staff usually have little training on disability issues."¹⁹² The lack of professional training for correctional officers is arguably more damaging than the lack of training for commissioners because an inmate must first succeed in rehabilitating while incarcerated before having an opportunity to be successful at their parole hearing.

"California falls far behind some other states" in regard to rehabilitation.¹⁹³ In a study conducted by the University of California, Irvine that focused on the MR/DD population in prison, researchers found "virtually no specialized rehabilitation or substance abuse programs . . . in

190. See *CLARK V. CALIFORNIA: REMEDIAL PLAN 1*, *supra* note 73, at 1–2.

191. CAL. PENAL CODE § 5075.6(b)(1) (West 2018).

192. PETERSILIA, *supra* note 7, at 61.

193. *Id.*

jail, or in prison[,] [that could] meet the unique needs of offenders with retardation.”¹⁹⁴ In the few jurisdictions that have special corrections programs for the DD, they have been shown to lead to “increased social functioning and reduced recidivism rates, while at the same time reducing corrections costs.”¹⁹⁵

There needs to be more training of both correctional officers and commissioners, especially in the realm of cognitive impairments, because it affects a large segment of the prison population. The trainings need to increase knowledge and sensitivity to these issues as well as provide instruction on how to best interact, encourage, and rehabilitate individuals struggling with cognitive impairments. This would give inmates a fair chance to rehabilitate and demonstrate to the commissioners at their parole hearings that they are no longer a current danger to society. It is essential to expand awareness and give training tools to commissioners and CDCR employees.

C. LESS EMPHASIS ON INSIGHT

After *In re Lawrence*, the Board’s focus on insight has increased substantially and has become one of the most important factors used to determine if parole will be granted.¹⁹⁶ Because insight is not a statutorily mandated factor and because it requires the ability to process ideas abstractly—in a way certain inmates are incapable of doing—the Board should focus less on insight, or at a minimum, be willing to accept a wider range of ways in which it can be demonstrated.

D. PROVIDING PSYCHOLOGICAL EVALUATIONS AND PSYCHOLOGIST TESTIMONY AT PAROLE PROCEEDINGS

Another remedy that may improve California’s current parole system is to allow testimony of a mental health professional at all parole hearings. As of now, the inmate’s Comprehensive Risk Assessment is the only documentation that addresses this. However, the ultimate goal of the psychologist who administers the risk assessment is not identifying disabilities; rather, it is to determine how much of a public safety risk the inmate poses. Thus, the assessment likely underrepresents, or does not address at all, an inmate’s disabilities. Having a mental health professional attend all parole hearings could provide the commissioners with

194. *Id.*

195. *Id.*

196. *See* Wattley, *supra* note 18, at 273.

information on an inmate's cognitive ability and add a necessary safeguard that the system is currently lacking.

E. AMENDING RULE VIOLATION WRITE-UPS

Furthermore, I propose extending the amended procedure for administrating rule violations for inmates in the DDP to inmates who have cognitive impairments, but do not fall within CDCR's stringent definition of a having a disability. This would allow individuals who function at a low cognitive level, or who have processing disorders, to explain their actions more fully. If someone, for example, cannot understand a rule, they should not be punished for it.¹⁹⁷

F. FAIR WEIGHT GIVEN TO TABE SCORES

Further, more weight and analysis should be given to an inmate's TABE score at their parole hearing. This could better inform the commissioners of an inmate's cognitive ability level. More importantly, there should be different rules for the hearing based on how the inmate scored on the TABE. If an inmate has a TABE score of under 4.0, the commissioners should be required to ask different questions and run the parole hearing in a different way than when interacting with an inmate whose score is above 9.0. Expecting an individual to perform beyond their ability results in an unfair parole proceeding.

CONCLUSION

Ultimately, the way the California parole board treats people with cognitive impairments is arguably illegal. Though the *Clark* Remedial Plan was intended to prevent some of the criminal justice system's abuses against people with cognitive disabilities, it has failed on a multitude of fronts.

CDCR's rigid and narrow definition of a developmental disability is too limiting. As a result, it excludes the large segment of the incarcerated population with cognitive impairments. This disadvantages that specific population both prior to and during their parole hearings because they are unable to meet the requirements of parole suitability. This system is impermissible and must be changed as it results in the continued incarceration of people who do not pose a current danger to society.

197. PETERSILIA, *supra* note 7, at 29.

