Stanford Law School | Stanford Intellectual & Developmental Disabilities Law and Policy Project (SIDDLAPP)

Left Behind: Developmental Disability and the Pursuit of Parole

Nathaniel Hsieh, J.D.

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559 Nathan Abbot Way Stanford, CA 94305 law.stanford.edu/siddlapp/

Table of Contents

I. Introduction

As the nation enters an era of prison downsizing and begins to focus on those who are obtaining release, it is important to remember those who are not. It is important to examine what is separating those who are gaining freedom from those who are being left behind, and it is important to honestly acknowledge patterns that bespeak systematic disadvantage and discrimination. The developmentally disabled are one such disadvantaged group, and unless meaningful accommodations are integrated into the mechanisms being used to downsize prisons, the developmentally disabled will remain behind bars on account of cognitive deficiencies beyond their control. This not only violates a moral sense of fairness, it also violates the developmentally disabled's right to non-discrimination under the 1990 Americans with Disabilities Act.

II. The Context: Prison Downsizing

The tide is beginning to turn. After decades of steady increase, America's inmate population is finally in a state of decline. America's inmate population reached an all-time high in 2007 when about one in every one hundred American adults was incarcerated on any given day (Pew Center on the States, 2008). The national economic downturn in 2008 exposed the wastefulness and financial unsustainability of mass incarceration, and, in 2009, state prison populations in the United States decreased for the first time in thirty-eight years (Pew Center on the States, 2010). This trend has continued and the combined state and federal prison population has declined every year since 2009 (Glaze & Herberman, 2013).

In their article "*Liberal but Not Stupid: Meeting the Promise of Downsizing Prisons*," Joan Petersilia and Francis Cullen identify five key factors leading to this decline (Petersilia & Cullen, 2015). First, the 2008 recession forced many states to make budget cuts and realize they could not justify funding mass imprisonment in the costly way that they had during periods of economic growth. Second, decreased crime rates obviated the perceived need for mass incarceration and tough-on-crime policies. Third, crime ceased to be a hotly contested partisan issue as both the right and the left agreed that restorative and rehabilitative approaches were more effective in achieving public safety than mindless incarceration. Fourth, politicians have shifted their attention from popular sentiment to the expertise of academics when shaping prison policy. Last, the U.S. Supreme Court actually mandated prison downsizing in California—the state with the second highest prison population in the nation—through its 2011 decision in *Brown v. Plata*.

In *Brown v. Plata*, the U.S. Supreme Court held that a mandate requiring California to reduce its prison population to 137.5% of design capacity in two years was necessary to remedy the Eighth Amendment violation that occurred by failing to provide prisoners with adequate healthcare (*Brown v. Plata*, 2011). In the wake of this decision, California Governor Jerry Brown

embarked on what he described as the "boldest move in criminal justice in decades." (St. John, 2014). In his effort to comply with the Supreme Court's ruling that the California prison population be reduced to 110,000, Brown initiated widespread criminal justice reforms through a program known as "realignment." Realignment centered on shifting inmates from state prisons to county jails. This inevitably led to a spike in county jail populations and forced jail officers to release offenders after serving mere fractions of their sentences. In Los Angeles County, for instance, inmates are often released after serving just 5-10% of their sentence length (St. John, 2012). In addition to shifting non-serious felons from prison to jail, Governor Brown has implemented a number of downsizing mechanisms that allow more prisoners to be released on parole.

The focus here will be on three different mechanisms that states, including California, use in determining whether prisoners should be paroled. While sentencing reform and the "entry end" of determining the prison population are significant to the downsizing movement, the focus here will be on the "exit end" and methods states use to release prisoners onto parole.

A. Downsizing Mechanisms

In determinate sentencing states, an inmate receives a maximum prison sentence and is automatically released after the sentence expires. For example, a man who receives a sentence for five years is automatically released after he serves his five years in prison. No parole board or agency can extend the sentence beyond those five years. In indeterminate sentencing states, by contrast, an inmate receives a minimum prison sentence and after that minimum term expires a parole board determines whether or not he is eligible for release. For example, a man receives a sentence of five years to life. After five years, a parole board can assess whether or not the inmate is suitable for parole but can deny him parole indefinitely.

(1) Sentencing Credits

While it may seem like determinate sentences are rigidly set, many determinate sentencing states are allowing prisoners to be released before their term expires through a credit system based on good behavior and participation in certain kinds of programs. Good-time credits are granted to inmates who simply follow the rules, fulfill required duties, and participate in mandatory activities. Earned-time credits, in contrast, are granted to inmates who go beyond good behavior and successfully complete certain programs like educational courses, vocational training, parenting courses, and substance abuse treatment programs (National Conference of State Legislatures, 2011). The rationale behind these release incentives is that it is a way for states to downsize prisons in a way that, ideally, prepares inmates for successful reentry into society.

While at least 44 states allow sentences to be shortened through a good-time and earned-time credit system, states differ regarding their specific criteria and also the extent to which credits can reduce sentences. In Oregon, for instance, an inmate can reduce his sentence by up to 30%

through good behavior, programming, and earning vocational certificates of educational degrees (National Conference of State Legislatures, 2011). In New York, an inmate's sentence can be reduced by up to one-third if he is serving a definite sentence (for a misdemeanor or violation) but only up to one-seventh if he is serving a determinate sentence (for a felony). The New York *Jailhouse Lawyer's Manual* also emphasizes that the granting of credit is completely discretionary and that credits can be taken away as punishment for disruptive behavior through a disciplinary hearing process (Columbia, 2009).

In California, Governor Brown is seeking to liberalize the use of sentencing credits through his Public Safety and Rehabilitation Act that will be voted on in November 2016. In addition to allowing more convicts to be considered for parole, the Act grants the Department of Corrections and Rehabilitation more authority to "award credits earned for good behavior and approved rehabilitative or educational achievements." (Public Safety and Rehabilitation Act, 2016).

(2) Parole Board Hearings

The U.S. Bureau of Justice Statistics defines parole as a period of conditional supervised release in the community following a prison term (Kaeble, Maruschak, & Bonczar, 2015). Parolees are released through either mandatory supervised release because they have served their maximum sentences or discretionary release because they have served their minimum sentences and have been deemed eligible for release by the state parole board. Each state has its own policies regarding parole. Fourteen states have abolished parole completely and only use parole boards to evaluate those who have been sentenced to life with the possibility of parole (Schwatzapfel, 2015). In contrast, twenty-six other states have more liberal parole policies and vest parole boards with the authority to release nearly any state prison inmate who has served his or her minimum sentence (Schwatzapfel, 2015).

While the particulars of parole boards differ by states, what they all share is a sense of stringency. Earning the stamp of eligibility for release from a parole board has become notoriously difficult. In Ohio, it is estimated that the rate of those who are granted parole after coming before the parole board is 4% (Wilford, 2015). In California, even being deemed eligible by the parole board is not enough; the governor must personally approve each prospective parolee's release. While current California Governor, Jerry Brown, is granting parole to a record number of inmates in an effort to downsize prisons, former governor Gray Davis is famous for only granting parole to two inmates in three years (Fox News, 2014).

Many factors contribute to why it is so difficult to earn parole and why parole boards are both stringent and unpredictable. One factor is politics. Many parole board commissioners are political appointees who have little if any background in criminal justice work (Schwartzapfel, 2015). Parole board commissioners then face tremendous political pressure to not parole individuals who could, upon release, commit further crimes. Thus, the default becomes denial. Lack of transparency and accountability further engrain this default as parole boards in six states

are not required to provide any reason at all for their decisions (Schwartzapfel, 2015). In twenty-four states where the boards must give reasons for their decisions they do not have to disclose any of the materials they relied on in reaching their decisions (Schwartzapfel, 2015). While the focus of this paper will not be on parole board reform, it is necessary to establish how difficult it is earn parole generally before focusing on the specific challenges faced by the developmentally disabled.[1]

(3) Actuarial Risk Assessment Tools

In an effort to reduce discretion and promote uniformity and consistency, many states have adopted actuarial risk assessment tools at various stages of a criminal proceeding including at parole board hearings. Actuarial risk assessment tools analyze a combination of static factors—immutable characteristics like neighborhood, socioeconomic background, and level of education—and dynamic factors—like postdischarge plan, prison record, and program completion—in order to predict an inmate's likelihood of recidivism.

The use of actuarial risk assessment tools in making parole decisions is nearly universal. A 2008 survey reported that 88% of paroling authorities indicated that they use actuarial risk assessment tools in making parole decisions (Kinnevy & Caplan, 2008). Some states, like Texas, have come to rely exclusively on risk-assessment tools and have completely eliminated the in-person hearing component from the parole decision-making process (Revised Parole Guidelines, 2016). The American Law Institute even revised the Model Penal Code to require "offender risk instruments or processes, supported by current and ongoing recidivism research of felons in the state that will estimate the relative risks that individual felons pose to public safety through future criminal conduct." (American Law Institute, 2011).

While actuarial risk assessment tools have become standard, there remain questions regarding their accuracy and ethicality. Regarding accuracy, actuarial risk assessment tools have been found to over-predict when it comes to identifying high-risk individuals. The Level of Service Inventory-Revised (LSI-R) is the most popular risk assessment tool in use today, and the LSI-R manual admits to a high false positive rate. This means that a substantial number of inmates (approximately 30 percent) identified by the LSI-R as high-risk will not actually recidivate. This significant risk of error is one of many ethical concerns with risk assessment tools. In essence, risk assessment tools make predictions based on statistical correlations and thus adopt a determinative framework that leaves little room for individualism. While this is problematic on an individual level for those who staunchly believe that people can always change, it becomes problematic on a much broader level when one considers the ways in which such assessments systematically disadvantage people of color, people from low socioeconomic backgrounds, and people with disabilities. Former Attorney General Eric Holder echoed this concern when he

[1] For extensive treatment on the topic of parole board reform *see The Future of Parole Release: A Ten-Point Reform Plan* by Edward E. Rhine, Joan Petersilia, and Kevin R. Reitz

observed that "basing sentencing decisions on static factors . . . may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system." (Holder, 2014). For example, the COMPAS risk assessment tool used in California determines an inmate to be higher risk if he or she has parents or siblings who have been arrested (COMPAS, 2004). While there is presumably a statitstical correlation between growing up with incarcerated family members and recidivism, it is easy to see how using static factors like that to make sentencing and parole decisions entrenches disparities that often originated because of prejudice and bias. While the focus here will be on the ways in which actuarial risk assessment tools systematically disadvantage the developmentally disabled, there is no denying that the unjust disparities resulting from static factor based predictions extend to other marginalized groups as well.

III. The Problem: Systematic Disadvantage

It is clear that those who do not program well, those who do not perform well at parole board hearings, and who are not accurately assessed through actuarial risk assessment tools are systematically disadvantaged and likely to be left behind in the wake of the prison downsizing movement. Those affected by developmental disabilities are one such group.

A. Developmental Disability

The Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1994 define a developmental disability as a severe, chronic disability of an individual five years of age or older that:

- is attributable to a mental or physical impairment or combination of mental and physical impairments
- is manifested before the individual attains age 22
- is likely to continue indefinitely
- results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency (Tarjan, 2011).

In California, the Lanterman Disabilities Services Act further states that the disability must be due to one of the following conditions:

- Mental retardation
- Cerebral Palsy
- Epilepsy
- Autism
- A disabling condition closely related to mental retardation or requiring similar treatment (W&I Code Sec 4512(a)).

The Centers for Disease Control and Prevention states that it is currently preferable to use the term "intellectual disability" instead of "mental retardation" and defined "intellectual disability

as having an IQ of 70 or less on the most recent psychometric test performed by a psychometrist."(CDC, 2011). Thus, an intellectual disability is a specific type of developmental disability and here the term developmental disability will be used to represent both developmental and intellectual disabilities.

It is important to note that developmental disability is not the same as mental illness. While developmental disabilities are permanent conditions present at birth or developed during one's developmental period (typically before 18 or 22), mental illness can occur at any age and can also be cured through therapy or medication. Furthermore, while developmental disability is often characterized by low IQ (an IQ of 70 or below constitutes an intellectual disability), mental illness has nothing to do with IQ and affects many with very high IQ's. Examples of mental illness include schizophrenia, bipolar disorder, anxiety disorder, and clinical depression, and while the developmentally disabled may be affected by mental illness in addition to disability, they are distinct and this paper will focus on developmental disability and not mental illness.

(1) The Developmentally Disabled in Prison

While it is difficult to determine a precise prevalence rate of developmental disability in prisons, the U.S. Department of Justice Bureau of Justice Statistics reports that two in every ten prison inmates and three in every ten jail inmates is affected by a cognitive disability (Bronson & Maruschak, 2015). Also, before focusing on how the developmentally disabled are specifically disadvantaged in regards to downsizing mechanisms, it is important to note how the developmentally disabled are disadvantaged in regards to the criminal justice system in general. For one, individuals with developmental disabilities are more likely to enter the criminal justice system in the first place because they are less criminally sophisticated than their typical counterparts. In the words of one police officer, they are the "last to leave the scene, the first to get arrested, and the first to confess." (Petersilia, 1997). Once in prison, the developmentally disabled are often "cruelly abused or victimized." (Petersilia, 1997). While this will be discussed further in relation to earning good-time credits, it is important to remember that barriers to leaving prison are but one aspect of a broader narrative of systematic disadvantage.

(2) Sentencing Credits and the Developmentally Disabled

Governor Brown and officials in other states believe that increasing the use of sentencing credits is "thoughtful" and "well-balanced." (Myers, 2016). They believe that such liberalized policies facilitate the identification and release of the inmates who are most motivated, best behaved, and consequently most suitable for release. This belief rests on a tenuous assumption, however. It assumes that successful programming really does identify those who are best suited for release without addressing the fact that programming can be highly underinclusive. For example, a number of California's 35 prisons offer little to no rehabilitation programming while some offer a wealth of programming opportunities. Under the current system, inmates who would otherwise

be extremely successful in rehabilitation programs may be left behind simply because their geographic location prevents them from accessing such opportunities.

Another group of people who will be left behind by sentencing credit systems is those who do not have the ability to successfully complete the programs and courses that garner credits. Inmates affected by developmental disabilities are one such group and are systematically disadvantaged by a system that equates suitability for release with the completion of quasi-academic programs. For instance, it will be nearly impossible for an intellectually disabled inmate to complete reading and writing intensive educational courses, and it will be uniquely difficult for an autistic inmate to successfully participate in group therapy programs seeing that autism is by definition a social disorder (ASHA, 2016). The disconnect in a system that relies so heavily on programming and specific achievements to indicate suitability for release is that it assumes that failure to program or achieve successfully is due to lack of motivation when it can, instead, be solely due to lack of basic ability. Poor performance may indicate apathy for a majority of inmates, but all that it conclusively indicates for the developmentally disabled is congenital cognitive impairment beyond their control.

Beyond being systematically disadvantaged for earned-time credits through proactive participation in programming, the developmentally disabled are also disadvantaged when it comes to earning passive good-time credits for good behavior. One reason for this is the fact that developmentally disabled inmates are exceptionally vulnerable to victimization. Developmentally disabled inmates are disproportionately taken advantage of sexually and are often easy targets for theft or simply false accusations. Furthermore, due to their cognitive deficiencies, developmentally disabled inmates are more likely to respond physically than verbally when they feel threatened which often leads to sanctions by prison staff and even reclassification to higher security levels. The cumulative effect of this is that a developmentally disabled inmate often has a "poor prison record with little program participation, many infractions and violations, and a very weak postdischarge plan." (Petersilia, 1997).

(3) Parole Board Hearings and the Developmentally Disabled

Coming before the parole board is a stressful experience. In addition to parole board commissioners, it is common for the district attorney from the prosecuting county and even victims of the crime to be present at the hearing (CDCR, 2016). Hearings often last for several hours. In California, the minimum deferral that can be granted is three years and can extend up to fifteen years (CDCR, 2016). Beyond logistical factors, the highly discretionary nature of the hearing exerts further pressure. While the stated requirements differ slightly by state, an inmate must ultimately prove that he or she does not pose an unreasonable risk of danger to society. Although determining whether an inmate presents an unreasonable risk of danger seems general, parole boards often look to specific metrics like demonstrated insight into the crime and evidence of genuine change. Again, parole boards often have extremely specific definitions of "insight"

and are not looking for a mere general understanding of what happened, but rather for agreement with the court's interpretation of the crime, understanding of why the crime occurred and received the sentence that it did, demonstration of remorse, and full acceptance of responsibility.

The standard for demonstrating that genuine change has occurred is often just as specific and rigorous. In addition to having a clean behavioral record in prison, convicts must demonstrate that they have been actively trying to improve themselves through continuing their education, earning good time credits by participating in prison programs, and going to therapy. This is all to say that a typical parole board hearing requires an inmate to ascertain nuanced expectations, engage in rigorous self-analysis, interpret varied circumstances, and articulate persuasive reasoning all under extreme pressure. This is a formidable task for anyone, but it is exceptionally difficult for someone with a developmental disability who, by definition, has difficulty receiving, processing, and expressing information. Forcing a developmentally disabled inmate through a traditional parole board hearing without altering the method or means of evaluation is setting him or her up for failure.

(4) Actuarial Risk Assessment Tools and the Developmentally Disabled

Aside from the general issues with actuarial risk assessment questions discussed, inmates with developmental disabilities are uniquely disadvantaged. One key reason for this is that while a particular answer may signify one thing for a typical individual the exact same answer can signify something completely different for an individual with a developmental disability. One basic example is question 77 of the COMPAS risk assessment tool: "What were your usual grades in high school?" For most people, checking "D" and admitting to subpar grades indicates some level of apathy, irresponsibility, or even a troubled learning environment that correlates to higher recidivism rates. For an individual with a developmental disability, however, receiving "D" level grades could simply be the result of cognitive incapacity. It could have easily been the case that the disabled individual was trying earnestly and was even in a "good" school environment but simply did not have the IQ required to succeed without proper accommodation.

Beyond the fact that identical responses can signify different realities for individuals with developmental disabilities, the developmentally disabled are furthermore systematically disadvantaged because of bias embedded in the questions posed. For example, in the COMPAS risk assessment tool, nine of the questions focus on the nature of one's friendships and social interactions. While even if one were to assume that a developmentally disabled individual's responses do not indicate anything different than those of a typical individual, the nature of the questions systematically disadvantage whole groups of individuals affected by particular kinds of developmental disabilities. For instance, question 110 directs the individual to mark an answer on the continuum of "strongly disagree" to "strongly agree" in response to the statement " No one really knew me very well." (COMPAS, 2004). Now it is likely that individuals with autism and cerebral palsy, for instance, will mark "agree" or "strongly agree." This could be explained

by the fact that autism is a social communication disorder that distorts the way individuals process social information and thus develop relationships and by the fact that cerebral palsy is a neurological disorder that can cause individuals to become nonverbal and have difficulty with communication and feeling known (Lyford, 2012). Thus, even if one were to assume that not feeling known is a reliable dynamic factor that indicates higher-risk for recidivism, it seems problematic that individuals with particular developmental disabilities are fated, arguably by nature, to fail such evaluations on account of congenital neurological differences.

In addition to implicit bias, there seems to be an issue of double counting. For instance, questions 18, 19, and 20 on the LSR-I require the evaluator to rate on a scale of 0-3 the individual's "participation/performance," "peer interactions," and "authority interactions." (Andrews & Bonta, 1995). If the individual in question is an inmate with a developmental disability seeking parole, it is easy to see how he can be doubly punished for the same behavior resulting from his disability. As discussed, it is likely that a developmentally disabled inmate will have difficulty participating in and completing rehabilitative programs and will also have strained interactions with peer inmates and authority figures on account of being victimized and retaliating physically. Because of this, the disabled inmate will likely not receive any sentencing credits and may even be classified as a higher security level. It seems problematic, however, for this systematic disadvantage to be re-counted in the form of a risk assessment tool used in parole decision-making. Coding failure to program and strained relationships with prison guards and other prisoners as predictors of recidivism adds yet another hurdle for developmentally disabled inmates to overcome and makes it significantly more likely that they will be left behind.

IV. The Solution: Accommodations

The need for accommodation is clear. What is less clear is what specific accommodations are effective in removing the barriers that systematically disadvantage the developmentally disabled when it comes to earning credits, coming before the parole board for hearings, and being evaluated through actuarial risk assessment tools. While states have taken a variety of approaches to developing accommodations, the focus here will be on the efforts of three specific states: Texas, California, and Ohio.

A. Medically Recommended Intensive Supervision: Texas' Approach

A number of states have established medical parole systems where inmates are released on parole because terminal illness, age, physically disability, or cognitively debilitating conditions render them not dangerous to society. Rather than carving out accommodations within the traditional parole board hearing process, medical parole constitutes its own alternative system where what is being determined is not suitability for reintegration into society but rather the extent to which one's medical condition renders one harmless if released into a medical facility on special medical supervision. State policies differ on whether individuals affected by developmental

disabilities are eligible for medical parole. Many states limit medical parole to those who are physically incapacitated. In Florida, for instance, the only inmates who can be considered for medical parole are those who are "permanently and irreversibly physically incapacitated to the extent that the inmate does not constitute a danger to herself or himself or others." (Statute 947.149(a)). Other states like Georgia limit their medical parole system to not only the physically incapacitated but also to merely granting "reprieves." This means that if the inmate somehow recovers from a physical illness while on medical reprieve, he or she must return to prison to complete his or her sentence. That said, four of the ten states with the highest prison populations—Texas, New York, Ohio, and Michigan—include some form of developmental disability in their definition of conditions that qualify for medical parole.

As the state with the largest inmate population in America—166,043 individuals in 2014—Texas is a prime example of a system that has attempted to accommodate the developmentally disabled through including them in an alternative medical parole system. As of 2013, Section 508.146 of the Texas Government Code stated that an inmate may be released on Texas' version of medical parole called Medically Recommended Intensive Supervision (MRIS) if the Texas Council on Offenders with Medical or Mental Impairments (TCOOMMI), in cooperation with the Correctional Managed Health Care Committee, identifies the inmate as being "mentally retarded." Section 591.003 of the Texas Health and Safety Code defines "mentally retarded" as "significantly sub-average intellectual functioning that is concurrent with deficits in adaptive behavior and originating in the developmental period (until the age of 18)." (Ethridge & White, 2015). While ultimately underinclusive, this definition of mental retardation includes many developmentally disabled individuals and, in theory, represents an important accommodation for the developmentally disabled community. In theory, deeming many developmentally disabled inmates eligible for MRIS is a significant step in counteracting systematic disadvantage as the entire rationale behind MRIS in Texas was acknowledging that traditional prisons were not the right place for special needs offenders and that "these offenders require specialized medical and health care as well as special housing and programmatic needs." (Sharp, 1991).

While promising in theory, the numbers tell a strikingly different story. For example, of the 1,817 inmates who were referred to TCOOMMI for MRIS in 2012, only 34 were actually released (Ethridge & White, 2015). In analyzing this 1.87% MRIS release rate, Philip Ethridge and Thomas White break down the process into five steps, each of which accounts for a portion of special needs inmates being denied MRIS. First, there must be a referral to TCOOMMI stating that a certain inmate meets the requirements for MRIS. This referral is often made by a health provider, attorney, or family member, but could also be made by the offender himself (though such referrals are rarely, if ever, approved). Second, TCOOMMI determines whether the inmates meet the statutory requirements for MRIS. For example, certain sex offenders and perpetrators of aggravated offenses are not eligible for MRIS because the nature of their crime or the belief that regardless of their incapacitation they pose an undue risk to society. Third, those who meet the legal criteria are then evaluated by the medical staff at the Texas Department of

Criminal Justice (TDCJ) who determine whether or not the offenders meet the medical criteria. The medical criteria consist of a number of factors including whether the current medical condition is severe enough and whether there is a high chance of future recovery. Fourth, those who are still left—typically less than one third of those who were initially referred—are presented to the Texas Board of Pardons and Parole MRIS Parole Panel. Fifth, the Board engages in a two-step inquiry to determine whether an inmate is eligible for MRIS parole. The first question is whether the offender constitutes a threat to public safety; the second is whether the offender is holistically suitable for MRIS parole, all things considered. While the vast majority of those presented to the Board are denied on the basis of posing a public safety threat, not even all of those who initially make it through the two-step inquiry are ultimately released as many die pending release while some even have their votes for release withdrawn.

All this to say, while MRIS theoretically seems like an effective way to downsize Texas' massive prison system while providing significant accommodation to developmentally disabled offenders, this is simply not the case in practice. Ultimately, MRIS is a circuitous route to the same analysis that governs typical parole board decisions. While supporters may contend that MRIS allows for these decisions to be made in light of more medical information, it does not seem that this information meaningfully influences the decision making process or resultant outcomes. Despite 2011 and 2013 efforts in the Texas legislature to restructure MRIS to release more special needs prisoners and thus alleviate the state budget, MRIS remained unchanged. The fact is that while the MRIS alternative system has the potential to counteract the systematic disadvantage developmentally disabled inmates face in regards to parole, that potential seems almost completely unrealized.

B. Clark v. State of California: California's Approach

California's approach to accommodations for the developmentally disabled has been primarily litigation driven. Through *Clark v. State of California*, attorneys from the Prison Law Office filed suit for a class of developmentally disabled inmates against the California Department of Corrections and Rehabilitation (CDCR) and Board of Parole Hearing on the grounds that their rights had been violated under the 1990 Americans with Disabilities Act. Specifically, the plaintiff class claimed that they were being deprived of due process and equal protection under the Fourteenth Amendment and that their living conditions in prison constituted cruel and unusual punishment under the Eighth Amendment. In 1998, the plaintiff class and the State of California settled and entered an agreement known as the Clark Remedial Plan (CRP). The CRP stipulated that the CDCR would develop and implement a six-point plan to:

1. Screen all newly arrived inmates for developmental disabilities.
2. Train staff to recognize, communicate with, and interact with inmates/parolees with developmental disabilities.
3. Provide equal access to all inmate/parolee programs, activities and services.
4. Ensure appropriate classification and safe housing.

5. Provide staff assistance with disciplinary, classification, and other processes as needed.
6. Ensure adequate medical care. (Salz, 2008).

In order to achieve these broader goals of the CRP, the CDCR instituted procedures to guarantee the following for developmentally disabled inmates: 1) proper identification, 2) reading and writing assistance, 3) meaningful assistance in disciplinary, administrative, and classification proceedings, 4) meaningful access to prison grievance procedures, 5) assistance with self-care and daily living activities, 6) protection from abuse, and 7) adequate notice of parole conditions. These procedural reforms sought to counteract the ways in which the previously discussed downsizing mechanisms disadvantaged the developmentally disabled in several ways. For one, they institute policies that, in theory, make it easier for the developmentally disabled to receive sentencing credits. For instance, a developmentally disabled inmate who is kept at a reception center longer than sixty days due to disability screening and classification procedures automatically receive sentencing credits (CDCR, 2002). More significantly, educational accommodations make earned-time credits theoretically more accessible for the developmentally disabled. Such accommodations include requiring at least one instructor at each Developmental Disability Program facility to have a Special Education Credential. Also, all developmentally disabled inmates are supposed to receive an Individually Tailored Education Plan so as not to unfairly withhold earned-time credits from developmentally disabled inmates who simply cannot track with a typical education plan (CDCR, 2002). Similarly, in regards to vocational programs, the CRP suggests that developmentally disabled inmates pursue programs like janitorial services, landscape gardening, and vehicular repair as a way of using whatever "remedial basic skills" they do possess to earn sentencing credits and prepare for parole life (CDCR, 2002).

Regarding accommodations during various proceedings like parole board hearings, the CRP guarantees that developmentally disabled inmates are assigned staff assistants to ensure comprehension and due process during the proceedings. The staff assistants are required to help developmentally disabled prisoners in several ways. First they must help them prepare for hearings by informing them of their rights while not providing legal counsel or influencing the prisoners' decisions. At the hearings, they must assist the prisoners by being present, representing their positions, and ensuring hearing officials know of the prisoners' disabilities and need for adaptive support. Following the hearings, the staff assistants must help the prisoners understand what decisions were reached. The CRP goes so far as to specify that staff assistants must ask affirmative questions to ensure comprehension and should have disabled prisoners repeat information back in their own words. This accommodation ideally mitigates the disadvantage developmentally disabled prisoners face before the parole board as they have assistance in articulating their position and are supposed to be evaluated in light of their special needs.

While the CRP set into motion these accommodations and many others, their efficacy and the extent to which they have been implemented are questionable. In fact, in 2010, the State of California brought a motion to terminate prospective relief claiming that because of their

compliance with the CRP there were no current violations of the plaintiff class members' rights under federal law. After extensive research conducted by two court-appointed experts, however, the Court denied the State's motion and concluded that there was not sufficient compliance with the CRP. Furthermore, it concluded that the CRP itself was insufficient and that further remedial orders were required to ensure compliance with the Americans with Disabilities Act.

In a detailed and lengthy opinion, Judge Charles Breyer used the experts' findings to explain how the State continued to violate the rights of developmentally disabled prisoners. From failure to adequately identify and diagnose developmental disability to a multitude of staffing issues from inadequate training to staff members abusing inmates, Breyer demonstrates that the State not only fails to comply with the terms of the CRP but is actually incapable of complying without court intervention. Regarding downsizing mechanisms specifically, Breyer goes into detail explaining how equal access to sentencing credits and meaningful accommodations at hearings have not been realized. Regarding equal access to sentencing credits, even the most basic accommodations like assistance with reading and writing have been denied. While this clearly hinders participation in programs like educational courses, it more fundamentally interferes with developmentally disabled inmates' ability to earn good time credits through simply abiding by the rules and avoiding physical conflict. The opinion presents numerous examples of developmentally disabled prisoners requesting assistance with reading and writing tasks like filling out a sick call form, for instance, and being ignored or denied. Often, these prisoners are then forced to pay fellow inmates to help them which, unsurprisingly, leaves them vulnerable to abuse. Furthermore, the opinion concludes that the State fails to provide most basically "effective communication of the rules with which developmentally disabled prisoners are required to comply" resulting in developmentally disabled prisoners disproportionately having their sentences extended rather than commuted through credits (*Clark v. California*, 2010). Regarding hearings, Breyer's opinion reports that prisons "repeatedly default" on their responsibility to provide staff assistants to developmentally disabled inmates (*Clark v. California*, 2010). Instead of proactively providing each developmentally disabled inmate a staff assistant, inmates who needed staff assistance and knew their rights were forced to file grievance complaints in order to try and obtain the support that they needed. The opinion reports that at one prison the ADA Coordinator did not even know that the CRP required developmentally disabled prisoners be assigned staff assistants before going through a hearing (*Clark v. California*, 2010).

While the CRP represents a monumental step towards accommodations for developmentally disabled inmates in the California prison system, there is a marked disconnect between paper and practice. In many ways, the CRP stands as a shining example of policy reform that recognizes failure to accommodate as a violation of federal law and constitutional rights. That said, however, the fact that the State's motion to terminate relief was so vehemently denied and ultimately backfired in the form of further remedial orders underscores the fact that policy

change is not enough. Accommodations must be actualized and not merely articulated in order to effectively mitigate the systematic disadvantage developmentally disabled prisoners face.

C. Parole Handbooks: Ohio's Approach

In addition to medical parole and litigation driven settlement, some states have preemptively pursued accommodation through heightened transparency. Ohio, for instance, has published a comprehensive "Parole Board Handbook" that methodically sets out the parole hearing process. The handbook specifies which inmates are subject to the discretionary releasing authority of the parole board based on the type of crime they committed and when they were convicted (ODRC, 2015). The handbook also delineates the eligibility requirements and presents eighteen of the factors considered by the board in determining suitability (ODRC, 2015). The handbook even details what different types of hearings are possible, the procedures for each of those hearings, potential outcomes, and ways that various stakeholders can participate in the hearing process.

Presenting all this information so transparently is a significant accommodation for many as it allows inmates to more effectively prepare for the hearing and think through how they are going to present themselves and articulate their experiences in light of the board's expectations. Inmates with developmental disabilities, however, are once again left out and do not benefit from this heightened transparency in the same way their typical counterparts do. For the same reasons developmentally disabled inmates have trouble articulating their understanding and remorse during the hearing, they will struggle to make meaningful sense of the contents of the handbook. In fact, those who are most likely to benefit from the handbook are those who are most able to articulate their thoughts during the hearing in the first place. This is not to undermine the benefit of having a transparent handbook, it is only to underscore how, yet again, the developmentally disabled are excluded and left behind on account of their cognitive deficiencies.

V. The Charge: Legal Obligations

While a strong case can be made for accommodating the developmentally disabled on moral grounds, the justification for accommodations does not end with the fact that it is the humane thing to do. Instead, states are under a legal obligation to provide reasonable accommodations pursuant to the 1990 Americans with Disabilities Act. As illustrated by *Clark v. State of California*, states that do not provide sufficient accommodations on their own are liable to costly litigation where courts intervene until they determine constitutional and ADA rights are no longer being violated.

A. The Americans with Disabilities Act

On July 26, 1990, President George H.W. Bush signed into law the Americans with Disabilities Act (ADA), one of America's most comprehensive pieces of civil rights legislation. Like the Civil Rights Act of 1964 which outlaws discrimination on the basis of race, religion, sex, or national origin, the ADA guarantees that individuals affected by physical, intellectual, and

developmental disabilities are not discriminated against and have the opportunity to "participate in the mainstream of American life." (U.S. DOJ). The ADA is divided into three sections. Title I prohibits employment discrimination, Title II prohibits discrimination in the context of state and local government services, programs, and activities, and Title III prohibits discrimination in places of public accommodation.

Seeing that prisons and jails are state government services, Title II is of particular interest in discerning what legal obligations exist to accommodate developmentally disabled inmates. Under Title II of the ADA, "no 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 such entity." (§35.130(a)). This provision was based on § 504 of the 1973 Rehabilitation Act which guarantees non-discrimination to disabled individuals "under any program or activity receiving Federal financial assistance," (29 U.S.C. § 794(a)), and thus courts have applied the same analysis to Title II of the ADA as they have to § 504 of the 1973 Rehabilitation Act, (*Zukle v. Regents of Univ. of Cal.*, 1999). While Title II specifically addresses a wide variety of issues from the accessibility of buildings and sidewalks to the use of wheelchairs and service animals to the provision of interpreting services and signage, it is the more general requirements that demonstrate the legal obligations prisons face in accommodating the developmentally disabled. For example, § 35.130(b)(3)(i) of Title II states that a public entity like a prison may not "utilize criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability." (Americans with Disabilities Act, 2011). Similarly, § 35.130(b)(7) of Title II requires that a public entity like a prison make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." (Americans with Disabilities Act, 2011).

The application of these requirements to the downsizing mechanisms previously discussed is clear. For example, not modifying the criteria by which the developmentally disabled are evaluated at parole board hearings almost always has a discriminatory effect in violation of the ADA. In California, for instance, parole board members must determine that inmates demonstrate a particular form of insight into the crime and remorse for committing it. There is no modification of these criteria when applied to the developmentally disabled, and thus parole board members often expect a type of articulation or pronouncement that a developmentally disabled inmate is simply incapable of giving. Keith Wattley, Executive Director of UnCommon Law, a non-profit law firm helping long-term prisoners attain release, recounted one developmentally disabled inmate who had come before the parole board multiple times but had simply plateaued in his intellectual ability to understand his crime. Time after time he would come before the parole board but despite his improvements and excellent record, the board repeatedly held that the inmate had simply not demonstrated the kind of insight they were required to find before granting parole. This matter eventually went to court and the court issued an order that the board grant this inmate parole. Still, even armed with the court order, the board was hesitant to grant parole

because it felt bound by the requirement to find a particular demonstration of insight. Only after dialogue with the inmate's legal counsel did the board members take an alternative approach and ask, "So what I'm hearing you say is you have this particular insight into your crime, is that right?" to which the inmate was able to respond in the affirmative (Wattley, 2016). Criteria that require finding a rigidly defined type of insight seem in direct violation of Title II of the ADA. Instead, parole boards should be ready to make "reasonable modifications" that account for the cognitive limitations of the developmentally disabled like broadening the criteria for finding insight or instituting methodological accommodations like asking directed questions. In regards to methods of administration, the discussion of the *Clark* court's continued remedial orders demonstrates how the methodological accommodations of California parole board hearings are still in violation of Article II of the ADA.

VI. Conclusion

It is important to maintain a balanced view of where the developmentally disabled stand in the context of the national prison downsizing movement. Without accommodations, the developmentally disabled are grossly and systematically disadvantaged by the most frequently used downsizing mechanisms. Sentencing credits, parole board hearings, and actuarial risk assessment tools all discriminate against the developmentally disabled in the way they overlook fundamental cognitive differences and wrongly assume that the meaning attached to a typical inmate's behavior can be automatically applied to the developmentally disabled inmates as well. With accommodations, however, the picture is not quite as bleak. Accommodations like heightened transparency, medical parole, and the Clark Remedial Plan have to some extent succeeded in mitigating the disadvantage facing the developmentally disabled. Progress has been made, and it is important to recognize that. What is also important to recognize, however, is how much progress still needs to be made. While the accommodations in place today represent good starts, they remain far from the finish line. Whether there remain facial issues like the fact that a written handbook is inaccessible to most developmentally disabled people or application issues like the fact that many staff members in California prisons routinely fail to implement the requirements of the Clark Remedial Plan, it is clear that the journey to meaningful accommodation has only begun. If current trends continue, America will see in the coming years a record number of prisoners released on parole. Whether the developmentally disabled are counted in that number or are left behind depends on the realization of accommodations that are both effective and meaningful.

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