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# A Call to Abolish Determinate-Plus Sentencing in Washington

Rachel Stenberg
*University of Washington School of Law*

# A CALL TO ABOLISH DETERMINATE-PLUS SENTENCING IN WASHINGTON

Rachel Stenberg*

*Abstract:* For certain incarcerated individuals who commit sex offenses, Washington State's determinate-plus sentencing structure requires a showing of rehabilitation before release. This highly subjective "releasability" determination occurs after an individual has already served a standard sentence. A review of recent releasability determinations reveals sentences are often extended on arbitrary and inconsistent grounds—especially for individuals who face systemic challenges in prison due to their identity or condition. This Comment shows that the criteria to determine whether individuals are releasable is an incomplete picture of their actual experience in the carceral setting, using the distinct example of incarcerated individuals with mental illness. While mental illness and the likelihood of recidivism are not connected, mental illness negatively impacts individual release decisions, directly and indirectly. While a legal appeal exists for these determinations, that legal remedy is insufficient to provide true relief. This Comment argues that the state's determinate-plus sentencing structure should be abolished to end the cycle of vulnerable incarcerated individuals receiving disparate and biased denials of release.

## INTRODUCTION

D.O. is a seventy-year-old incarcerated man observed to have mild cognitive impairment.[1] His sentence required him to participate in treatment while incarcerated, but the treatment provider stated that he had a hard time succeeding in treatment, likely because of his cognitive impairment.[2] A judge originally sentenced D.O. to a minimum of 130 months; he had been periodically assessed for potential release but repeatedly denied.[3] By the time of the most recent assessment, he had served 452 months in prison along with 100 days' jail time.[4] D.O. was found to be ineligible for release once again, in part due to his lack of

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1. Osborne, No. 267767, at *2 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 17, 2020) (Decision and Reasons).

2. *Id.*

3. *Id.* at *3.

4. *Id.*

success in treatment.[5] His sentence was extended another thirty-six months, at which point he would be assessed again.[6] D.O. chose not to attend the most recent hearing on his potential releasability.[7] He stated that he did not attend because he was done fighting, and he had resigned himself to die in prison.[8]

Prison is a convenient black box. The legal community spends an extraordinary amount of time talking about how to keep people out of prison, how to put people in, or even what to do with a person once they're released. In contrast, it spends very little time interrogating the carceral experience when a person is inside.[9] Whether or not the collective disinterest is intentional, the state keeps prison operations quiet and confidential, exacerbating the black box mentality. People in D.O.'s position remain out of sight and out of mind. Fortunately, the prison abolition movement's recent increase in popularity has created an opening for the legal community to reckon with this mentality. Community members, activists, and incarcerated individuals have pushed the legal community to think more deeply about why we imprison people:[10] what purposes does the prison system serve? Does it really make us all safer? What are the costs?

One of the prevailing justifications for incarceration is that it is "rehabilitative."[11] Rehabilitation, when compared to other justifications—deterrence, incapacitation, and retribution—is what self-identified Democrats often lean on when asked to justify the carceral system.[12] The rehabilitation narrative says that, once a person commits a crime, the state must give that individual appropriate access to skills and values that will

5. *Id.* at *2.

6. *Id.*

7. *Id.*

8. *Id.* at *4.

9. *See* Lucy Lang, *The Punishment Bureaucracy Has Nothing to Do with Justice*, SLATE (Nov. 18, 2019, 3:24 PM), https://slate.com/news-and-politics/2019/11/usual-cruelty-criminal-justice-book-review.html [https://perma.cc/X845-PKYV] ("As a former prosecutor myself, I relate to criminal lawyers—prosecutors, in particular—who may prefer not to engage with the notion that even the most well-meaning criminal law actors cause harm by virtue of their participation in these systems.").

10. *See generally* Khalil Gibran Muhammad, *A Review of Recent Historical Scholarship on Racial Criminalization and Punitive Policy in the United States*, THE SQUARE ONE PROJECT: ROUNDTABLE (Mar. 2019), https://squareonejustice.org/wp-content/uploads/2020/01/Muhammad-RT-Paper.pdf [https://perma.cc/WWV9-WLD3].

11. *See* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 56–57 (2019).

12. *See* Michael M. O'Hear & Darren Wheelock, *Public Attitudes Toward Punishment, Rehabilitation, and Reform: Lessons from the Marquette Law School Poll*, 29 FED. SENT'G REP. 47, 49–50 (2016).

help them become a better version of themselves.[13] If D.O. receives high-quality treatment, we tell ourselves, perhaps he could re-enter society as a changed man. For prison abolitionists, the rehabilitation narrative can be especially counterproductive because it suggests that carceral systems are benevolent instruments of treatment and change rather than places built for punitive control.[14]

The rehabilitation narrative may be straightforward in theory, but in practice, it is messy and complicated. Rehabilitation is not quantitative. It is not obvious. It is nearly impossible to measure or predict,[15] and attempts to do so are subject to any number of biases or emotional influences.[16] It looks different in every person, in every different stage of life. And for some, remorse—a commonly-employed archetype of rehabilitation—is unattainable.[17] In D.O.'s case, his ability to participate in treatment was significantly impaired by his cognitive ability. Conditioning individual release on proof of rehabilitation would likely result in disparate, inconsistent, and arbitrary decisions based as much on nebulous character assessments as on measurable data.[18] As this Comment suggests, it would likely disproportionately disadvantage people with disabilities like D.O.'s. Such inconsistency, especially in decisions that impact something so critical—an individual's freedom—should compel deep concern and

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13. Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1197 (1990) ("If rehabilitation is successful, a criminal learns his lesson—to avoid crime—when his newly acquired skills and values attract him to the straight life.").

14. *See Demythologizing Our Views of Prison: The Myth of Rehabilitation*, *in* INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS, ch. 2 (Mark Morris ed., 1976) (ebook), https://www.prisonpolicy.org/scans/instead_of_prisons/ [https://perma.cc/MXQ3-3XU9] ("[R]ehabilitation succeeds, not in correcting, but in controlling. For the 'rehabilitation' model effectively reinforces the primary purpose of prisons: to control and to punish certain segments of society.").

15. *See* BARKOW, *supra* note 11, at 57 (footnote omitted) ("The rehabilitative programs offered were often lacking. A highly influential study of rehabilitative programs in prisons in 1974 concluded that they did little to lower recidivism rates. In the face of rising crime rates, these shortcomings led to dissatisfaction with this model and with the dominant idea that punishment was to serve rehabilitative purposes.").

16. *See, e.g.*, Brian H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131, 131–32 (2006) (explaining that remorse, one of the key factors referenced in an assessment of potential rehabilitation, "should not be relevant in criminal sentencing because its application is completely subjective. This subjectivity has led to a multitude of different approaches for determining the presence (or absence) of remorse, many of which are illogical and prejudice either the criminal defendant or the prosecution").

17. *See id.* at 136; Rocksheng Zhong, Madelon Baranoski, Neal Feigenson, Larry Davidson, Alec Buchanan & Howard V. Zonana, *So You're Sorry? The Role of Remorse in Criminal Law*, 42 J. AM. ACAD. PSYCHIATRY L. 39, 40 (2014).

18. Ward, *supra* note 16, at 166 ("Courts have ultimately failed to fairly and accurately consider the concept of remorse during criminal sentencing . . . . Often, remorse has been used as a justification for enhancing or reducing a sentence based on the 'gut instincts' of a judge, and nothing more.").

hesitation. Indeed, the rehabilitative model of punishment has been widely criticized as ineffective.[19]

And yet, for some incarcerated individuals in Washington State, this model persists.[20] After serving their sentences, individuals sentenced for sex offenses under Washington's determinate-plus structure are subject to release only if they have been adequately rehabilitated.[21] These releasability determinations are made by a politically-appointed board of individuals, not a court of law.[22] This effectively serves as a second trial for these individuals, where they must prove that they are worthy of release.[23] This is functionally an inversion of a typical criminal trial, where the government would have the burden to prove an individual's freedom should be taken away. Because the board making these determinations operates independently from the criminal legal process, individuals facing that board do not have the same legal rights like access to counsel.[24] Releasability decisions are subject to appellate review,[25] but that review is incredibly limited and largely inaccessible.[26] Individuals seeking release under this sentence structure are subject to a burden—proving their own reformation—not required of any other group of incarcerated individuals, in a process that largely remains hidden from public scrutiny. D.O. is not alone—dozens of determinate-plus sentence cases like his are adjudicated each year.[27]

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19. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 741 (2005) ("By 1983, when the U.S. Senate issued a report accompanying legislation to abolish indeterminate sentencing at the federal level, it could be fairly stated that 'almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.'" (quoting S. REP. No. 98-225, at 38 (1983))).

20. *See generally* Decisions and Reasons (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Apr. 2017–Sept. 2020) (outlining the outcomes of a system of indeterminate sentencing based on rehabilitative potential in Washington State).

21. *Cf.* 13B SETH A. FINE, WASHINGTON PRACTICE SERIES: CRIMINAL LAW § 42:11 (3d ed. 2021) (explaining that, for persons sentenced under the state's determinate-plus system, at the conclusion of their standard term of incarceration an independent board will "determine[] whether the [person] is likely to commit additional sex offenses if released. If it is more likely than not that this will occur, the [person]'s minimum term will be extended).

22. *Id.*; WASH. REV. CODE § 9.95.003(1) (2011).

23. WASH. REV. CODE § 9.95.420(3)(a) (2009); *In re* Dyer, 157 Wash. 2d 358, 365, 139 P.3d 320, 323 (2006) ("The [incarcerated person] bears the burden of establishing [their] parolability. In turn, the ISRB must base its decision on the evidence presented at the hearing.").

24. *See* WASH. STATE DEP'T OF CORR., DOC 320.100, INDETERMINATE SENTENCE REVIEW BOARD § VII (2021) [hereinafter INDETERMINATE SENTENCE REVIEW BOARD].

25. WASH. R. APP. P. 16.3.

26. *See infra* Part III.

27. *See* WASH. STATE DEP'T OF CORR., INDETERMINATE SENTENCE REV. BD., 300-RE006, END OF

Because of the nebulous nature of rehabilitation and the criteria that have been developed in an attempt to "measure" it, rehabilitation (and, subsequently, release) is more attainable for some than for others. One discreet group for whom rehabilitation determinations are particularly subject to nuance and bias are individuals with mental health conditions, or cognitive or behavioral disorders.[28] While releasability determinations are worthy of critique across the board, these individuals and the unique challenges they face during incarceration provide a useful critical lens through which to analyze the determinate-plus sentencing structure more broadly. This Comment presents an analysis of releasability decisions as applied to individuals with mental health conditions. More broadly, it serves as a critique of releasability determinations for *all* individuals subject to them. If the criteria that are used to make releasability decisions can be delegitimized by the application of one critical lens, then they do not deserve to stand at all.

This Comment is an effort to contribute meaningfully to the greater prison abolition conversation in Washington State. On their own, the solutions called for here do not resolve our complicated and entrenched societal reliance on incarceration. They do not resolve the countless issues faced by individuals with mental health conditions who come into contact with incarceration. But I hope that this discussion sheds a small amount of light on the black box. The carceral system's strength is its convolution. The more opportunities we have to face this complicated system, to understand and deconstruct it, and to be critical of it, the closer we get to justice.

To distill this issue to a digestible framework, this Comment focuses on a discreet group of individuals and tracks their journey through the relevant stages of releasability determinations: their carceral experience, their experience when being assessed for potential release, and their experience appealing those determinations. Part I provides a framework to understand Washington's complex determinate-plus sentencing structure. This Part takes a closer look at releasability determinations and shows how the criteria for those decisions conflict with the lived experiences of incarcerated individuals. With that background, Part II turns to the general challenges that individuals with mental illness face during their period of incarceration, specifically in prison settings. These challenges are relevant to the criteria that the Indeterminate Sentence Review Board considers when determining an individual's potential for

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YEAR REPORT 2021 (2021) [hereinafter END OF YEAR REPORT 2021], https://www.doc.wa.gov/docs/publications/reports/300-RE006.pdf [https://perma.cc/6QU3-3J49].

28. *See infra* Part I.

release. Part III applies the discussions from Part I and Part II through a qualitative analysis of releasability determinations made in Washington State over a four-year period. Part III also briefly looks at how appellate courts address these issues. From there, this Comment discusses the insufficiencies of the current system and offers a handful of short- and long-term solutions for consideration.

## I. INDETERMINATE SENTENCING IN WASHINGTON

Part I of this Comment provides an overview of a specific statutory structure in Washington State: determinate-plus sentencing and the Indeterminate Sentence Review Board (ISRB). The ISRB makes determinations about whether certain individuals are fit for release from prison.[29] Some individuals with mental illness or other disabilities inevitably fall within the ISRB's jurisdiction.[30] As this Comment demonstrates in Parts II and III, the policies that govern the ISRB are relevant when discussing the population with mental illness under its jurisdiction.[31] Section I.A outlines what the landscape of sentencing looked like before the ISRB was established and how it came to have jurisdiction over certain populations. Section I.B outlines how the ISRB makes its determinations of who merits release based on "rehabilitation" and what criteria are used. Section I.C outlines what legal remedies are available if an individual disagrees with an ISRB determination on their case.

### *A. The ISRB and its Jurisdiction*

The current indeterminate sentencing structure in Washington State is the result of a decades-long evolution mirroring nationwide criminal law reforms. Prior to 1981, Washington State's sentencing structure mirrored structures across the country.[32] All individuals sentenced to a period of confinement were given a maximum term, usually determined by the sentencing court.[33] Sentencing courts had a large amount of discretion

29. WASH. REV. CODE § 9.95.100 (2001); WASH. REV. CODE § 9.95.420 (2009).

30. *See Frequently Asked Questions (FAQ)*, WASH. STATE DEP'T OF CORR., https://doc.wa.gov/corrections/isrb/faq.htm#isrb-inmates [https://perma.cc/C27B-N8F5] (confirming the ISRB has jurisdiction over all individuals "who committed certain sex offenses on or after September 1, 2001"—mental health status notwithstanding). Even if the ISRB determines that an individual is cognitively or mentally impaired, the ISRB still has jurisdiction over the individual. *Id.*

31. *See infra* Parts II–III.

32. WASHINGTON PRACTICE SERIES, *supra* note 21, § 42:2; *see also* BARKOW, *supra* note 11, at 57 ("By the middle of the 20th century, every state and the federal government followed this [indeterminate sentencing] model.").

33. WASHINGTON PRACTICE SERIES, *supra* note 21, § 42:2.

under this system and could consider individual factors and determine whether to suspend or modify a sentence from its statutory requirement.[34] The minimum term of confinement was set not by the court but by the Board of Prison Terms and Paroles (the Board), and that term could be redetermined at any time.[35] When an individual met their minimum term, they would then become eligible for parole—supervised release to the community.[36] However, the individual faced an extra step: the Board would not release them to parole until it determined the individual had been fully rehabilitated.[37] Once on parole, the individual would still have to abide by certain restrictions of liberty and report to a parole officer.[38]

At that time, the Board had enormous discretion over the release of all individuals.[39] This led to unequal application and vast disparities in sentences.[40] The political nature of parole boards generally meant few incentives existed for those boards to release certain individuals for whom the public held less sympathy.[41] Because of the poor quality of carceral programming, individuals were not effectively rehabilitated, so rehabilitation as a central goal felt unproductive.[42] The Board was largely unsuccessful in determining who had been "rehabilitated" enough to release, and disparate sentences combined with recidivism damaged the public perception of the Board.[43]

In 1981, in response to public pressure surrounding the Board, the Washington State Legislature replaced its system of parole with a "system of determinate sentences."[44] This eliminated the minimum/maximum term system, instead instituting a firm statutory sentence dependent on the

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34. *Id.*

35. *Id.*

36. *See id.*

37. *Id.*

38. *Id. See also* January v. Porter, 75 Wash. 2d 768, 776, 453 P.2d 876 (1969) (noting that a parolee's status was that of a person "serving his time outside the prison walls")

39. WASHINGTON PRACTICE SERIES, *supra* note 21, § 42:2.

40. *Id.*

41. For example, individuals with certain political affiliations. *See* BARKOW, *supra* note 11, at 138; Natasha Lennard, *Why the Backlash to Former Black Panther Herman Bell's Parole Risks Setting a Dangerous Precedent*, INTERCEPT (Mar. 29, 2018, 10:45 A.M.), https://theintercept.com/2018/03/29/herman-bell-black-panther-parole-nypd-new-york/ [https://perma.cc/HDU8-ZDF6].

42. *See* BARKOW, *supra* note 11, at 61.

43. WASHINGTON PRACTICE SERIES, *supra* note 21, § 42:2.

44. *Id.*; *see also* BARKOW, *supra* note 11, at 57 ("Plenty of problems arose from [the previous] individualized approach. Because there was no appellate review of individual decisions or any kind of systematic oversight, this regime hardly amounted to a rational program for addressing crime control or rehabilitation. It produced large disparities based on which judge or probation officer happened to be assigned to a defendant's case.").

crime.[45] This change was an echo of the larger national trend that moved away from prison as a rehabilitative mechanism and toward the new primary goal of incapacitation[46]—removing a person from the community to prevent them from doing additional harm.[47] "Truth-in-sentencing" politics—a tough-on-crime mentality urging straightforward results: do the crime, do the time—hardened the public's expectations that, once convicted, a person should not be able to escape a full sentence.[48] The new system, created under the Sentencing Reform Act (SRA), did away with the Board of Prison Terms and Paroles in an attempt to resolve the public's concerns about both inequity and the release of un-rehabilitated individuals.[49] The Board was replaced by the newly-established ISRB, which at that time only made parole decisions for an incredibly limited group of individuals still entitled to a parole decision because they had been sentenced before the new sentencing structure was implemented.[50] The new ISRB's makeup tracked that of the original Board of Prisons and Paroles:[51] primarily individuals with law enforcement backgrounds, who were appointed to the position.[52]

During this period, Washington State also followed another trend in the national tough-on-crime movement: an effort to establish higher mandatory sentences for certain crimes, including sex crimes.[53] The state slowly increased statutory sentences and two- and three-strike laws for

45. WASHINGTON PRACTICE SERIES, *supra* note 21, § 42:5.

46. *See* BARKOW, *supra* note 11, at 56.

47. *See* Kevin Bennardo, *Incarceration's Incapacitative Shortcomings*, 54 SANTA CLARA L. REV. 1, 2 (2014).

48. *See* BARKOW, *supra* note 11, at 78.

49. WASHINGTON PRACTICE SERIES, *supra* note 21, §§ 42:4–42:5; s*ee also* State v. Thomason, 199 Wash. 2d 780, 793, 512 P.3d 882, 888 (2022) (González, C.J., concurring) ("The Sentencing Reform Act of 1981, ch. 9.94A RCW (SRA), was enacted, at least in part, with the noble goal of constraining discrimination in our criminal justice system.").

50. *Frequently Asked Questions (FAQ)*, *supra* note 30.

51. WASH. REV. CODE § 9.95.009 (2011); WASHINGTON PRACTICE SERIES, *supra* note 21, § 42:5.

52. *Board Members*, WASH. STATE DEP'T OF CORR., https://www.doc.wa.gov/corrections/isrb/board-members.htm [https://perma.cc/NVX9-6FZZ]. This emphasis on law enforcement, rather than social work, can be impactful: "A study that examined the relationship between a parole officer's practice orientation and recidivism found that high-risk offenders who were assigned officers with a law enforcement orientation received more technical violations and had higher rates of recidivism than those assigned to officers with a social work orientation." BARKOW, *supra* note 11, at 79.

53. *See* BARKOW, *supra* note 11, at 42–43 (highlighting that many states implemented higher mandatory sentences); David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71, 98–101 (2001) (providing an in-depth explanation of the increase in sex offense and other sentences in Washington State).

certain crimes.[54] Facing increasing public pressure to deal ever-harsher sentences to sex offenders, in 2001 the state introduced the version of indeterminate sentencing for sex offenders used today, called "determinate-plus."[55] Under this regime, certain sex offenders are sentenced to a statutory maximum term for their crime of conviction, but for many, that maximum is now a life sentence.[56]

To soften the impact of these heavily ratcheted-up sentences for sex crimes, each convicted sex offender also has a potential minimum term based on the standard range sentence for that crime—the sentence they would likely have received before the new life sentence regime was introduced.[57] The system mirrors much of the former parole system. Once the minimum term is reached, the ISRB determines whether an individual is "likely to commit additional sex offenses if released."[58] If an individual is found *unlikely* to commit additional offenses, they are potentially releasable once they serve the minimum term.[59] But, if the ISRB *can* establish that likelihood, the individual's minimum term is extended for up to sixty months. These extensions can continue indefinitely for a person sentenced to life.[60] The practical impact of this structure is that sex offenders now serve sentences that match the standard sentencing range from the pre-SRA era—but are then subject to *additional* time on top of that sentence, subject to the complete discretion of the ISRB.[61] When this change was instituted, many perceived it as a move by the state to "keep 'the most dangerous sex offenders' in prison virtually forever."[62]

Over time, the ISRB's jurisdiction expanded again to include juveniles. Individuals under ISRB jurisdiction now fall into three categories:

- Individuals from the Board of Parole days who committed crime(s) prior to July 1, 1984, and were sentenced to prison (Parole);
- Individuals who committed certain sex offenses on or after September 1, 2001 (Community Custody Board); and

54. WASH. STATE INST. FOR PUB. POL., SEX OFFENDERS IN WASHINGTON STATE: KEY FINDINGS AND TRENDS 13, 18 (2006) [hereinafter KEY FINDINGS AND TRENDS].

55. WASHINGTON PRACTICE SERIES, *supra* note 21, § 42:11.

56. *Id.*; KEY FINDINGS AND TRENDS, *supra* note 54, at 13.

57. WASHINGTON PRACTICE SERIES, *supra* note 21, § 42:11.

58. *Id.*

59. *Id.*

60. *Id.*

61. KEY FINDINGS AND TRENDS, *supra* note 54, at 13.

62. *Washington State Keeps Sex Offenders in Prison, Bypasses Civil Commitment*, PRISON LEGAL NEWS (Aug. 23, 2016), https://www.prisonlegalnews.org/news/2016/aug/23/washington-state-keeps-sex-offenders-prison-bypasses-civil-commitment/ [https://perma.cc/QLA6-VQJE].

- Individuals who committed crimes prior to their 18th birthday and were sentenced as adults (Juvenile Board).[63]

Most individuals fall in the first and second camps,[64] which the ISRB tends to assess in a similar way.[65] ISRB assessment of Juvenile Board individuals diverges slightly.[66] For example, following a 2018 court decision,[67] Juvenile Board determinations function with a statutory "presumption of release."[68] The Supreme Court of Washington extended this presumption to Community Custody cases too,[69] but the ISRB does not necessarily apply that presumption consistently.[70] For the purpose of keeping the legal standard streamlined, the remainder of this Comment is tailored to Parole or Community Custody cases under the ISRB's discretion. This is not to say that Juvenile Board individuals do not face challenges with mental illness. Rather, the statute governing those cases (and the more favorable societal view of juveniles' potential for change) gives the ISRB more latitude to make a favorable decision for release after considering the entirety of an individual's rehabilitation.[71]

The ISRB is comprised of five gubernatorial appointees, two of whom (at the time of writing) have experience working with or within Washington State's Department of Corrections (DOC).[72] Three current board members have experience working in victim's services organizations, and only one member is a practicing lawyer.[73] The ISRB is

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63. *Frequently Asked Questions (FAQ)*, *supra* note 30.

64. *See* END OF YEAR REPORT 2021, *supra* note 27, at 8.

65. *See generally* Decisions and Reasons (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Apr. 2017–Sept. 2020) (making no distinction between .100 individuals and CCB in coding each Decision and Reasons document).

66. WASH. REV. CODE § 9.94A.730 (2015).

67. *In re* Brashear, 6 Wash. App. 2d 279, 430 P.3d 710 (2018).

68. *Id.* at 288, 430 P.3d at 715.

69. *In re* McCarthy, 161 Wash. 2d 234, 241, 164 P.3d 1283, 1286 (2007) ("RCW 9.95.420(3) requires the [ISRB] to release the offender unless it finds the offender likely to commit sex offenses upon release . . . . [It] creates a limited liberty interest by restricting the [ISRB's] discretion and establishing a presumption that offenders will be released to community custody upon the expiration of their minimum sentence.").

70. *See infra* note 288.

71. Juveniles generally enjoy a societal assumption that they have a greater ability to rehabilitate themselves than adults. *See Juvenile vs Adult Justice*, FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/juvvsadult.html [https://perma.cc/Y69V-SZHQ] ("The underlying rationales of the juvenile court system are that youth are developmentally different from adults and that their behavior is malleable.").

72. *Board Members*, *supra* note 52.

73. *Id.* Some scholars have noted the unintended consequences of having a non-legal body making inherently legal determinations on an individual's liberty interests. Because of their political nature, parole boards tend to have complicated motives with respect to findings of parolability (or, in

not statutorily required to include members with experience or expertise in mental health, disability advocacy, or competency in working with disabled populations.[74] Neither RCW 9.95.003, which created the ISRB, nor the subsequent DOC policy governing the ISRB include a requirement that individuals on the ISRB receive information related to the experience of incarcerated individuals who experience mental illness or training in mental health competency.[75] Finally, ISRB members are not explicitly required to have a legal background.[76]

In the 2019 legislative session, a bill was proposed to the legislature that would have radically changed the structure of the ISRB by moving it outside of the DOC and renaming it the "Post-Conviction Review Board."[77] The Post-Conviction Review (PCR) Board would consist of, by law, at least one judge, one behavioral health professional, one representative of a statewide or local organization representing communities of color or racial equity, and one representative for the interests of formerly incarcerated individuals.[78] The PCR Board would consist of nine full-time members, an increase from the current Board's requirement of four.[79] The bill also proposed minimum education and experience requirements for Board member qualification.[80] Indigent individuals submitting petitions for release would have the right to appointed counsel.[81] However, this proposed change was not adopted by the legislature.

### *B. ISRB Criteria Used for Releasability Determinations*

The ISRB has some statutory guidance on what it may consider when determining whether an individual can be released or paroled.[82] In reality, many factors play into the ISRB's determination beyond those spelled out

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Washington, releasability under the ISRB). Populations subject to parole board discretion tend to be particularly vulnerable, having committed crimes that subject them to more intense public scrutiny. Without the traditional controls on decision-making that come with legal processes, parole (and releasability) hearings carry much of the authority of judicial proceedings, but with few of the safeguards. *See generally* BARKOW, *supra* note 11.

74. WASH. REV. CODE § 9.95.003 (2011).

75. *Id.*; INDETERMINATE SENTENCE REVIEW BOARD, *supra* note 24.

76. WASH. REV. CODE § 9.95.003 (2011); INDETERMINATE SENTENCE REVIEW BOARD, *supra* note 24.

77. S. B. REP., S.B. 5819, Reg. Sess. (Wash. 2019).

78. *Id.* at 3.

79. *Id.* at 3–4.

80. *Id.* at 4.

81. *Id.* at 5.

82. WASH. REV. CODE § 9.95.011 (2011); *id.* § 9.95.100 (2001); *id.* § 9.95.420 (2009).

in statute. Section I.B.1 discusses firm criteria used by the ISRB, while section I.B.2 delves into more nuanced considerations that seem to sway the ISRB's determinations. Finally, section I.B.3 covers the ISRB's determination of remorse, a criterium difficult to quantify yet also incredibly impactful in decision-making.

### *1. Statutory Guidelines and ISRB Policy*

When determining an individual's releasability, the ISRB tries to determine whether an individual has proven they deserve to have their liberty reinstated.[83] To do this, the ISRB asks whether a preponderance of the evidence has shown that an individual is likely to re-offend once released.[84] Specifically for Community Custody Board individuals, the Department of Corrections will examine the "sexual dangerousness" of an individual using methods that are "recognized by experts in the prediction of sexual dangerousness."[85] The ISRB then "shall consider the department's recommendations" but need not base a determination solely off that examination and prediction.[86] The ISRB can also consider an individual's refusal to participate in the Department's assessment process against the individual.[87] The explicit statutory requirements for consideration of Parole Board individuals are much more narrow, only requiring that the ISRB release individuals whose "rehabilitation has been complete, and [who are] a fit subject for release."[88] The ISRB's ultimate responsibility is to perform a "discretionary assessment of a multiplicity of imponderables,"[89] but the state legislature requires that the ISRB "give public safety considerations the highest priority" in their determinations.[90] The Washington Administrative Code adds some additional detail to these broad requirements:

> Examples of adequate reasons for a finding of nonparolability include, but are not limited to:
>
> (1) Active refusal to participate in available program or resources designed to assist an [individual] to reduce the risk of reoffense (e.g., anger management, substance abuse treatment).
>
> (2) Serious and repetitive disciplinary infractions during

83. *In re* Dyer, 157 Wash. 2d 358, 365, 139 P.3d 320, 323 (2006).

84. WASH. REV. CODE § 9.95.420(3)(a) (2009).

85. *Id.* § 9.95.420(1)(a) (2009).

86. *Id.* § 9.95.420(2) (2009).

87. *Id.* § 9.95.420(3)(a) (2009).

88. *Id.* § 9.95.100 (2001).

89. *In re* Dyer, 157 Wash. 2d 358, 363, 139 P.3d 320, 322 (2006).

90. WASH. REV. CODE § 9.95.009(3) (2011).

> incarceration.
>
> (3) Evidence of an [individual]'s continuing intent or propensity to engage in illegal activity (e.g., victim harassment, criminal conduct while incarcerated, continued use of illegal substances).
>
> (4) Statements or declarations by the [individual] that he or she intends to re-offend or does not intend to comply with conditions of parole.
>
> (5) Evidence that an [individual] presents a substantial danger to the community if released.[91]

Following these standards, the ISRB (according to materials published by the DOC) currently takes the following criteria into account when making a releasability determination:

- The original recommendation of the sentencing Judge and Prosecutor to the ISRB (if available).
- The length of time an [individual] has served so far.
- *Actuarial Risk Assessment Scores (static, dynamic and protective)*
- *Responsivity to Programming (level and dosage of program)*
- *Institutional and Previous Supervision Behavior*
- *Inmate Change (participation, refusal, progress)*
- *Release Plan*
- Case Specific Information
- Discordant Information
- Victim Input
- Public Safety
- Statutory Direction[92]

The italicized items are the most likely to be directly impacted by an individual's mental illness or cognitive/behavioral disorder, as discussed in Part II.

### *2. The ISRB Hearing*

One non-listed criterium that inevitably affects an ISRB determination is how the hearing itself is conducted and an individual's participation (or lack thereof) in the hearing.[93] When an individual is up for their ISRB

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91. WASH. ADMIN. CODE § 381-60-160 (1998).

92. *Frequently Asked Questions (FAQ)*, *supra* note 30 (emphasis added).

93. *See* Osborne, No. 267767, at *2 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd.

hearing, their case manager is required to be present to speak to the individual's experience and progress, but ISRB policy does not require the individual themself to be there.[94] However, the ISRB has consistently concluded that an individual's failure to show up for a hearing indicates that the individual is not invested in their own release or success.[95] While individuals are usually aware that they risk a negative outcome if they refuse to appear, some are resigned to it after past experiences with the ISRB where they felt they were not heard.[96] Others disagree with the results of certain pre-hearing psychological tests but feel that their appeals to the ISRB go unheard.[97] Still others may attend but exhibit signs of cognitive impairment that damage their prospects with the ISRB.[98]

Access to legal counsel during a hearing is also not a guarantee.[99] The Supreme Court of Washington, en banc, determined in 2007 that Community Custody Board individuals do not automatically have the

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Aug. 17, 2020) (Decision and Reasons) (listing D.O.'s failure to participate in the hearing as a factor in the ISRB's ultimate decision that he is not parolable). From records review so far, an individual's failure to appear before the ISRB is essentially predictive of a negative determination and sentence extension.

94. INDETERMINATE SENTENCE REVIEW BOARD, *supra* note 24, at 3.

95. *See* Ostberg, No. 265243 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Oct. 14, 2019) (Decision and Reasons); Smith, No. 118603 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Feb. 10, 2020) (Decision and Reasons); Osborne, No. 267767 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 17, 2020) (Decision and Reasons).

96. Ostberg, No. 265243, (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Oct. 14, 2019) (Decision and Reasons) (stating the reason he has not attended was because his first ISRB meeting treated him poorly); Osborne, No. 267767, (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 17, 2020) (Decision and Reasons) ("Mr. Osborne informed [his attorney] that he was 'done fighting with the Board' and has resigned himself to die in prison.").

97. Nicholson, No. 126645, at *6 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 13, 2018) (Decision and Reasons) ("Mr. Nicholson stated that he has refused psychological evaluations as the last one he participated in had inaccuracies."). Still others refuse to participate in those tests because they feel the ISRB misinterprets the results. *See* Krueger, No. 627969, at *6 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 14, 2019) (Decision and Reasons) (noting the incarcerated individual "indicated that he saw no reason" to participate in a new evaluation "since, in his view, his evaluations always turn out positive yet he does not get paroled").

98. Groth, No. 911473, at *4 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. May 3, 2021) (Decision and Reasons) ("Mr. Groth presented with a very flat affect. At times he focused on details of his life that were of little relevance."); Richmond, No. 624570, at *6 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Sept. 30, 2019) (Decision and Reasons) ("Mr. Richmond tends to ramble and it is hard to keep him on track with the conversation."). *But see, e.g.*, Gourley, No. 797556, at *5 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. May 18, 2020) (Decision and Reasons) (explaining Mr. Gourley's tearful answer to a question about his index offense was a helpful factor in the ISRB's consideration of his case, exemplifying that excessive emotion can be beneficial if that emotion fits neatly into the ISRB's conception of a remorseful and deferential incarcerated person).

99. INDETERMINATE SENTENCE REVIEW BOARD, *supra* note 24, at 7.

right to counsel during ISRB hearings.[100] Individuals may request a defense attorney at their own expense.[101] Alternatively, individuals may be appointed a DOC contract attorney to defend them "if the [ISRB] determines that a cognitive/mental health issue(s) prohibits the individual from participating in the hearing."[102] However, ISRB policy does not specify how the ISRB makes such a determination.[103] DOC contract attorneys are paid $60 per hour and must show cause if they surpass ten total hours in representing an individual on one case.[104] Those ten hours can include researching a person's entire criminal history—including the present charge—as well as reviewing a Forensic Psychological Evaluation (FPE) (sometimes more than one), requesting and reviewing an individual's entire behavior history while incarcerated or on community supervision, and interviewing the individual and their DOC counselors, in addition to the hearing itself.[105]

### *3. Individual Remorse*

Finally, another unlisted but impactful factor in the ISRB's determination is the individual's expression of remorse and acceptance of guilt for their crime.[106] Individuals who do not accept guilt are not received well by the ISRB, regardless of the individual's offered justification.[107] During the hearing, tearful displays of regret over the

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100. *In re* McCarthy, 161 Wash. 2d 234, 164 P.3d 1283 (2007). Individuals who are incarcerated are only entitled to Fourteenth Amendment Due Process protections if they can establish that they have a liberty interest at stake (because the Fourteenth Amendment only allows for Due Process protections for deprivations of life, liberty, or property). *Id.* at 240, 164 P.3d at 1286. When an incarcerated person has a limited liberty interest as a result of state law, they subsequently are only entitled to limited Due Process protections. *Id.* at 241, 164 P.3d at 1286. Incarcerated persons facing a hearing for possible release on parole are only required to have the "opportunity to be heard." *Id.* at 242, 164 P.3d. at 1287. They are not, however, entitled to counsel because the court does not see parole release determinations as adversarial criminal processes on par with a standard criminal trial. *Id.*

101. INDETERMINATE SENTENCE REVIEW BOARD, *supra* note 24, at 7.

102. *Id.*

103. *Id.*

104. WASH. STATE DEP'T OF CORR., 737 CONTRACT ATTORNEY ATTACHMENT D: COMPENSATION 1.

105. *Id.* at 1–2.

106. *See, e.g.*, Harig, No. 247957, at *2 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Nov. 25, 2019) (Decision and Reasons) (citing the fact that an individual took "full responsibility" for the underlying crime to support his release decision); Gourley, No. 797556, at *5 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. May 18, 2020) (Decision and Reasons) (same).

107. *See, e.g.*, Graham, No. 943021, at *5 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Sept. 19, 2019) (Decision and Reasons) (referring to an individual who did not want to speak with the ISRB regarding his underlying offense, both because he had already spoken about it to the ISRB multiple times before, and because he maintained his innocence).

consequences of past crimes are well-received by the ISRB.[108] Perceptions of remorse can also affect the ISRB's determinations before the hearing starts. For example, acknowledgement of an individual's crime is a prerequisite to entering programs like the Sex Offender Treatment and Assessment Program (SOTAP);[109] refusal to admit guilt in programming can lead to a negative ISRB determination based on program failure.[110]

Remorse in criminal defendants has been widely panned as unpredictive of a person's risk of recidivism.[111] Remorse is not uniformly measurable.[112] At best, it is unevenly and arbitrarily assumed on behalf of some but not others, and that analysis is often subject to implicit bias.[113] Even assuming that remorse is a valuable tool to indicate possible recidivism in neurotypical[114] adults, research suggests that shifting blame, denying circumstances, and refusing to follow authority can all be symptoms of common behavioral disorders in adults.[115] Lack of empathy and remorse are diagnostic traits found in individuals who exhibit antisocial personality disorder,[116] but can also be traits of more common diagnoses like traumatic brain injury (TBI),[117] or even just part of a non-diagnosable personality. Empathetic responses can decrease in

108. *See, e.g.*, Gourley, No. 797556, at *5 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. May 18, 2020) (Decision and Reasons) (including explicit mention of his tearful account of his crime of conviction in front of the ISRB).

109. *See infra* section II.C. This can cause particular problems when, for example, an individual's underlying crime was not charged with sexual motivation, but the individual is told to participate in SOTAP anyway. *See* Ostberg, No. 265243, at *2–3 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Oct. 14, 2019) (Decision and Reasons).

110. *See, e.g.*, Richmond, No. 624570, at *5 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 11, 2021) (Decision and Reasons) (finding an individual's refusal to admit guilt meant that he could not be screened for reentry into SOTAP, which he needed to complete in order to be released).

111. *See* Ward, *supra* note 16; Zhong et al., *supra* note 17.

112. Ward, *supra* note 16.

113. *Id.*

114. "[N]ot affected with a developmental disorder and especially autism spectrum disorder: exhibiting or characteristic of typical neurological development." *Neurotypical*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/neurotypical [https://perma.cc/JSV6-322G].

115. *Antisocial Personality Disorder*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/antisocial-personality-disorder/symptoms-causes/syc-20353928 [https://perma.cc/63P8-QB3P].

116. *Id.*

117. Dawn Neumann, *People with Traumatic Brain Injury, Who Often Lose Empathy, Can Regain It with Treatment*, CONVERSATION (May 24, 2019, 6:44 AM), https://theconversation.com/people-with-traumatic-brain-injury-who-often-lose-empathy-can-regain-it-with-treatment-116982 [https://perma.cc/B8MV-ZR7V].

individuals suffering from post-traumatic stress disorder.[118] Regardless, the ISRB's decisions denote a strong preference for individuals who show remorse, and the Supreme Court of Washington has legitimized the ISRB's consideration of empathy and denial of guilt.[119]

### *C. Remedies to Appeal an ISRB Determination*

If an individual disagrees with an ISRB determination, they have the right under the Washington Rules of Appellate Procedure (RAP) 16.3 to file a Personal Restraint Petition (PRP) to challenge the determination in front of the Court of Appeals.[120] Generally, the PRP in Washington is a form of collateral review.[121] Collateral review allows a defendant to challenge a case after the options for direct appeal (a challenge to the case on its merits) have expired.[122] The federal version of this type of challenge is a habeas petition.[123] In this context, the PRP functions as an appeal of the ISRB's determination because the ISRB does not have its own internal appeal process.[124]

Generally, the PRP offers a remedy if an individual can demonstrate that they were unlawfully restrained.[125] What makes a restraint "unlawful" for purposes of the PRP mirrors the criteria traditionally used in habeas petitions: something was procedurally or legally wrong with the underlying decision, the underlying law or facts have changed, or "the conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington."[126] This last point is what governs the PRP when it is

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118. Gabriela Nietlisbach, Andreas Maercker, Wulf Rössler & Helen Haker, *Are Empathetic Abilities Impaired in Post-Traumatic Stress Disorder?*, 106 PSYCH. REP. 832 (2010).

119. *See In re* Ecklund, 139 Wash. 2d 166, 176, 985 P.2d 342, 348 (1999) (stating that the ISRB was "justified in considering [petitioner's] denial of guilt as a fact bearing on the question of whether he had been rehabilitated" because "the first step toward rehabilitation" is a petitioner's recognition of their own fault).

120. WASH. R. APP. P. 16.3.

121. 3 ELIZABETH A. TURNER, WASHINGTON PRACTICE SERIES: RULES PRACTICE RAP § 16.3 (8th ed.).

122. 13 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE SERIES: CRIMINAL PRACTICE & PROCEDURE § 5001 (3d ed. 2021). In collateral review, like a habeas petition or PRP, the individual is not appealing on the facts of the underlying case. *Id.* Rather, they are appealing based on new information, a change in the law that would make their current conviction invalid, the unconstitutionality of the incriminating statute, or other reasons outside the scope of the original proceeding. *Id.* § 5002.

123. *Id.* § 5001.

124. INDETERMINATE SENTENCE REVIEW BOARD, *supra* note 24.

125. WASH. R. APP. P. 16.4.

126. WASH. R. APP. P. 16.4(c).

submitted as an appeal of an ISRB determination.

To succeed with a PRP, the individual "must show [they were] actually and substantially prejudiced by a violation of constitutional error or that nonconstitutional [sic] error occurred constituting a fundamental defect that inherently resulted in a complete miscarriage of justice."[127] The burden of establishing that rests on the incarcerated individual.[128] When the court adjudicates a PRP in this context, the standard of review for ISRB decisions is abuse of discretion—a high bar to overcome.[129] In the pivotal case, *In re Dyer*,[130] one petitioner (Mr. Dyer) was able to prove to the Washington State Supreme Court that the ISRB had abused its discretion by "disregard[ing] the evidence presented and support[ing] its decision with speculation and conjecture."[131] In that case, the ISRB ignored Mr. Dyer's positive actuarial assessments[132] and lack of disciplinary issues and focused heavily on his crime of conviction.[133] But, such findings are rare, and Mr. Dyer's success was later walked back when the ISRB issued a re-written decision which backed up its previous "speculation and conjecture" with new facts.[134] The Court has clarified time and again that its role is not to act as a "super" ISRB, but rather, it only looks for whether the ISRB "fails to follow its own procedural rules for parolability [sic] hearings or acts without consideration or in disregard of the facts."[135] Considering this ISRB criteria in releasability determinations, the next section examines our sample group more closely to develop a lens through which to view indeterminate sentencing.

## II. MENTAL AND BEHAVIORAL HEALTH IN THE CARCERAL SETTING

Ample scholarship in recent decades has confirmed what advocates

127. *In re* Theders, 130 Wash. App. 422, 429, 123 P.3d 489, 493 (2005).

128. WASHINGTON PRACTICE SERIES, *supra* note 122, § 5001.

129. *In re* Dyer, 157 Wash. 2d 358, 363, 139 P.3d 320 (2006).

130. 157 Wash. 2d 358, 139 P.3d 320 (2006).

131. *Id.* at 369, 139 P.3d at 325.

132. Actuarial assessment is a type of statistical analysis that assesses the risk of future negative behaviors. For a more extensive definition, see *infra* section II.A.1.

133. *In re* Dyer, 157 Wash. 2d at 364–65, 139 P.3d at 323.

134. *In re* Pers. Restraint of Dyer, 164 Wash. 2d 274, 280, 189 P.3d 759, 762 (2008). In fact, although Mr. Dyer was originally successful in getting the court to rule the ISRB had abused its discretion, on remand, the ISRB again made a negative determination. *Id.* at 292, 189 P.3d at 768. When Mr. Dyer challenged this second determination, the court was not supportive of Mr. Dyer's case. *Id.* All the ISRB had to do for the court to uphold its determination was to re-word the same determination citing specific evidence.

135. *In re* Jackson, 18 Wash. App. 2d 1045, 2021 WL 3290650, *1–2 (2021).

have long understood to be true: the carceral setting is an unfit—if not overtly harmful—environment for individuals with mental illness, traumatic brain injury (TBI), cognitive or behavioral health disorders, or other unidentified mental health concerns.[136] Some have argued that incarceration itself can lead to the *development* of mental or behavioral health challenges where none previously existed.[137] For example, solitary confinement as a disciplinary or administrative measure can lead to dissociation and loss of pro-social behavior patterns.[138] One-off instances of harm done to people with mental illness in carceral settings sometimes crop up in the national conversation,[139] but these harms are much more pervasive than the occasional spotlight would suggest.[140] In 2016, nearly two in five state and federal prisoners reported at least one disability—cognitive, ambulatory, vision, ADD, learning disability, or otherwise.[141] Put succinctly, "[h]aving a mental health condition while incarcerated can

136. *See* RACHAEL SEEVERS, MAKING HARD TIME HARDER: PROGRAMMATIC ACCOMMODATIONS FOR INMATES WITH DISABILITIES UNDER THE AMERICANS WITH DISABILITIES ACT 4–6 (2016); *see also generally* Rebecca Vallas, *Disabled Behind Bars*, CTR. FOR AM. PROGRESS (July 18, 2016), https://www.americanprogress.org/article/disabled-behind-bars/ [https://perma.cc/959Q-K8X7] (outlining several key findings from a 2016 study regarding the difficulties experienced by mentally ill individuals who come into contact with incarceration).

137. Vallas, *supra* note 136 ("[P]risons and inadequate access to health care and mental health treatment can not only exacerbate existing conditions, but also lead to further physical and mental health problems that individuals did not have prior to incarceration.").

138. *See* Kirsten Weir, *Alone, in 'the Hole'*, 43 AM. PSYCH. ASS'N 54 (May 2012), https://www.apa.org/monitor/2012/05/solitary [https://perma.cc/B92B-UCD9]; Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, PRISON POL'Y INITIATIVE (May 13, 2021), https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/ [https://perma.cc/M5M7-HWLX].

139. Recall, for example, the tragic story of Kalief Browder, the young man who spent "more than one thousand days" at Rikers awaiting trial—a stay that included almost two years in solitary confinement. *See* Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015 [https://perma.cc/WN22-K5ZZ]. Browder died by suicide shortly after his release, garnering national attention. *Id.* Browder had attempted suicide multiple times, including while in confinement, leading some to conclude he was suffering from an undiagnosed or untreated mental health condition. *Id.* His death inspired Mayor Bill de Blasio to attempt to reform the carceral system (to little success), and Shawn "Jay-Z" Carter produced a Netflix documentary on the story. *Id.* That national attention, while strong, was not enough to get Browder access to mental health services to overcome whatever mental health condition ultimately led to his demise. *Id.*

140. The reality is, countless Kalief Browders move in and out of our state prison systems every year but garner little attention beyond the grief of their loved ones. *See* ELISABETH KINGSBURY & PATRICIA H. DAVID, WASH. STATE OFF. OF CORR. OMBUDS, ANALYSIS OF 2019 SUICIDE DEATHS IN WASHINGTON DOC (Aug. 17, 2020), https://oco.wa.gov/sites/default/files/Overall%20Analysis%20of%202019%20Suicide%20Deaths%20Final.pdf [https://perma.cc/RRD8-QWM3].

141. LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 252642, DISABILITIES REPORTED BY PRISONERS (Mar. 2021).

result in exceptional difficulties beyond those already associated with incarceration. These include obtaining adequate treatment, disparate treatment, misperceptions and stigma, and increased vulnerability."[142]

This Part highlights a few key points which serve as relevant considerations during the releasability analysis in Part III, but it is not meant to serve as an exhaustive list of difficulties faced by incarcerated individuals experiencing mental illness. Section II.A looks at the underlying challenge of identifying, quantifying, and referring mentally ill incarcerated individuals for treatment within the Washington Department of Corrections (DOC). Section II.B provides an overview of mental illness and its impacts on an incarcerated individual's disciplinary experience. Section II.C discusses mental health impacts on programming participation, using Washington's Sex Offender Treatment and Assessment Program (SOTAP) as an example. Finally, section II.D discusses how an individual's mental health impacts the release planning process and available community supports.

### *A. Mental Health Diagnoses and Treatment in the Carceral Setting*

One large challenge illuminated by disability rights advocates is that correctional authorities use inconsistent methods to screen and define which incarcerated individuals have mental illness or cognitive or behavioral disability.[143] Washington's Department of Corrections (DOC) is no exception. While screening for some mental health conditions is standard upon entry to DOC custody,[144] screeners have little opportunity to assess for other less-visible conditions. In 2019, the Office of the Corrections Ombuds—an independent branch of the governor's office meant to investigate and resolve claims against the DOC[145]—found health intake screening in Washington prisons was "insufficient to accurately identify people with disabilities."[146] However the group of individuals with particularized mental or behavioral needs is defined, the group

142. ELISABETH KINGSBURY, WASH. STATE OFF. OF CORR. OMBUDS, SYSTEMIC REPORT: MENTAL HEALTH ACCESS & SERVICES (June 2021) [hereinafter OCO MENTAL HEALTH SYSTEMIC REPORT].

143. Jennifer M. Reingle Gonzalez & Nadine M. Connell, *Mental Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity*, 104 AM. J. PUB. HEALTH 2328 (2014) ("[L]ack of treatment continuity is partially attributable to screening procedures that do not result in treatment by a medical professional in prison.").

144. WASH. STATE DEP'T OF CORR., DOC 630.500, MENTAL HEALTH SERVICES § II.A.1 (2022) [hereinafter MENTAL HEALTH SERVICES].

145. WASH. STATE OFF. OF CORR. OMBUDS, https://oco.wa.gov/ [https://perma.cc/ZZT8-HZ8U].

146. *See* ELISABETH KINGSBURY, WASH. STATE OFF. OF CORR. OMBUDS, PERSONS WITH DISABILITIES 8 (Nov. 22, 2019), https://oco.wa.gov/sites/default/files/ADA%20report%20with%20DOC%20responses%20FINAL.pdf [https://perma.cc/HQU9-GU6Z].

defined by the DOC continues to be under-representative of the population who need additional support beyond that needed by a neurotypical or otherwise-abled incarcerated individual.[147] Even if an individual is symptom-free or has no anti-psychotic prescriptions when they enter a facility, they may develop symptoms later on that are not screened in a timely manner.[148] Whether an individual is formally determined to have a mental illness or other cognitive impairment, or falls outside of the currently-defined group, their needs have a direct impact on their experience while incarcerated.[149]

Currently, the DOC assesses and codes each incoming individual under the "PULHES" system, where each initial corresponds with a different area of health.[150] In this system, "S" codes signify an individual's mental health while "R" codes signify suicidal risk, on a scale of one—presenting no needs—to four—presenting severe needs.[151] Individuals with an S code of two or higher become eligible for regular psychiatric evaluation and treatment.[152] Mental Health Assessments are performed within fourteen days of arrival, and S codes are primarily based on an individual's active expression of psychiatric symptoms or prior diagnosis

147. Victoria Hay, *Educational Requirements as Barriers to Release for Incarcerated People with Cognitive Disabilities*, 5 COLUM. HUM. RTS. L. REV. ONLINE 225 (2021).

148. "Because many people first develop serious mental illnesses while in their late teens and twenties—the age group that makes up the bulk of incoming prisoners—the fact that an initial intake-screening process finds an individual to be free of mental illness is no guarantee that they will remain healthy throughout their sentence." SASHA ABRAMSKY & JAMIE FELLNER, HUM. RTS. WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 102 (2003).

149. Importantly, people are not singular traits; these particularized challenges co-exist with other systemic inequities in the carceral experience, shared by BIPOC individuals, LGBTQ+ individuals, and others whose identity is statistically likely to place them at greater risk of negative impact. *See* OCO MENTAL HEALTH SYSTEMIC REPORT, *supra* note 142, at 2.

150. Bette Michelle Fleishman offers a comprehensive description of PULHES codes in her 2013 article for the Seattle Journal for Social Justice. *See* Bette Michelle Fleishman, *Invisible Minority: People Incarcerated with Mental Illness, Developmental Disabilities, and Traumatic Brain Injury in Washington's Jails and Prisons*, 11 SEATTLE J. FOR SOC. JUST. 401, 411–12 (2013).

151. WASH. STATE DEP'T OF CORR., DOC 610.040, HEALTH SCREENINGS AND ASSESSMENTS § III.A.1 (2018) [hereinafter HEALTH SCREENINGS AND ASSESSMENTS]. The original codes, PULHES, were derived from the coding system used by the U.S. military. Capt. Robert Klein, Capt. Josi Hall & Capt. William Greenwood, *Managing the Health of the Force: A Primer for Company Leaders*, U.S. ARMY (Jan. 5, 2017), https://www.army.mil/article/179909/managing_the_health_of_the_force_a_primer_for_company_leaders#:~:text=PULHES%20is%20an%20acronym%20for,that%20the%20Soldier%20cannot%20deploy [https://perma.cc/TL6C-8ESX]. The modern DOC approach has expanded PULHES to PULHESDXT to encompass areas of risk—Dental, Overall Functional Capacity, and Transportation Demand—that previously were not captured by the initial code system. Brief for Petitioner at 6–7, Peralez v. Wash. Dep't of Corr., No. C06-5625, 2007 WL 2332455, at *1 (W.D. Wash. Aug. 10, 2007).

152. HEALTH SCREENINGS AND ASSESSMENTS, *supra* note 151.

of psychotropic[153] or anti-psychotic medication.[154] Some have criticized the PULHES system as overbroad yet not specific enough to truly identify an individual's level of need.[155] For example, according to a report completed in 2013, TBI is not captured by the PULHES system of screening.[156]

TBI in particular has been identified as a pervasive diagnosis for individuals in custody, but the DOC's resources to screen for and diagnose TBI remain limited. In 2012, the DOC attempted a population-wide assessment of TBI in Washington facilities for the first time.[157] The report estimated that 7.6% of all individuals incarcerated in Washington had moderate or severe TBI[158] and 8.3% of the incarcerated population had a developmental disability.[159] Upon finding that a potentially significant number of incarcerated individuals may be affected by TBI, the report concluded that "TBI screening is needed for all [incarcerated individuals]."[160] Today, every individual is given a general mental health screening upon entering DOC custody.[161] That screening includes one question regarding TBI, which may be used to refer an individual for further TBI assessment.[162] If that intake screening is rushed, delayed, or done by a staff member with an excessive caseload—all circumstances that the Office of the Corrections Ombuds (OCO) reports have observed in the past[163]—it is up to an individual to advocate for additional screening. As for individuals who entered custody before this policy was active, the DOC has a large backlog to screen but few resources to tackle

153. "[H]aving an effect on how the mind works." *Psychotropic*, BRITANNICA DICTIONARY, https://www.britannica.com/dictionary/psychotropic [https://perma.cc/WPY2-B2Z4].

154. HEALTH SCREENINGS AND ASSESSMENTS, *supra* note 151, § IV.A.

155. Brief for Petitioner, *supra* note 151 (footnotes omitted) ("The score is designed to covey a broad-brush picture of whether the [incarcerated person] has significant physical, sensory, and/or mental limitations. Yet it is not possible, by looking at an offender's numbers alone, to know what particular physical, mental, and/or sensory condition [they have], what the true nature and practical effect of any limitation actually is, whether and how the condition can be accommodated, whether the condition is temporary or permanent, whether the condition is the result of injury, disease or defect, whether the condition is correctable, or anything else about why the offender has a certain PULHESDXT score.").

156. *See* Fleishman, *supra* note 150, at 412.

157. *See* WASH. STATE DEP'T OF CORR., 600-RE001, IDENTIFYING TRAUMATIC BRAIN INJURY AND DEVELOPMENTAL DISABILITY IN PRISON 1 (Jan. 2013).

158. *See id.* at 2.

159. *See id.* at 3.

160. *See id.* at 4.

161. HEALTH SCREENINGS AND ASSESSMENTS, *supra* note 151, § III.A.

162. WASH. STATE DEP'T OF CORR., DOC 13-349, INTERSYSTEM/RESTRICTIVE HOUSING MENTAL HEALTH SCREENING (Aug. 2021) (asking patients about TBI in question 7 only).

163. *See* OCO MENTAL HEALTH SYSTEMIC REPORT, *supra* note 142, at 5–6.

that task.[164] In March of 2020, the DOC secured federal grant funding for a pilot program to begin screening previously un-examined and undiagnosed high-risk populations (veterans, for example) for TBI.[165] That pilot was limited to only one facility, with an application pending to expand funding to two.[166]

Even individuals exhibiting a mental illness or cognitive impairment that *is* caught by screening processes may still experience barriers to care depending on how strongly their symptoms manifest. Individuals who meet criteria of having a "significant mental disorder" receive specialized housing and access to care, but those with less "significant" issues receive fewer treatment options.[167] Symptoms that are not severe enough to merit an S code of two or higher may still have a significant impact on an individual's daily experience.[168] If an individual does not have an S code of two or higher, they must self-report to prison medical staff if they need access to mental health services,[169] creating a potential barrier to screening.[170] The DOC generally cites lack of resources and available beds for their inability to provide adequate support for all who exhibit need.[171]

Once determined, S and R codes do not automatically guarantee that an individual's need will be accommodated. In many contexts, DOC employees have discretion over whether an individual should receive

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164. Rachel Freiderich, *Pilot Program at Stafford Creek to Identify, Help Incarcerated with Traumatic Brain Injuries*, DOC COMMC'NS (Mar. 4, 2020), https://www.doc.wa.gov/news/2020/03042020.htm [https://perma.cc/XYU6-VPAS].

165. *Id.*

166. *Id.*

167. MENTAL HEALTH SERVICES, *supra* note 144. For example, "[r]esidential treatment is provided for individuals unable to function in general population with a significant mental disorder, the symptoms of which result in serious impairment in adaptive functioning." *Id.* § IV.A. Outpatient services for those who do not meet criteria for residential treatment are prioritized for treatment "based on acuity level and functional impairment." *Id.* § V.A. Imagine, then, how this kind of prioritization could play out for lower-need individuals in times where access to care is limited due to a facility COVID-19 outbreak.

168. Fleishman, *supra* note 150, at 414. The primary example of this is TBI—higher levels of aggression, lower cognition, and decision-making capacity, but not necessarily "psychotic" such that it garners attention and treatment.

169. HEALTH SCREENINGS AND ASSESSMENTS, *supra* note 151.

170. Fleishman, *supra* note 150, at 409–10. Self-report could be a defective monitoring tool for any number of reasons; Fleishman identified at least four: "(1) the negative stigma associated with a mental health diagnosis; (2) a lack of understanding about how the information will be used; (3) a lack of understanding regarding the importance of answering the questions honestly; and (4) an inability to pay attention to the questionnaire." *Id.* at 409–10 (footnotes omitted).

171. *See* OCO MENTAL HEALTH SYSTEMIC REPORT, *supra* note 142, at 18–19 (citing physical space, budget, and staffing constraints as a barrier to increasing availability of group therapy, ability to screen more quickly and effectively in intake, and ensuring timely assessments are done for individuals as needed).

assistance for a cognitive disability. Such is the case when a DOC hearing officer is determining whether an individual should have access to a department advisor[172] during a disciplinary hearing.[173] If an individual is scheduled to participate in a disciplinary hearing, the hearing officer assigned to that hearing "may . . . appoin[t]" a department advisor to assist the individual.[174] That determination is based on the incarcerated individual's literacy; the complexity of the issue; the individual's "overall ability to speak for [themselves] and adequately present [their] case;" the individual's English proficiency; and "[a]ny disability that might impair the offender's ability to adequately defend [themselves]."[175] While this policy seems robust, it is flawed in application—many individuals reported to the Office of the Corrections Ombuds that they were denied access to a department advisor even after they made an affirmative request based on knowledge of their own mental capacity.[176] It is virtually impossible to measure how that lack of a department advisor may have affected the outcome of those individuals' hearings.

Hearing officers are not the only staff members who have discretion over accommodations. Each DOC facility has an Americans with Disability Act (ADA) Coordinator who serves as the facility lead for ensuring ADA compliance.[177] These coordinators are tasked with ensuring that incarcerated individuals receive reasonable accommodation for their disabilities in housing, programs, and other services.[178] But according to an OCO report in 2019, some of those coordinators "did not indicate awareness that the ADA extends to people with mental illness and other unseen disabilities."[179] In response to this report, the Department committed to "expand the breadth of the ADA training to include mental health as a disability" as a part of the March 2020 ADA Coordinators' training.[180]

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172. A department-appointed individual who can help explain the disciplinary procedure to an individual, assist them in collecting evidence or reading infraction materials, and ensure they have an adequate understanding of the process and are able to advocate for themselves effectively. WASH. STATE DEP'T OF CORR., DOC 460.000, DISCIPLINARY PROCESS FOR PRISONS (2022) [hereinafter DISCIPLINARY PROCESS FOR PRISONS].

173. *Id.*

174. WASH. ADMIN. CODE § 137-28-295(1) (2016).

175. *Id.* § 137-28-295(1)(a)–(e).

176. OCO MENTAL HEALTH SYSTEMIC REPORT, *supra* note 142, at 8.

177. WASH. STATE DEP'T OF CORR., DOC 690.400, INDIVIDUALS WITH DISABILITIES § II.A (2022).

178. *See generally id.*

179. *See* KINGSBURY, WASH. STATE OFF. OF CORR. OMBUDS, PERSONS WITH DISABILITIES, *supra* note 146, at 6.

180. *See id.*

### *1. Actuarial Risk*

One particularly relevant type of assessment undergone by many individuals under ISRB jurisdiction is actuarial risk, or a statistical analysis of the risk posed by an individual.[181] These evaluations use predetermined schedules of criteria to determine an individual's likelihood of recidivism.[182] Such criteria, referred to as "risk factors,"[183] can be indicators of an individual's risk to re-offend—things like negative family background, problems in social functioning, and tolerant attitudes toward sexual assault.[184] In an effective actuarial assessment, these risk factors are each scored and combined according to a specific process to create an overall risk score.[185] An individual's overall risk score is then presented to the ISRB to consider as a part of an individual's file.[186]

One example of a commonly used actuarial tool in the ISRB context is the Static-99R. The Static-99R is a "ten item actuarial assessment instrument" extensively used in the United States and elsewhere as a way to determine an adult male sex offender's likelihood of recidivism.[187] According to its creators, Static-99R results "can be thought of as a baseline estimate of risk for new sexual charges and convictions."[188] The ISRB seems to agree. Static-99R results are cited in a majority of

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181. WASH. REV. CODE § 9.95.420(1)(a) (2009) ("[T]he department shall conduct, and the offender shall participate in, an examination of the offender, incorporating methodologies that are recognized by experts in the prediction of sexual dangerousness, and including a prediction of the probability that the offender will engage in sex offenses if released."). The Washington Court of Appeals has determined that such methodologies include the Static–99R, which is covered later in this section. *In re* Jackson, 18 Wash. App. 2d 1045, 1045, 2021 WL 3290650, at *3 (2021).

182. *See* R. Karl Hanson & Kelly Morton-Bourgon, *Predictors of Sexual Recidivism: An Updated Meta-Analysis 2004-02*, PUB. WORKS & GOV'T SERVS. CAN. 2 (2004).

183. *See id.*

184. *Id.*

185. *Id.* at 3.

186. *See generally* Decision and Reasons (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Apr. 2017–Sept. 2021).

187. *Overview*, SOC'Y FOR ADVANCEMENT OF ACTUARIAL RISK NEED ASSESSMENT, https://saarna.org/static-99/ [https://perma.cc/GM5J-NYTZ].

188. AMY PHENIX, YOLANDA FERNANDEZ, ANDREW J. R. HARRIS, MAAIKE HELMUS, R. KARL HANSON & DAVID THORNTON, STATIC-99R CODING RULES 6 (2016). Importantly, a recent scholar has criticized Static-99R's efficacy as a tool to predict recidivism, based on a number of methodology issues. For a more robust explanation of the test's possible weaknesses, see Mara Howard Williams, Comment, *Sexual Abuse and Statistic Misuse: An Analysis of the Static-99R*, 98 N.C. L. REV. 933 (2020). Another scholar has raised that the tool may not be as un-biased as originally intended, because it views certain variables as objective when they, too, may have been impacted by structural racism and other inequities. *See* Marina Bell, *Abolition: A New Paradigm for Reform*, 46 J. L. & SOC. INQUIRY 32, 37 (2021).

determination documents for Community Custody Board individuals.[189]

Actuarial risk measurements have been regarded as an effective and useful tool in measuring the risk of recidivism.[190] In contrast with the murkier judicial method of discerning an individual's risk level, these tools are backed up by peer reviews and decades of study.[191] But this success comes with two important caveats. First, it is imperative that the risk factors considered during an actuarial risk assessment are *actually* predictive of recidivism.[192] For example, empathy for victims, denial of sex offense, and low motivation for treatment have been proven to have little predictive value for sexual recidivism.[193] Seriousness of the index offense (or crime of conviction), while "commonly considered in risk assessments," is not related to sexual recidivism risk.[194] Also, several risk factors that may be important to determine general recidivism—like alcohol abuse[195]—may not be important at all in the context of *sexual* recidivism.[196] Second, while the actuarial tool on its own is a valuable predictive mechanism, that tool can become less effective when paired with "unguided professional judgement."[197] When actuarial risk assessment is structured and methods are defined, the tools are largely accurate, but when combined with method-less evaluation by professionals, the tools become measurably less effective.[198]

### *B. Mental Health and Discipline in the Carceral Setting*

Individuals with mental illness or cognitive/behavioral disability are

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189. *E.g.*, Rivas, No. 250527 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Jan. 28, 2019) (Decision and Reasons).

190. *See* Hanson & Morton-Bourgon, *supra* note 182, at 15 (citing "strong evidence for the validity of actuarial risk assessment instruments for the prediction of sexual, violent and general recidivism"). *But see supra* note 188 and sources cited therein.

191. *Id.* at 15–18 (providing a meta-analysis of the actuarial tools used in the professional field between 1998 and 2004, referencing additional reviews by other authors and suggesting further research to hone the tools discussed).

192. *See generally* R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCH. 348 (1998) (offering a meta-analysis of risk factors used across actuarial risk tools and the predictive value of those factors).

193. *Id.* at 352.

194. Hanson & Morton-Bourgon, *supra* note 182, at 2 (citing Hanson & Bussière, *supra* note 192).

195. Hanson & Bussière, *supra* note 192, at 353.

196. *See id.*

197. R. KARL. HANSON & KELLY E. MORTON-BOURGON, PUB. SAFETY & EMERGENCY PREPAREDNESS CAN., THE ACCURACY OF RECIDIVISM RISK ASSESSMENTS FOR SEXUAL OFFENDERS: A META-ANALYSIS 14 (2007).

198. *Id.* at 3.

more likely to be subjected to discipline within prison facilities.[199] As stated in Part I, discipline plays a key role in releasability determinations. Jails and prisons operate under a regime of rules governing behavior, often punishing behaviors that would never garner formal discipline outside the jail or prison setting.[200] Complying with this regime is challenging for any individual unfamiliar with prison operations, but this difficulty can be exacerbated by mental health conditions or cognitive or behavioral disorders.[201] Some individuals' mental health conditions can be exhibited "through disruptive behavior, belligerence, aggression, and violence."[202] A correctional staff member who does not understand that such behaviors stem from mental illness may believe the individual is acting out intentionally.[203] In Washington, as recent as 2018, incarcerated individuals reported receiving disciplinary infractions—a formal citation for breaking a rule—for incidents that occurred while they were suffering from an acute mental health crisis.[204] Washington DOC staff have little to no access to training in de-escalation and effective management of mental health crises,[205] making them more prone to see someone's behavior as willfully disobedient rather than the product of a cognitive or behavioral disability.[206]

More serious infractions merit a hearing where individuals have an opportunity to present a defense,[207] but mental illness can also affect this step of the process. Some individuals have reported that the DOC denied them access to a staff advisor to assist during their disciplinary hearing, even after demonstrating that they had difficulty understanding the

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199. "According to the Bureau of Justice Statistics, mentally ill prisoners in state and federal prisons as well as local jails are more likely than others to have been involved in a fight and also more likely to have been charged with breaking prison rules." HUMAN RIGHTS WATCH, *supra* note 148, at 60.

200. *See* DISCIPLINARY PROCESS FOR PRISONS, *supra* note 172. Currently, individuals can be infracted for actions like possessing more than five dollars' worth of stamps at a time, being unable to urinate within an hour for a random test, acquiring a new tattoo or piercing, sending a letter to another incarcerated person, or wasting supplies. WASH. ADMIN. CODE § 137-25-030 (2019).

201. *See* HUMAN RIGHTS WATCH, *supra* note 148, at 59.

202. "Many will simply—and sometimes without warning—refuse to follow straightforward routine orders to sit down, to come out of a cell, to stand up for the count, to remove clothes from cell bars, or to take showers." *Id.*

203. *Id.*

204. *See* OCO MENTAL HEALTH SYSTEMIC REPORT, *supra* note 142, at 8.

205. *Id.* at 16.

206. HUMAN RIGHTS WATCH, *supra* note 148, at 75 ("If correctional officers view acting out as volitional, deliberate misbehavior, if they do not realize a prisoner who is mumbling to himself is hallucinating, if they don't realize that huddling in the corner of a cell may be a sign of crippling depression, they will not call for mental health staff.").

207. *See* DISCIPLINARY PROCESS FOR PRISONS, *supra* note 172.

proceedings.[208] As of 2021, Washington's DOC states that they have instituted a pilot program to allow mental health staff to play a meaningful role in the disciplinary process when an individual with mental illness receives an infraction.[209] At the time of this writing, that program is available in just two residential units, within two out of twelve facilities statewide.[210]

The consequences of disciplinary infractions—even for actions outside an individual's control—can compound into a perpetuating cycle. In most cases, the act of breaking a rule leads to "sanctions," or restrictions on already-curtailed freedoms within the facility.[211] While Washington's DOC committed to ending solitary confinement as a disciplinary sanction,[212] individuals can still be placed in solitary confinement as a result of an infraction for investigative or protective purposes.[213] While different in name, "administrative segregation" is the functional equivalent of its former disciplinary counterpart.[214] The negative impact of solitary confinement on individuals with mental health concerns is extensive and well-documented.[215] Moreover, sanctions can affect an individual's custody level, causing them to be demoted to a more restrictive classification where, again, a more restrictive living situation can lead to deterioration of mental and emotional health.[216] If an individual is infracted multiple times over a limited time period, the sanctions can be enhanced.[217]

Finally, significant disciplinary issues can negatively impact an individual's release. The DOC employs a system of "[e]arned [r]elease [t]ime" where most incarcerated individuals can "earn" time toward an

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208. *See* OCO MENTAL HEALTH SYSTEMIC REPORT, *supra* note 142, at 8.

209. *Id.* at 22–23.

210. *Id.*

211. DISCIPLINARY PROCESS FOR PRISONS, *supra* note 172.

212. *See Press Release: Washington State Department of Corrections Ends Disciplinary Segregation*, WASH. STATE DEP'T OF CORR. (Sept. 30, 2021), https://www.doc.wa.gov/news/2021/09302021p.htm [https://perma.cc/H9CY-E3UL].

213. *See* WASH. STATE DEP'T OF CORR., DOC 320.200, ADMINISTRATIVE SEGREGATION (2020).

214. ANGEE SCHRADER, WASH. STATE OFF. OF CORR. OMBUDS, INVESTIGATIVE REPORT ON THE INVESTIGATION INTO MULTIPLE INDIVIDUALS HELD FOR AN EXTENDED PERIOD OF TIME IN ADMINISTRATIVE SEGREGATION 1 (May 6, 2021).

215. *See* Weir, *supra* note 138; *see also* Quandt & Jones, *supra* note 138 ("[T]he stress caused by spending time in solitary confinement can lead to permanent changes to people's brains and personalities. Depriving humans — who are naturally social beings — of the ability to interact with others can cause 'social pain,' which affects the brain in the same way as physical pain.").

216. *See* WASH. STATE DEP'T OF CORR., DOC 300.380, CLASSIFICATION AND CUSTODY FACILITY PLAN REVIEW (2021).

217. *See* WASH. STATE DEP'T OF CORR., DOC 460.050, DISCIPLINARY SANCTIONS (2022).

earlier release.[218] When an individual enters custody, they are given an early release date that can be maintained if they exhibit good conduct and standing while incarcerated.[219] Disciplinary issues can result in a loss of earned time, pushing an individual's release date back toward their sentenced release.[220] The loss of earned release time is often used as a tool to incentivize good behavior—for those whose behavior is within their control to begin with.[221]

### *C. Mental Health and Program Participation in the Carceral Setting*

Courts often require incarcerated individuals to participate in programming as a condition of their confinement.[222] One such requirement is Sex Offender Treatment and Assessment Program (SOTAP) for individuals convicted of a sex offense.[223] Other individuals are required by the DOC to participate in job-skills programs, educational programs, or drug treatment programs, or risk being infracted and sanctioned for their refusal.[224] For individuals facing discretionary release—that is, their date of release or parole is up to the discretion of the Indeterminate Sentence Review Board (ISRB)[225]—these programs can be one of the most important ways for that individual to prove their "rehabilitation."[226]

Mental illness can serve as a barrier for meaningful participation in programming. If an individual has a cognitive or behavioral disability that makes it impossible for them to succeed in the traditional program format,

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218. WASH. STATE DEP'T OF CORR., DOC 350.100, EARNED RELEASE TIME (2022) [hereinafter EARNED RELEASE TIME].

219. *Id.*

220. *Id.*

221. *See Good Time Compliance Computation Q&A*, WASH. STATE DEP'T OF CORR. (Dec. 2015), https://www.doc.wa.gov/corrections/justice/sentencing/docs/error/good-time-compliance-faq.pdf [https://perma.cc/4UJX-S36W].

222. A common example is a statutorily required court order to undergo alcohol or chemical dependency treatment as part of a sentence for a felony conviction for driving under the influence (DUI). *See* WASH. REV. CODE § 9.94A.603(1) (2006). Courts may also require, as part of a sentence, that a person comply with any release requirements set by the ISRB, which often include programming. *See id.* § 9.94A.507(6)(a).

223. *See Sex Offender Treatment and Assessment*, WASH. STATE DEP'T OF CORR., https://www.doc.wa.gov/corrections/programs/sex-offender-treatment.htm [https://perma.cc/MMC9-DVU2]; *see also* WASH. REV. CODE § 72.09.335 (2017) (requiring DOC to make sex offender training accessible to any individual for whom treatment is required by the ISRB as a precondition for release).

224. *See* Hay, *supra* note 147; *see also* WASH. ADMIN. CODE § 137-25-030, Category C, Level 1, no. 557 (2019) (refusing to participate in programming can constitute serious violation).

225. *See supra* section I.A.

226. *See* Hay, *supra* note 147, at 236.

structural adaptations to assist them are few and far between.[227] For example, like many other programs, SOTAP is offered in a group therapy setting.[228] This can present a challenge to individuals who have trouble focusing or retaining information in a group setting, or for whom the group setting is distracting or triggering of behavioral issues.[229] For those individuals, effective structural alternatives could look like changing the length of therapy sessions for better retention,[230] or offering individual assistance.[231] Additionally, a limited number of individuals have access to the Skill Builders Unit (SBU), which is a program intended specifically for individuals with intellectual and/or developmental disabilities or TBI.[232] Individuals in the SBU have the opportunity to participate in educational and vocational training adapted for their success.[233] However, some prison facilities in Washington do not have an SBU.[234] While the DOC has a statutory requirement to ensure disabled individuals have access to appropriate accommodations in programming,[235] implementing these accommodations can be limited in practice.[236] In some cases, incarcerated individuals in Washington reported that the DOC required them to participate in some kind of mental health treatment "before agreeing to grant an accommodation related to the [individual's] psychiatric disability."[237] Beyond cognitive and behavioral barriers,

227. *See* Seevers, *supra* note 136.

228. *See Sex Offender Treatment and Assessment*, *supra* note 223.

229. Certain individuals whose mental health diagnosis prevents them from forming meaningful inter-group alliances, like some personality disorders, can lead to them taking on a "deviant" role in the group setting, leading to program failure. Howard B. Roback, *Adverse Outcomes in Group Psychotherapy*, 9 J. PSYCHOTHERAPY PRAC. & RSCH. 113, 118 (2000).

230. *See* CRYSTAL BARRERA, COGNITIVE BEHAVIOR THERAPY WITH ADULTS WITH INTELLECTUAL DISABILITIES: A SYSTEMATIC REVIEW (2017) (suggesting that the ability to extend programs beyond traditional timeframes was indicative of increased program success through a review of group CBT therapy methods).

231. *See* L.M.C. van den Bosch, M.J.N. Rijckmans, S. Decoene & A.L. Chapman, *Treatment of Antisocial Personality Disorder: Development of a Practice Focused Framework*, 58 INT'L J.L. & PSYCHIATRY 72, 74–75 (2018) (suggesting that effective treatment of antisocial personality disorder could occur as long as the treatment team has the flexibility to alternate between group and individual therapy settings).

232. *See* WASH. STATE DEP'T OF CORR., DOC 310.300, SKILL BUILDING UNIT (2022).

233. Patricia Murphy, *A Washington Prison Unit Where 'No One Picks on You for Being Slow'*, KUOW (Oct. 16, 2014, 5:06 PM), https://kuow.org/stories/washington-prison-unit-where-no-one-picks-you-being-slow/ [https://perma.cc/K6HL-D4UX].

234. *Id.*

235. *See* Seevers, *supra* note 136, at 10 & n.17.

236. "OCO has observed DOC's difficulty bridging its ADA and mental health siloes in order to provide ADA-mandated accommodations to someone who has a mental health disability." OCO MENTAL HEALTH SYSTEMIC REPORT, *supra* note 142, at 11.

237. *Id.*

physical barriers can sometimes limit an individual's ability to succeed in a program. If an individual is in solitary confinement, regardless of the reason, their ability to program can be slim to nonexistent.[238]

Individuals who are assigned to participate in SOTAP may be dropped from treatment if they exhibit "[b]ehaviors that are disruptive to the orderly operation of the program."[239] When dropping an individual, SOTAP staff routinely noted the individual was "found to be unamenable" to treatment.[240] Alternatively, if an individual is placed in segregation or moved to a facility that does not have a SOTAP program, they may be dropped from the program.[241] Programs within the DOC routinely have large waitlists for participation.[242] Because of the nature of SOTAP, which requires a post-release community component as well as a twelve-month program during confinement, an individual must begin and complete SOTAP within a relatively limited window to ensure program continuity.[243] This means that some individuals may be stuck on the waitlist until their window has passed, and they may go past their slated release date because they still have programming to complete.[244] When an individual is dropped from SOTAP, they must re-join the waitlist to enter

238. *See* Seevers, *supra* note 136.

239. WASH. STATE DEP'T OF CORR., DOC 570.000, SEX OFFENDER TREATMENT AND ASSESSMENT PROGRAMS § VI.B (2021) [hereinafter SEX OFFENDER PROGRAMS].

240. Demos, No. 287455 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. June 8, 2020) (Decision and Reasons). Lack of amenability to SOTAP could be connected to the requirement that, when an individual is enrolled, they are expected to take full responsibility and express remorse for sexual crimes. *Accord* Graham, No. 943021 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Sept. 9, 2019) (Decision and Reasons); *see* SEX OFFENDER PROGRAMS, *supra* note 239, § I.C. If an individual refuses to accept guilt, they cannot successfully complete the program.

241. *See, e.g.*, McVay, No. 628500 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 26, 2019) (Decision and Reasons) (noting an instance where an individual was moved to the Washington State Reformatory, where SOTAP not available, so he could not complete that program).

242. *See, e.g.*, *In re* Haynes, 100 Wash. App. 366, 378, 996 P.2d 637, 645 (2000) (confirming the existence of program waitlists for SOTAP); Emma Hogan & Hannah Bolotin, *Opinion: Washington's DOC Is Trapping Incarcerated Men in Solitary Confinement*, S. SEATTLE EMERALD (July 28, 2021), https://southseattleemerald.com/2021/07/28/opinion-washingtons-doc-is-trapping-incarcerated-men-in-solitary-confinement/ [https://perma.cc/953G-JDU5] (discussing long waitlists for anger management programs available to individuals in solitary confinement as the result of a violent infraction); Emma Hogan, *Locked Out of Life-Saving Education Programs*, POST-PRISON EDUC. PROGRAM (July 12, 2021), https://www.postprisonedu.org/blog/eduaccess [https://perma.cc/YZL3-AWJY] (discussing long waitlists for applicants interested in educational programming, as well as other limitations on enrolling).

243. *See* SEX OFFENDER PROGRAMS, *supra* note 239.

244. Johnson, No. 903820 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Jan. 27, 2020) (Decision and Reasons) ("[Mr. Johnson] stated he has applied for SOTAP as requested by the [ISRB] but was not prioritized for the program. He stated he feels like he is in a 'catch 22' and that he is not being allowed to participate in the program he needs to be found releasable. He stated he would certainly participate in SOTAP if allowed.").

the program from the beginning, putting some individuals in a loop of beginning, disrupting, failing out, and re-applying—sometimes multiple times over the course of their sentence.[245] Due to COVID-19 restrictions, the number of individuals allowed to participate in SOTAP dwindled, increasing waitlists for entry and re-entry.[246] Illustratively, Disability Rights Washington found that many individuals at McNeil Island, a facility for civilly committed individuals in Washington State,[247] were unable to participate fully in programming due to their disability.[248] This left those individuals in the same disastrous loop of being required to program, being dropped from programming for failure to meaningfully participate, and subsequently being punished for failing to program.[249] The Washington State Department of Social and Health Services (DSHS), the state agency with authority over the facility, settled the suit before trial.[250]

For some, even completing programming is not sufficient to merit a releasability determination if the ISRB feels that they did not glean the correct lessons or adopt the correct behaviors.[251] Remorse plays a large part in this analysis; if an individual completes a program but still shows little remorse, the ISRB is not persuaded that the program was effective.[252] Failure to control one's own behaviors after programming is completed

245. *See id.* (noting an instance where an individual was not prioritized on the waitlist for re-entry after being dropped from programming, resulting in his denial of release due to failure to program).

246. *See, e.g.*, Anspaugh, No. 247032 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Jan. 25, 2021) (Decision and Reasons) (discussing a situation where an individual was stuck on the waitlist for a program due to COVID-19 restrictions, which was then held against him during releasability determination).

247. *See McNeil Island History*, WASH. STATE DEP'T OF CORR., https://www.doc.wa.gov/about/agency/history/micc.htm#scc [https://perma.cc/K3PV-YC8T].

248. Complaint at 2–3, R.R. v. DSHS, No. 3:17-cv-05080 (W.D. Wash. Feb. 1, 2017).

249. *Id.*

250. *R.R. v. DSHS*, DISABILITY RTS. WASH., https://www.disabilityrightswa.org/cases/r-r-v-dshs/ [https://perma.cc/RSC7-GKKQ]. While McNeil Island is technically overseen by an agency other than the DOC, leadership between the DOC and the DSHS at the facility is often interchangeable. Systemic inequities that occur at McNeil are indicative of similar problems plaguing the DOC as a whole.

251. *See* Savage, No. 238101 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Jan. 27, 2020) (Decision and Reasons) (denying an individual release after he had completed SOTAP three times, but had failed to do one portion of "aftercare" associated with the program).

252. Osborne, No. 267767 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 17, 2020) (Decision and Reasons) ("[W]hile he has completed SOTAP, Mr. Osborne continues to demonstrate only limited insight into his offense behavior. This may be due to his cognitive abilities, as testing suggests mild cognitive impairment, but nevertheless, constitutes a risk factor for repeat offense behavior.").

can also effectively invalidate an individual's SOTAP completion.[253] This standard affects every program participant under the ISRB's jurisdiction but is exponentially burdensome for individuals who may already have difficulty participating—not only must they participate, but they also must retain the benefits from that participation for a significant amount of time.

### *D. Mental Health and Release Planning*

Beyond impacting confinement, mental health concerns can also complicate an individual's community re-entry process. The ideal release environment for an incarcerated person with a mental health condition includes affordable housing with comprehensive wraparound services, mental health care, and community support to increase their chance of success in the community after incarceration.[254] The DOC's re-entry planning process echoes this goal, stating that they aim to ensure that an individual has adequate supports to "assist in safe and successful transition to the community."[255] However, the supports needed by a majority of individuals who experience mental illness, TBI, or cognitive/behavioral disability are difficult, if not impossible, to come by in Washington State—even for those who have never been incarcerated.[256] Federal data from June 2021 estimated that "about 37 percent of Washingtonians live in an area with a shortage of mental health providers," and worse, "only 12 percent of residents live in an area where they could expect their mental health needs to be met."[257] The type of support needed by people with mental health conditions is thus effectively nonexistent in many counties in Washington. Maintaining continuity of care in a community with few or no providers can be acutely difficult for individuals navigating release from the carceral setting.[258]

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253. McCumber, No. 282835 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Sept. 9, 2019) (Decision and Reasons) ("Despite completing SOTAP twice, the following dynamic risk factors remain as a 'high' ongoing treatment need . . . : Poor cognitive problem-solving, negative emotionality/hostility . . . .").

254. *See generally* NANCY LA VIGNE, ELIZABETH DAVIES, TOBI PALMER & ROBIN HALBERSTADT, URB. INST. JUST. POL'Y CTR., RELEASE PLANNING FOR SUCCESSFUL REENTRY (2008).

255. *Reentry into the Community*, WASH. STATE DEP'T OF CORR., https://www.doc.wa.gov/corrections/community/reentry.htm [https://perma.cc/CZ66-9SRE].

256. Hannah Furfaro, *Washington State Struggles to Access Mental Health Care*, SEATTLE TIMES (Oct. 1, 2021) https://www.governing.com/now/washington-state-struggles-to-access-mental-health-care [https://perma.cc/F8ZR-37FA].

257. *Id.*

258. SASHA ABRAMSKY & JAMIE FELLNER, HUM. RTS. WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 192 (2003) ("Many mentally ill prisoners who were receiving medication in prison are released with as little as a week's supply of medicine. Such a limited supply

Re-entering individuals must manage mental health on top of a long list of other needs—housing, employment or other income, family and community re-integration, and more.[259] The DOC's Mental Health Services policy requires that re-entering individuals with serious mental health needs are given assistance applying for expedited Medicaid reinstatement,[260] but policy is much less demanding for individuals with lower S codes.[261] Barriers to community support are exacerbated for incarcerated individuals who cannot release to the community or home where the victim of their crime of conviction resides, or who may have been unhoused at the time of arrest.[262] Some programs, like SOTAP, extend into community custody, so individuals have access to some community treatment.[263] However, gaps remain. For example, "DOC does not provide mental health treatment to individuals in work release. The burden of arranging one's own services in the community may be particularly significant for some individuals with mental health conditions, cognitive disabilities, and/or traumatic brain injury."[264]

Some individuals who have committed sex crimes exhibit a serious mental illness such that the state believes the only acceptable option at the end of their criminal sentence is for them to be civilly committed as a Sexually Violent Predator (SVP).[265] If that is the case, the DOC follows a set of procedures to obtain an Forensic Psychological Evaluation (FPE) and notify the appropriate prosecuting authority if the evaluation suggests the individual merits SVP civil commitment. [266] SVP civil commitment is

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may well not last until they link up with doctors on the outside and are able to get their prescriptions renewed.").

259. *Id.* at 195 (footnotes omitted) ("[Ideal re-entry] agencies should include, at a minimum, corrections, parole (or releasing authority), mental health, housing, employment, health, and welfare, and private providers of treatment and support services. The different agencies should view their individual services as part of an integrated whole, and understand how their mandates overlap, in order to better serve their client populations.").

260. MENTAL HEALTH SERVICES, *supra* note 144, § X.

261. WASH. STATE DEP'T OF CORR., DOC 350.200, TRANSITION AND RELEASE § VIII.A.5 (2022) (stating only that individuals "may receive" assistance applying for health insurance).

262. *See id.* § V.A.1.b. (establishing an address approval requirement for individuals with sex offenses before they may be released from prison); *id.* § IV.G.1.b. (noting that individuals who do not have an address to release to are offered assistance, but must wait for housing assistance benefits to be approved before they may release); ABRAMSKY & FELLNER, *supra* note 258, at 193.

263. *Sex Offender Treatment and Assessment*, *supra* note 223.

264. *See* OCO MENTAL HEALTH SYSTEMIC REPORT, *supra* note 142, at 7.

265. *Sexually Violent Predators*, WASH. STATE OFF. OF THE ATT'Y GEN., https://www.atg.wa.gov/sexually-violent-predators [https://perma.cc/9XY9-7A7B].

266. WASH. STATE DEP'T OF CORR., DOC 350.500, END OF SENTENCE REVIEW/SEXUALLY VIOLENT PREDATOR CIVIL COMMITMENT (2022). The Forensic Psychological Evaluation is a clinical assessment of dynamic risk factors posed by an individual. Richard Rogers, *The Uncritical*

still served in total confinement, but (in theory) those in confinement have greater access to more tailored resources for their mental health and sex offense treatment.[267] Importantly, the FPE is not the final determination of an individual's qualification as an SVP under the Revised Code of Washington (RCW) 71.09; it only triggers the process.[268] The ultimate finding of eligibility rests with a judge in a separate civil trial, if the prosecutorial authority decides to move forward.[269] This Comment does not delve into the territory of RCW 71.09 SVP civil commitment. However, it is critical to note if an individual's FPE states they are likely to qualify as an SVP, that individual is often determined by the ISRB not to be releasable.[270] These individuals are left in DOC custody to ride out their maximum sentence before they are released and the RCW 71.09 process can begin.[271] Instead of moving forward with commitment (if eligible), where they would ideally receive tailored and accessible treatment, individuals are left to wait out a sentence in criminal confinement, where their mental health treatment needs may not be addressed as effectively.[272]

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*Acceptance of Risk Assessment in Forensic Practice*, 24 L. & HUM. BEHAV. 595 (2000). There is some critique that FPEs are not necessarily unbiased, nor are they always an accurate and holistic picture of the risk a person may pose to their community. *Id.*

267. Emily Gillespie, *On Washington's McNeil Island, the Only Residents Are 214 Dangerous Sex Offenders*, GUARDIAN (Oct. 3, 2018, 6:00 AM), https://www.theguardian.com/us-news/2018/oct/03/dangerous-sex-offenders-mcneil-island-commitment-center [https://perma.cc/ADR3-Z9PG]. "In theory" is a reference to some claims that the Special Commitment Center (Washington State's facility for SVP designees) has lacked in its provision of accessible services and treatment. *See R.R. v. DSHS*, *supra* note 250.

268. WASH. REV. CODE § 71.09.040 (2009).

269. WASHINGTON PRACTICE SERIES, *supra* note 122, § 5406.

270. *See, e.g.*, Bingham, No. 249136 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Oct. 26, 2020) (Decision and Reasons) (listing the fact that an individual *might* qualify for SVP civil commitment as one of the reasons to deny him release). The ISRB's practice of denying early release to individuals who are likely to qualify for civil commitment under RCW 71.09 is concerning in its own right. If an individual is clearly not likely to progress to a point where they are no longer a threat to the community, shouldn't they be placed into civil commitment as soon as possible, where they may have more expansive access to appropriate care? That question falls outside the scope of this Comment.

271. Plemons, No. 286922 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 14, 2019) (Decision and Reasons); Barker, No. 241981 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 14, 2019) (Decision and Reasons); Johnson, No. 903820 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Jan. 27, 2020) (Decision and Reasons); Bianchi, No. 266961 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Feb. 10, 2020) (Decision and Reasons); Moore, No. 277489 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Apr. 27, 2020) (Decision and Reasons). All of these received sentence extensions, whose ISRB documents explicitly note possible RCW 71.09 designation as a reason for extension.

272. *See supra* section I.A. Justice Kennedy, in the decision that upheld the constitutionality of the SVP civil commitment process, pointed out the dangers of conflating an individual's criminal

## III. WHEN MENTAL ILLNESS AND RELEASABILITY DETERMINATIONS MEET

These two realities—an individual's inequitable experience with mental illness and the high bar to prove releasability—inevitably collide. The result is that mental illness affects not only an individual's carceral experience but also their chance of succeeding in a releasability determination. As many social science scholars have recognized, "[d]espite the weak relationship between mental health and recidivism, [incarcerated person]s with mental illness tend to fare worse in risk assessments . . . and are less likely to be paroled than [incarcerated person]s without mental illness . . . extending their time behind bars."[273] But while this has been a widely-accepted conclusion within the world of social science, ISRB determinations and appeals have largely left systemic causes behind releasability factors uninterrogated.[274] Section III.A of this Part provides an overview of the collision between mental health and releasability over four years of ISRB determinations. Section III.B focuses on what that collision looks like at the court level.

### *A. Analysis of Recent ISRB Determinations*

For this Comment, I reviewed the ISRB's Decision and Reasons documents for all releasability determinations made between April 2017 and September 2021.[275] Discipline, programming, and release planning each played a central role in the ISRB's analysis:

In one example, an individual's mental health was the underlying cause

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conviction and their possible eligibility for civil conviction:

> The point, however, is not how long [sexually violent predators] should serve a criminal sentence. . . The concern instead is whether it is the criminal system or the civil system which should make the decision in the first place. If the civil system is used simply to impose punishment . . . then it is not performing its proper function. . . . We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.

Kansas v. Hendricks, 521 U.S. 346 (1996) (Kennedy, J., concurring).

273. Jason Matejkowski, Joel M. Caplan & Sara Wiesel Cullen, *The Impact of Severe Mental Illness on Parole Decisions*, 37 CRIM. JUST. & BEHAV. 1005, 1005–06 (2010).

> Mental illness affects many domains of social functioning considered in parole release decisions . . . including supportive social networks . . . , employment . . . , institutional misconduct . . . , and housing . . . . Thus, having a mental illness may have a cumulative negative impact on an [incarcerated person]'s parole eligibility, reducing his or her chances of being granted parole above and beyond concerns about mental or emotional health alone.

*Id.* at 1006.

274. *See generally* Decision and Reasons (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Apr. 2017–Sept. 2021).

275. *See generally id.* (containing the full record of documents that were reviewed for the purpose of this Comment).

for his infracted behavior—confirmed by the individual and DOC staff.[276] When the individual attempted to make his case to the ISRB, he was unsuccessful in persuading the ISRB not to consider that disciplinary history against him.[277] Another individual's long history of infractions was counted against him; the ISRB noted that many of the infractions were for the individual's inability to maintain proper personal hygiene, possibly due to his dementia.[278] Underlying reasons aside, many other individuals were determined not releasable based on their institutional disciplinary records.[279]

Countless individuals were denied release due to their programming experience, but the ISRB criteria varied widely: one individual completed only part of a program but was still released;[280] another completed but did not do well enough in the program for the ISRB to deem it effective;[281] still others completed programs twice but were found lacking,[282] even when the program supervisor gave a glowing report of their progress.[283]

The ISRB expressed hesitancy concerning underdeveloped release plans as well. In one case, the ISRB expressed concern that an individual's mental health condition would require placement in a skilled nursing facility.[284] While release planning was not officially listed as a determinative factor in that case, the ISRB language suggested that it was doubtful the individual could find a place that would accept someone with his level of need.[285] In another scenario, even when an individual had

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276. Bird, No. 754754 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. June 25, 2018) (Decision and Reasons).

277. *Id.*

278. Sattler, No. 127145 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 13, 2018) (Decision and Reasons).

279. *E.g.*, Dearbone, No. 229014 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. May 7, 2018) (Decision and Reasons); Ansbaugh, No. 247032 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. July 30, 2018) (Decision and Reasons); Sattler, No. 127145 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 13, 2018) (Decision and Reasons).

280. Scott, No. 970703 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. May 11, 2020) (Decision and Reasons).

281. Osborne, No. 267767 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 17, 2020) (Decision and Reasons).

282. McCumber, No. 282835 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Sept. 9, 2019) (Decision and Reasons); Ansbaugh, No. 247032 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. July 30, 2018) (Decision and Reasons).

283. Stanphill, No. 908387 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Apr. 27, 2020) (Decision and Reasons); Ray, No. 727859 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Oct. 23, 2017) (Decision and Reasons).

284. Sattler, No. 127145 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 13, 2018) (Decision and Reasons).

285. *Id.* ("Any community based facility willing to consider Mr. Sattler will most likely want to

expressed that his wife would be able to support him upon release, the ISRB denied release for the individual citing its concern that it "ha[d] not seen such relationships survive the release of the [incarcerated person]."[286] Again, release was not listed as an official determinative factor for the ISRB but was clearly influential.[287] Broadly, the presumption of release was only referenced in decisions for Juvenile Board individuals.[288] Only one mention of the presumption occurred in a non-juvenile case, but the ISRB quickly dismissed it.[289]

Even cases where an individual exhibited positive behaviors, the ISRB found reasons to dismiss those successes. For example, when one individual exhibited a long period of incarceration without any serious infractions, the ISRB was quick to emphasize that the individual still showed antisocial traits, implying that the lack of infractions bore little significance.[290] In another case, an individual presented evidence that he had completed Sex Offender Treatment and Assessment Program (SOTAP) to support the claim that he had participated in requisite programming.[291] The ISRB was unmoved, stating that the program's structure had changed since he completed it, and he would need to again complete the updated program.[292] In yet another case, an individual's counselor stated that he was a positive and un-problematic presence on his unit, posing few disciplinary issues.[293] The ISRB was not swayed and stated in response that an individual's behavior on the unit "in no way

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meet with him in person prior to final acceptance. . . . CMHC stated that there are few places on the east side of the state that would be able to accommodate Mr. Sattler if he were released.").

286. Dodge, No. 772835 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Sept. 19, 2018) (Decision and Reasons).

287. *Id.*

288. Beaver, No. 819423 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Apr. 26, 2021) (Decision and Reasons); Feazell, No. 786882 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Dec. 3, 2018) (Decision and Reasons); Murphy, No. 747655 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. June 8, 2020) (Decision and Reasons).

289. Stoudamire, No. 287492 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Jan. 28, 2019) (Decision and Reasons). The presumption discussion in this case was curious because Mr. Stoudamire was fifteen years old at the time of his underlying offense but was still considered under Parole Board jurisdiction rather than as a juvenile. *Id.*

290. Dearbone, No. 229014 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. May 18, 2020) (Decision and Reasons) (explaining away Mr. Dearbone's successful periods of incarceration where he received few or no infractions: "[Mr. Dearbone] has had extended periods of staying out of trouble, though that is not to say that there is any dearth of enduring antisocial traits.").

291. Coker, No. 253235 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Dec. 16, 2019) (Decision and Reasons).

292. *Id.*

293. Scalice, No. 278901 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Oct. 28, 2019) (Decision and Reasons).

translates to managing his life in a community setting."[294] This last statement is at odds with the ISRB's assumption in almost every other case: that an individual's behavior while incarcerated does, in fact, reflect on their ability to function when released.[295]

Other factors also emerged across the sample beyond discipline, programming, and release planning. While these factors are not discussed in detail by this Comment, they provide helpful context for ISRB decision-making. For example, age and mobility were a complicating factor for many. This makes sense, given that individuals incarcerated pre-1984 as adults are, by and large, advanced in age. The ISRB was sometimes persuaded that someone's age or physical condition may mitigate their risk to the community, but the age and mobility issues cited in those cases were severe. One individual was released after the ISRB determined that his near-total confinement to a wheelchair and need for daily assistance was sufficient to lower his risk; he was sixty-four years old.[296] The ISRB found a seventy-six-year-old man who used a cane releasable, partly based on his age and mobility, but he would still be subject to electronic home monitoring once released.[297] One sixty-nine-year-old man cited "congestive heart failure, kidney problems, a pacemaker, difficulty walking," and a litany of other health conditions, which the ISRB found persuasive enough to submit a release determination.[298] However, mobility was not completely determinative; the ISRB denied release to one sixty-three-year-old man despite his concern that his body was "shutting down" as the result of persistent medical conditions.[299]

For many, the primary motivating factors for ISRB determinations were individual Forensic Psychological Evaluations (FPEs) along with actuarial risk assessments.[300] Those scores are not considered on their own

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294. *Id.*

295. Stanphill, No. 908387 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Apr. 27, 2020) (Decision and Reasons) (suggesting an individual's "decades of negative prison behavior in both Arizona and Washington" was indicative of his likely inability to succeed out of custody).

296. Shaw, No. 629497 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Nov. 25, 2019) (Decision and Reasons).

297. Johnson, No. 125311 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Feb. 8, 2021) (Decision and Reasons).

298. Graham, No. 943021 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. May 3, 2021) (Decision and Reasons).

299. Langendorf, No. 287495 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. June 10, 2019) (Decision and Reasons).

300. *See generally* Decision and Reasons (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Apr. 2017–Sept. 2021) (noting that almost every decision lists either an FPE or an actuarial score, if not both, as justification for the outcome reached).

but rather as part of the ISRB's larger analysis. The ISRB seems to be uncritical of the methodological underpinnings of the psychological evaluations it receives.[301] Actuarial scores were used in combination with unstructured professional evaluation in most cases.[302] Across the sample, if an individual's FPE suggested that they may qualify for RCW 71.09 civil commitment, the ISRB determined that individual to be ineligible for release.[303] Similarly, an individual's refusal to participate in their hearing was largely predictive of a negative determination.[304] Countless examples exist wherein the ISRB based their decision largely on a forensic psychologist's determination that the individual displayed "moderate" or "high psychopathy."[305] The ISRB also seems to prefer individuals who submit to medication to address mental health concerns.[306] In one case, the ISRB specifically cited an individual's *lack* of medication as a factor in support of his releasability—perhaps implying that people who don't

301. For example, none of the Decision and Reasons documents cite questions or concerns about the testing criteria. This claim was raised on appeal by one individual, who highlighted the "limited predictive value" of the Static-99R; that claim was not successful in court. *In re* Jackson, 18 Wash. App. 2d 1045, 1045, 2021 WL 3290650, at *3 (2021).

302. *See generally* Decision and Reasons (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Apr. 2017–Sept. 2021) (showing a large number of decisions that include actuarial scores as one bullet point in a list of criteria—often, criteria that are also ostensibly considered in the development of the actuarial score).

303. *See, e.g.*, Plemons, No. 286922 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 14, 2019) (Decision and Reasons) (citing Mr. Plemons's FPE result which noted he was likely eligible for RCW 71.09 commitment, as a reason to deny him release); Richmond, No. 624570 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 11, 2021) (Decision and Reasons) (citing Mr. Richmond's having been selected by the RCW 71.09 release committee for possible screening as an indicator of the "risk" he posed if released); Bingham, No. 249136 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Oct. 26, 2020) (Decision and Reasons) (same as previous). Similarly, if an individual was determined specifically *not* to meet criteria for RCW 71.09 civil commitment by their FPE evaluator, that information was considered a determinative factor that they could be releasable. *See* Parejo, No. 690773 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. June 8, 2020) (Decision and Reasons).

304. *See, e.g.*, Osborne, No. 267767 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 17, 2020) (Decision and Reasons) (stating the ISRB "cannot determine if Mr. Osborne is a fully rehabilitated and fit subject for release as he refused to meet with the Board in today's hearing").

305. *See* Roth, No. 281508 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. June 27, 2020) (Decision and Reasons). Mr. Roth was determined by his FPE evaluator to be in the "high range for psychopathy." *Id.* Mr. Roth's SOTAP counselor stated he "clearly had many cognitive distortions," and the ISRB claimed it "would behoove [Mr. Roth] to accept personal responsibility for his choices and stop blaming others." *Id.* These details were cited as the ISRB's core reasons for denying release to Mr. Roth. *Id.*

306. Requiring compliance with medication is often cited by disability justice advocates as a problematic reform that is abusive and dehumanizing toward neurodivergent and disabled individuals. *Reforms to Avoid*, ABOLITION & DISABILITY JUST. COAL., https://abolitionanddisabilityjustice.com/reforms-to-oppose/ [https://perma.cc/6C2B-PXC2].

need medication are less likely to re-offend.[307]

Empathy and remorse played a large role in many decisions. Lack of empathy,[308] lack of motivation for treatment,[309] and inability to show remorse for past behaviors[310] were all cited by the ISRB to justify denial of release. The amount of remorse required to satisfy the ISRB was a high bar; one individual who was sufficiently remorseful recounted "he threw up after [committing his index offense]" and wrote "an accountability letter to the victim's family" as well as admitted guilt to his own family.[311] Remorse was most valuable when the incarcerated individual was willing to match the ISRB's (at times, emotionally-charged) vocabulary in describing the index offense.[312] In one case, the ISRB found an individual releasable after a show of remorse and acknowledgement not only of his index offense, but a prior conviction as well—something the ISRB noted explicitly in their reasoning to release.[313] In another, the ISRB found an individual to be sufficiently empathetic even when he maintained his innocence for the index offense: "[h]e stated that he is not bitter about being confined for a crime he did not commit and has come to realize that he is in prison for all the other terrible things he has done throughout his life."[314]

Finally, by and large, the ISRB was dismissive when referring to individual behaviors that may have stemmed from an individual's mental illness or cognitive or behavioral disorder. The ISRB opined in one case, "[i]t is somewhat concerning that after [the individual's] lengthy period of incarceration he is not more able to show respect to others and get along with people."[315] Another individual, according to the ISRB,

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307. Smith, No. 287506 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Nov. 18, 2019) (Decision and Reasons).

308. Bingham, No. 249136 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Oct. 26, 2020) (Decision and Reasons).

309. Aiken, No. 029644 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. June 4, 2018) (Decision and Reasons).

310. Nordsven, No. 248359 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. June 3, 2019) (Decision and Reasons).

311. Joe, No. 773167 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Jan. 8, 2018) (Decision and Reasons).

312. Lovrick, No. 267696 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. June 4, 2018) (Decision and Reasons) (noting Mr. Lovrick "appeared very remorseful at times and was articulate and humble in describing *his horrific crime*" (emphasis added)).

313. Harig, No. 247957 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. May 22, 2018) (Decision and Reasons).

314. Skinner, No. 660064 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Nov. 27, 2017) (Decision and Reasons).

315. Coker, No. 253235 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Dec. 16, 2019) (Decision and Reasons).

"[c]ontinue[d] to demonstrate anti-social and manipulative behavior . . . . When caught he becomes obnoxious and aggressive about it."[316] Regarding one individual with documented mental illness which manifests in the form of conspiracy theories, the ISRB stated, "[h]e continues to act as if he is a sacred martyr serving an unjust sentence for a crime he did not commit. This has gotten him nowhere in more than [thirty] years."[317]

### *B. Analysis of Legal Remedies for Denial of Release*

Lack of interrogation into systemic causes for negative releasability criteria is not limited to the ISRB; it extends to the courts as well. This creates a huge barrier to relief for many individuals under the ISRB's jurisdiction who wish to challenge a sentence extension that they believe was unfair. Section III.B.1 is a cursory overview of how Washington courts have ruled on challenges to ISRB determinations. Section III.B.2 explores other possible grounds for relief (ADA claims, Eighth Amendment claims, and Fourteenth Amendment claims—all methods that are used in prison and/or mental health contexts) and explains why they are not sufficient to address the nuances presented.

#### *1. Court Determinations on Personal Restraint Petitions*

The Washington State Supreme Court has established that failure to meet any one of the ISRB's established criteria for releasability is legitimate grounds for rejection, regardless of the reason for the failure.[318] Programming requirements are illustrative. In one Personal Restraint Petition (PRP), a claimant articulated that the ISRB conditioned his releasability on a factor beyond his control: participation in SOTAP.[319] The Court disagreed, claiming that SOTAP was available to that individual if he "[took] responsibility for his crimes."[320] However, the Court did no analysis of whether the claimant had any kind of cognitive or behavioral disorder that would have made it difficult or impossible for

316. Robinson, No. 627740 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Mar. 9, 2020) (Decision and Reasons).

317. Demos, No. 287455 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. June 8, 2020) (Decision and Reasons).

318. *See In re* Pers. Restraint of Dyer, 164 Wash. 2d 274, 288, 189 P.3d 759, 766 (2008); *In re* Haynes, 100 Wash. App. 366, 996 P.2d 637 (2000).

319. *In re Dyer*, 164 Wash. 2d at 294, 189 P.3d at 769.

320. *Id.*

him to display that kind of remorse.[321] In another case, *In re Haynes*,[322] Mr. Haynes claimed he could not participate in SOTAP because he was stuck on the waiting list, and the ISRB did not compel the DOC to prioritize his enrollment.[323] The court claimed the waitlist issue was "a matter of administrative grace" that was "not reviewable" by the court.[324] The court did not ask why Mr. Haynes was on the waitlist in the first place. As discussed earlier in this Comment, it could have been because of systemic failures to fund the program at appropriate levels such that there was space for Mr. Haynes; or because he had previously been dropped for disruptive behavior that may or may not have been attributable to his mental health. Either way, the court did not discuss further. Taken together, these rulings made it clear that a failure to program, regardless of the reason behind an individual's refusal to attend treatment, is fair grounds for denial of release.[325]

Washington courts have determined that discipline and remorse—two other criteria cited by the ISRB—are equally unlikely to be valid bases for a successful PRP. In *In re Evans*,[326] the court of appeals established that an individual's demeanor and lack of overt remorse during a hearing could be considered by the ISRB under Washington Administrative Code (WAC) 381-90-050(4)(d) as "other pertinent information."[327] The court in *Evans* was also comfortable affirming the ISRB's decision based on "lack of changed behavior" and "minimal insight into his crimes."[328] The Washington State Supreme Court in *In re Ecklund*[329] affirmed its position that the ISRB may base its denial of release on an individual's lack of remorse.[330] The court of appeals recently doubled down on this analysis in *Evans*, affirming that the petitioner's lack of empathy and "minimal insight into his offending behavior" were acceptable grounds for denial of release.[331] Regarding infractions, *In re Jackson*[332] recently solidified the

321. *See supra* section II.B.iii.

322. 100 Wash. App. 366, 996 P.2d 637 (2000).

323. *Id.* at 368, 996 P.2d at 638.

324. *Id.*

325. *Id.*; *In re Dyer*, 164 Wash. 2d at 274, 189 P.3d at 759.

326. 16 Wash. App. 2d 1078, 2021 WL 982600 (2021).

327. *Id.* at *5.

328. *Id.* at *6.

329. 139 Wash. 2d 166, 985 P.2d 342 (1999).

330. *Id.* at 176, 985 P.2d at 348 ("[The ISRB] is justified in considering [the petitioner's] denial of guilt as a fact bearing on the question of whether he had been rehabilitated and presents a threat to community safety.").

331. *In re Evans*, 2021 WL 982600, at *6.

332. 18 Wash. App. 2d 1045, 2021 WL 3290650 (2021).

court of appeals's long-standing acceptance of the use of infraction behavior in releasability determinations—even if those infractions were the result of a substance use disorder.[333] Further, there need not be a nexus between the infracted behavior considered and the risk factors that individual faces.[334] For example, individuals at high risk of violent crimes need not have evidence of *violent* past infractions; the presence of *any* type of infraction is sufficient.[335] Finally, faulty actuarial assessment methods are valid determiners for the ISRB, recently affirmed by the court of appeals.[336] Specifically referring to the Static-99R, the court dismissed the petitioner's claims on the test's recognized limitations and stated that "[e]ven as a 'moderate predictor of sexual re-offense' as described by the Department of Corrections, the ISRB is still statutorily permitted to consider the Static-99R."[337]

Interestingly, one individual did challenge the ISRB's heavy reliance on possible RCW 71.09 eligibility,[338] with some success. The ISRB denied release to the plaintiff in *In re Parejo*[339] based on an FPE that stated he may meet criteria for RCW 71.09 civil commitment.[340] Mr. Parejo argued that this reliance was an incorrect interpretation of the governing RCW for parole, RCW 9.95.115.[341] That RCW states that individuals are only to be denied parole if they are "subject to" commitment under 71.09.[342] ISRB members stated in Mr. Parejo's hearing that it was their understanding that once an FPE found an individual to meet 71.09 criteria, their hands were tied, and parole must be denied.[343] The court of appeals soundly dismissed this line of thinking and asserted that the ISRB is not precluded from finding an individual releasable simply because of their possible eligibility for 71.09.[344] Unfortunately, because of a mootness issue, the court ultimately denied the PRP.[345]

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333. *Id.* at *4.

334. *Id.* at *3.

335. *Id.*

336. *Id.*

337. *Id.*

338. *See supra* section II.D.

339. 5 Wash. App. 2d 558, 428 P.3d 130 (2018).

340. *Id.* at 564–65, 428 P.3d at 135.

341. *Id.* at 565, 428 P.3d at 135.

342. WASH. REV. CODE § 9.95.115 (1986).

343. *In re Parejo*, 5 Wash. App. 2d at 565, 428 P.3d at 135 ("It's the board's understanding, as we have been advised by our Assistant Attorney General, that when we receive a forensic psychological evaluation that finds that a person is—does meet the criteria, that we no longer have the discretion to make a release decision.").

344. *Id.* at 575, 428 P.3d at 140.

345. *Id.* at 576, 428 P.3d at 140.

### 2. *Other Grounds for Relief: The ADA, the Eighth Amendment, and Equal Protection*

If the PRP as a legal remedy offers only limited success, it is worth questioning whether any other grounds exist to challenge a releasability determination. Whenever mental health creates a disparate experience in public accommodation for certain individuals, individuals may often turn to the Americans with Disabilities Act (ADA). Although the Americans with Disabilities Act (ADA) governs a significant amount of litigation in the mental health sphere, the ADA plays a limited role in the context of parole and release. Title II of the ADA states "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."[346] However, the ADA is a difficult pathway for challenging a denial of release that may have stemmed from mental illness. First, the Ninth Circuit has held that prison officials may discriminate based on disability, if that discrimination serves a "legitimate penological interest."[347] While "legitimate penological interests" are not explicitly defined by the Ninth Circuit, the Supreme Court has indicated that safety concerns are the primary interest at issue.[348]

Additionally, an open question remains as to how protective the ADA really is for behavioral disorders.[349] While the American Psychiatric Association's most current Diagnostic and Statistical Manual of Mental Disorders (DSM-5) legitimizes personality disorders and substance-related and addictive disorders as diagnosable mental illnesses,[350] little legal action has been pursued applying the ADA to those types of disorders.[351] Recently, a Massachusetts court determined that the state's parole board—fulfilling a similar function to the ISRB—could be challenged under the ADA if the board denied release based solely on lack of availability of community treatment, but did not take steps to provide

346. 42 U.S.C. § 12132.

347. Gates v. Rowland, 39 F.3d 1439, 1446–47 (9th Cir. 1994).

348. Turner v. Safley, 482 U.S. 78, 89 (1987) ("Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.").

349. Deirdre M. Smith, *The Paradox of Personality: Mental Illness, Employment Discrimination, and the Americans with Disabilities Act*, 17 GEO. MASON U. C.R.L.J. 79 (2006).

350. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. rev. 2022).

351. *See* Smith, *supra* note 349.

that treatment.[352] This type of claim has not yet been pursued against the ISRB in Washington.

Another potential avenue for relief is in the Eighth Amendment, but that avenue is limited. The Eighth Amendment governs treatment of incarcerated individuals experiencing mental illness during incarceration.[353] Broadly, the Eighth Amendment protects against the infliction of "cruel and unusual punishment."[354] To prove an Eighth Amendment violation, a plaintiff would have to demonstrate "deliberate indifference to serious medical needs" of an incarcerated individual; mere negligence in medical care is not sufficient.[355] Eighth Amendment claims challenge conditions that individuals experience *while* incarcerated. The denial of parole or release, however, is not a condition of confinement but instead a separate determination, thus making these cases a difficult fit to existing Eighth Amendment scholarship. The Eighth Amendment has been the basis for challenging excessive sentences, most notably in *Miller v. Alabama*,[356] wherein the United States Supreme Court invalidated life sentences without parole for juveniles.[357] Mentally ill individuals on death row have also employed the Eighth Amendment to challenge their sentences with some success, specifically if they do not remember their crime or do not understand the state's motivation in sentencing them to death.[358] This litigation has largely been limited to individuals facing capital punishment, however, which is not applicable to the present discussion.

In 1986, one group of self-reported mentally ill individuals attempted to legally challenge their parole denial through an Equal Protection claim.[359] The Washington State Supreme Court denied the claim en banc.[360] The Court's reasoning did not delve into Equal Protection standards of review in that decision; in fact, it spent very little time addressing the claim:

> [Petitioners] contend that, as mentally ill or developmentally

352. Recent Case, Crowell v. Massachusetts Parole Board: *Massachusetts Supreme Judicial Court Observes that Americans with Disabilities Act Applies to Parole*, 131 HARV. L. REV. 910 (2018).

353. Estelle v. Gamble, 429 U.S. 97, 97 (1976).

354. U.S. CONST. amend. XII.

355. *Estelle*, 429 U.S. at 104.

356. 567 U.S. 460 (2012).

357. *Id.*

358. Madison v. Alabama, 586 U.S. __, 139 S. Ct. 718, 728 (2019) (finding that earlier decisions "stated that an execution lacks retributive purpose when a mentally ill prisoner cannot understand the societal judgment underlying [their] sentence," and extending that understanding of mental illness to include dementia in some circumstances).

359. *In re* Ayers, 105 Wash. 2d 161, 713 P.2d 88 (1986).

360. *Id.*

> disabled persons, they are treated differently than other potentially parolable persons. *Those allegations may well be correct*, but we know of no principle that says that people who are *in fact* different, through no fault of their own, must be treated the same as persons who are *in fact* different from those who assert they must be treated the same as others. The *very* assertion denies the individuality of people. Equal protection requires equal treatment; it does not make people equal.[361]

The above excerpt is as far as the Court has gone to address an Equal Protection claim against disparate parole treatment of mentally ill individuals, in that case and since.

## IV. THE LEGAL REMEDY FOR ISRB DETERMINATIONS IS FUNCTIONALLY NONEXISTENT FOR INDIVIDUALS WITH MENTAL ILLNESS

The results of my survey of ISRB decisions largely echoed the concerns raised in the Introduction of this Comment. Individuals whose Decision and Reasons included some mention of mental illness, cognitive or behavioral disorder, or substance use disorder often experienced denial of release or parole for reasons related to their condition.[362] Only in rare occasions did the ISRB determine individuals exhibiting symptoms of mental illness to be eligible for release.[363] Those individuals had spent years in programming and treatment, had undergone multiple Forensic Psychological Evaluations (FPEs), had spotless disciplinary records, and had extensive and well-documented community supports ready to meet them.[364] Above all, the ISRB used language that suggested emotional determinations based on remorse and empathy—factors that are not probative of rehabilitation or releasability.[365]

The object of this Comment is not to litigate the personal biases of

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361. *Id.* at 167, 713 P.2d at 91 (first emphasis added).

362. *See supra* section III.A.

363. *See* Shelly, No. 925898 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. June 18, 2019) (Decision and Reasons); Moore, No. 269463 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. June 25, 2018) (Decision and Reasons); Shaw, No. 629497 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Nov. 25, 2019) (Decision and Reasons).

364. *See, e.g.*, Moore, No. 269463 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. June 25, 2018) (Decision and Reasons) (finding an incarcerated person releasable after he spent thirty-eight years in full custody because he was housed in a supportive unit for individuals with significant mental health needs, had no infractions for the previous twelve years, had a spouse of over twenty-seven years willing to assist him, was 100% medication compliant, and had an overall positive reputation with staff).

365. *See supra* section I.B.3.

ISRB members. Working with relatively limited statutory guidance,[366] the ISRB has established a structure of assessment that mirrors many other parole board structures around the country.[367] Scores of individuals have been successful in litigating their release in front of the ISRB, overcoming difficult crimes of conviction and severe mental health challenges.[368] An individual's mental health is by no means an absolute predictor of a negative determination.

But it cannot be overlooked that the ISRB's decision-making process puts incarcerated individuals with mental illness or cognitive or behavioral impairment at a distinct disadvantage. Further, while the ISRB is not a legal process,[369] the decisions it makes have the same impact as a sentencing court. The only oversight of ISRB decisions rests with the Governor's office through its appointment of ISRB members, and through the court of appeals when a Personal Restraint Petition is adjudicated. As a result, a body with broad discretion over the lives of incarcerated individuals operates with relatively little oversight—meaning that deficiencies in the ISRB's processes are left largely unchecked.[370] Individual discretion and broad disparities in application of sentences drove the public to eliminate the Board of Prisons and Paroles in Washington,[371] yet we see the same disparate application today in a different form: when individuals with mental illness face a steeper road to release.

The most reasonable legal solution to this problem is to turn to the court of appeals to exercise their oversight authority to remedy ISRB

366. *See supra* section II.B.1.

367. Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROB.: J. CORR. PHIL. & PRAC. 1 (2007).

368. *See* Moore, No. 269463 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. June 25, 2018) (Decision and Reasons); Anderson, No. 287309 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Mar. 8, 2021) (Decision and Reasons).

369. Not that it is *illegal*; rather, that it is not bound by the same checks that would govern a courtroom procedure—evidence limitations, judicial ethics, appellate review, and so forth. Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7, 16 (1979) (holding that, because there is no constitutional right to discretionary release before the expiration of a valid sentence, as long as an individual has a right to be heard and is notified of the reasoning for a determination, further due process is not required).

370. Recall *supra* section III.A and the ISRB's use of dismissive language regarding behavioral health manifestations in individuals who come before the ISRB. While seemingly insignificant on its face, a lack of intentional language (at best) and disregard for the presentation of symptoms of cognitive and behavioral disorders (at worst) are indicative of a lack of appropriate training in inclusive and non-biased mental health services provision.

371. WASHINGTON PRACTICE SERIES, *supra* note 21, §§ 42:4–42:5; s*ee also* State v. Thomason, 199 Wash. 2d 780, 793, 512 P.3d 882, 888 (2022) (González, C.J., concurring) ("The Sentencing Reform Act of 1981, ch. 9.94A RCW (SRA), was enacted, at least in part, with the noble goal of constraining discrimination in our criminal justice system.").

determinations. But several factors have made the court's oversight ineffective for claims of this nature, such that a legal remedy for discrimination in this space is functionally nonexistent. This Part outlines the two main reasons underpinning this deficiency. First, section IV.A discusses the court's deferential standard of review. Second, section IV.B addresses the history of cases in Washington that have closed off certain challenges.

### *A. The Court's Deferential Review Weakens Chances for Success*

First, the court's deferential standard of review for ISRB decisions is an exceedingly high bar to overcome. The court employs an abuse of discretion standard when reviewing ISRB determinations.[372] This means that an ISRB determination can only be overturned or remanded for reconsideration when the ISRB "disregards the evidence presented and supports its decision with speculation and conjecture,"[373] or when the ISRB "fails to follow its own procedural rules for parolability hearings or acts without consideration or in disregard of the facts."[374] This high standard mirrors the court's general approach to reviewing sentencing court determinations.[375] Abuse of discretion is a standard typically reserved for decisions made by lower courts,[376] but as stated above, the ISRB is *not* a court of law. In justifying its standard of review, the court defers to the legislature's intent in granting authority to the ISRB.[377] In fact, the court has gone so far as to say that individuals eligible for release are "subject entirely to the discretion of the [ISRB], *which may parole [them] now or never*."[378]

On top of the standard of review, the court's deference to the broader concept of "public safety" makes it more difficult for petitioners to succeed. The legislature requires the ISRB to "give public safety considerations the highest priority" when making determinations of release.[379] "Public safety" is a nebulous concept, and while predictive tools like actuarial risk assessments can help determine risk to a degree,

372. *See In re* Dyer, 157 Wash. 2d 358, 363, 139 P.3d 320, 323 (2006).

373. *Id.* at 369, 139 P.3d at 325.

374. *In re* Jackson, 18 Wash. App. 2d 1045, 2021 WL 3290650, at *2 (Aug. 2, 2021) (internal quotations omitted).

375. *In re* Myers, 105 Wash. 2d 257, 714 P.2d 303 (1986).

376. JULIA RUGG, THE WRITING CTR. AT GEO. UNIV. L. CTR., IDENTIFYING AND UNDERSTANDING STANDARDS OF REVIEW (2019).

377. *In re Myers*, 105 Wash. 2d 257, 714 P.2d 303.

378. *In re* Ecklund, 139 Wash. 2d 166, 174–75, 985 P.2d 342, 347 (1999) (quoting *In re* Personal Restraint of Powell, 117 Wash. 2d 175, 196, 814 P.2d 635 (1991)) (emphasis in original).

379. WASH. REV. CODE § 9.95.009(3) (2011).

the ISRB often supplants those assessments with less reliable methods of unstructured qualitative assessment.[380] Assessing the danger someone may pose while incarcerated also disregards the supports within the community that make those people more or less likely to pose a threat to people around them. If, in the ISRB's own language, an individual's behavior in confinement "in no way translates to managing his life in a community setting,"[381] this raises a question as to how the ISRB can truly know the public safety threat posed by an individual. Perhaps if an individual knowingly and intentionally fails out of a cognitive behavioral therapy program, they may not be interested in changing behaviors. But as a review of ISRB decisions suggests, the ISRB does not meaningfully discern between willful lack of participation and more nuanced reasons for failure to succeed.[382] It also invites the question: safety for whom? The ISRB's current method aims to protect neurotypical and non-convicted individuals; meanwhile, it compromises the safety of convicted individuals with mental health conditions by retaining them in carceral settings that pose unique dangers to that specific population. Research indicates that longer sentences purely for the sake of incapacitation or deterrence are not measurably more effective in reducing recidivism,[383] perhaps proving that the public is not any safer by virtue of long sentences. Yet, courts have not chosen to interrogate these issues, instead deferring entirely to the ISRB's determination of public safety.[384]

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380. *See, e.g.*, Vickers, No. 912730 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Jan. 25, 2021) (Decision and Reasons) (citing Mr. Vickers's Static-99R score on a list of criteria underlining a denial of release, but then devoting the majority of the decision to a description of how he fought with the ISRB about issues concerning guilt for the underlying offense); Alishio, No. 287540 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Dec. 17, 2018) (Decision and Reasons) (noting that Mr. Alishio's risk per his Static-99R score was "above-average", but ignoring that score in favor of other factors like age and programming); Bidon, No. 247534 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Oct. 9, 2017) (Decision and Reasons) (granting release to Mr. Bidon who was a "mixed bag" of risk scores—even scoring *high* risk on one test—because of other positive factors).

381. Scalice, No. 278901 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Oct. 28, 2019) (Decision and Reasons).

382. *See supra* section III.A.

383. *See* BARKOW, *supra* note 11, at 42–44 ("[I]t is not surprising that a report commissioned by the Department of Justice found that lengthy prison sentences are not the best way to deter crime. A 2016 report by the president's Council of Economic Advisers concurred, concluding that 'research on the impact of sentence length has found that longer sentences are unlikely to deter prospective offenders or reduce targeted crime rates.").

384. *See In re* Ecklund, 139 Wash. 2d 166, 174, 985 P.2d 342, 347 (1999) (noting the ISRB's "high degree of discretion" in determining public safety risk, among other things); *In re* Haynes, 100 Wash. App. 366, 377–78, 996 P.2d 637, 644–45 (2000) (declining to inquire as to the underlying justification for the ISRB's public safety analysis); *In re* Pers. Restraint of Dyer, 164 Wash. 2d 274, 293–94, 189 P.3d 759, 769 (2008) (declining to analyze the ISRB's reasons for determining Dyer was a public

The same deference to safety in DOC operations also makes other legal claims, such as claims under the ADA or Eighth Amendment, unlikely to succeed. Because the ISRB is required to prioritize public safety above all other considerations,[385] a deferential court would likely find that discrimination in an ISRB decision would not constitute a valid ADA claim.[386] The Eighth Amendment requires only that the medical needs of disabled incarcerated people are not met with "deliberate indifference;"[387] as long as the ISRB is not issuing deliberately cruel and unusual determinations for folks with mental illness (an incredibly difficult claim to prove), an Eighth Amendment claim is likely a dead end for individuals seeking another avenue for attack.

### *B. Past Decisions Have Calcified the Court's Inability to Accept Certain Claims*

The jurisprudence surrounding Personal Restraint Petitions in Washington makes claims of discrimination based on distinct factors—infractions, programming, shows of remorse, and actuarial assessments—difficult, if not impossible, to bring. A mentally ill person who wishes to submit a Personal Restraint Petition (PRP) based on the ISRB's unfair use of past infractions, actuarial tools, lack of empathy, or inability to complete programming in a denial of releasability would likely be unsuccessful if the courts chose to follow current precedent.[388] The above decisions each delve into a specific issue that the petitioner believed was in error in the ISRB's determination. However, rather than relying on one factor to make a negative determination, today's ISRB offers at least three to four reasons for approval or denial of releasability in every case.[389] Perhaps this is in response to dicta in court decisions stating that things like a lack of remorse would not stand as the *sole* reason for a

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safety risk). Indeed, the lack of scrutiny has been warned against by some. *See In re Ecklund*, 139 Wash. 2d at 184, 985 P.2d at 352 (Sanders, J., dissenting) ("If merely raising the specter of danger to public safety were enough to immunize an ISRB decision from reversal, then judicial review would amount to little more than a rubber stamp."). This deference to carceral authorities on the subject of public safety has a long history in U.S. caselaw. *See* Turner v. Safley, 482 U.S. 78, 90 (1987).

385. WASH. REV. CODE § 9.95.009(2)–(3) (2011).

386. *See supra* section III.B.2.

387. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

388. *See supra* section III.B.1.

389. *See generally* Decision and Reasons (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Apr. 2017–Sept. 2021) (demonstrating common practice is to list, at minimum, a reference to actuarial risk assessments and/or Forensic Psychiatric Evaluations, a reference to the individual's success or failure at programming, a reference to the individual's behavior while incarcerated, and possibly a reference to whether the individual shows insight into their own behaviors).

determination but would stand as part of a larger analysis.[390] Regardless, the result is that individuals facing a negative determination must make a showing of unconstitutionality, lack of factual support, or ISRB failure to follow procedure on multiple factors.

No precedent has yet been established where an individual brought *all* of the above claims at once. However, consider the burden on such a petitioner: the individual would need a mental illness that the court is willing to view as legitimate and worthy of protecting,[391] firm evidence that every determining factor was negatively impacted by their mental health,[392] access to counsel willing to pursue a PRP,[393] and a court willing to analyze a claim instead of deferring to the ISRB's discretion.[394]

### *C. Access to Counsel Is Limited*

Finally, analysis of legal avenues for relief ignores one of the largest barriers—access to counsel to put a claim forward in the first place. PRPs and other constitutional challenges fall outside the scope of what a DOC-assigned lawyer can assist with.[395] Advocacy organizations like Disability Rights Washington and Columbia Legal Services often prioritize more systemic issues over individual appellate representation in order to maximize impact with limited resources.[396] On top of everything, the same personality disorders that make it difficult for incarcerated individuals to attend ISRB meetings or concentrate during programming

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390. *See, e.g.*, *In re* Ecklund, 139 Wash. 2d 166, 176, 985 P.2d 342, 348 (1999) ("[W]e do not believe that it would have been appropriate for the Board to base an exceptional minimum term *solely on Ecklund's refusal* to admit that he was guilty of the offense which led to his sentence to prison." (emphasis added)).

391. A difficult bar to overcome for anyone experiencing psychopathy, antisocial personality disorder, or any number of non-visible illnesses or disorders historically deemed to be "untreatable." *See supra* notes 305–306 and accompanying text.

392. A difficult bar to overcome if the individual's mental illness is not obvious, is undiagnosed, or presents in a way that the ISRB perceives as willful rather than unintentional. *See supra* note 206 and accompanying text.

393. A difficult bar to overcome. *See infra* section IV.C.

394. A difficult bar to overcome, given courts' standard of review. *See supra* section IV.A.

395. WASH. STATE DEPT. OF CORR., 737 CONTRACT ATTORNEY TEMPLATE, ATTACHMENT B: SCOPE OF WORK § 1.i.iv.

396. *See, e.g.*, *Case Acceptance*, DISABILITY RTS. WASH., https://www.disabilityrightswa.org/case-acceptance/ [https://perma.cc/FR2H-BL7W] ("Disability Rights Washington generally does not provide legal advocacy assistance when the request for service is one commonly accepted by the private bar or by local legal service and advocacy organizations based on the type of legal issue raised or the likelihood of recovery. Exceptions may be made by the Director of Legal Advocacy, in cases in which there exists a large system-wide impact, and DRW has ample capacity."); *Get Help*, COLUMBIA LEGAL SERVS., https://columbialegal.org/get-help/ [https://perma.cc/Q2ZS-VZV3] (noting that the organization focuses on "impact litigation and policy reform" rather than individual assistance).

may also preclude them from proactively seeking legal assistance.[397] After the criminal legal system has repeatedly wronged an individual, appealing for relief through that same system could seem as futile to them as going to an ISRB hearing only to be denied release for the umpteenth time.

## V. POTENTIAL SYSTEMIC REFORMS

Admittedly, it will take a monumental societal shift for us to move away from incarcerating mentally ill individuals and move toward helping them. Neither the ISRB nor the courts are in a position to force that shift alone. But, as evidenced by this Comment's review of the ISRB's recent releasability determinations, the ISRB cannot deny its complicity in maintaining the status quo. Legal standards of review and statutory requirements aside, if an individual exhibiting cognitive impairment has "resigned himself to die in prison" after the ISRB's repeated refusal to understand and accommodate the impact of his mental illness on his ability to succeed,[398] the system has failed this individual. What, then, is the answer to that failure?

The real answer to this question requires a completely different approach to harm, community safety, incarceration, and mental health. Assuming our current system of incarceration can become less harmful and more rehabilitative through simple and incremental reform ignores how our carceral structure was never intended to be rehabilitative to begin with.[399] Eliminating harm in a space that is primarily built to do retributive harm is beyond the scope of this Comment and arguably beyond the realm of possibility. In lieu of such a massive shift, I believe this analysis equips us with some ways to *reduce* that harm, with the intention of paving the road toward abolition and justice with helpful (rather than counterproductive) reforms.

The remainder of this Comment outlines several key options. First, section V.A discusses stopgap measures that the ISRB and the Department of Corrections may implement to mitigate the occurrence of these cases before a legal remedy is needed. Next, section V.B explores a more systemic solution worthy of pursuit.

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397. *See* ABRAMSKY & FELLNER, *supra* note 258, at 33 ("Some personality disorders can include episodes of psychotic decompensation and several of the personality disorders can result in severe disability. For example, an individual suffering from a severe generalized anxiety disorder with panic attacks might spend all of her time terrified, incapable of acting productively, and cringing in her cell.").

398. Osborne, No. 267767 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 17, 2020) (Decision and Reasons).

399. *See supra* section I.A.

### *A. Stopgap Measures*

From reports of the Washington Department of Corrections (DOC) itself to reviews created by the Office of the Corrections Ombuds (OCO) and work being done by Disability Rights Washington, the DOC is already aware of several steps it must take to provide more humane and equitable treatment of individuals with mental illness under its jurisdiction. The following list outlines some of those measures and addresses how they would impact individuals under ISRB jurisdiction:

*Implement more effective screening procedures for mental illness, traumatic brain injury (TBI), and cognitive/behavioral disorders*. Numerous reports on the inadequacy of the DOC's mental health screening processes have been completed by individuals and organizations infinitely more well-equipped than this author and need not be reiterated here.[400] The DOC's responses to those reports indicate its intention to submit a budget request for more screening staff,[401] and to conduct a "comprehensive review" of the intake screening process, to be completed by July of 2021.[402] If those steps were taken, the DOC did not publish its progress. A robust intake and screening process that includes screening for TBI, developmental disabilities, and suicide risk is critical in identifying incarcerated individuals with elevated treatment needs and aligning them with appropriate care.[403] Proactive and *continuous* screening is necessary to maintain an accurate understanding of the number of mentally ill individuals in any facility.[404]

*Allow for adaptations to make programming more accessible to the mentally ill population*. The DOC's current inability to accommodate those who do not fit the treatment mold leads to negative ISRB determinations on a regular basis. Recent ISRB determinations highlight consistent barriers to meaningful participation in the Sex Offender Treatment and Assessment Program (SOTAP), either due to some

400. *See, e.g.*, OCO MENTAL HEALTH SYSTEMIC REPORT, *supra* note 142, at 5–6 (noting inadequacy in mental health screening at intake due to lack of staff capacity); KINGSBURY & DAVID, *supra* note 140, at 6 (citing failure of the DOC to recognize and manage mental health risks related to suicide); Fleishman, *supra* note 150, at 411–13 (noting the PULHES system's inadequacy in assessing for TBI and developmental disabilities).

401. *See* OCO MENTAL HEALTH SYSTEMIC REPORT, *supra* note 142, at 18.

402. Letter from Julie Martin, Acting Secretary, Wash. State Dep't of Corr., to Joanna Carns, Director, Wash. State Off. of the Corr. Ombuds, at 1 (May 7, 2021), https://oco.wa.gov/sites/default/files/DOC%20Suicide%20Response%202020%20to%20OCO.pdf [https://perma.cc/GF2K-S4KL].

403. *See* ABRAMSKY & FELLNER, *supra* note 258, at 101.

404. Continuity is key: "[T]he fact that an initial intake-screening process finds an individual to be free of mental illness is no guarantee that they will remain healthy throughout their sentence." *Id.* at 102.

individuals' enhanced needs,[405] custody level,[406] facility placement,[407] or inability to succeed in a group therapy setting.[408] Additionally, the OCO has highlighted the need for better understanding and implementation of program accommodations based on psychiatric need.[409] The DOC did not respond meaningfully to the OCO's recommendations, beyond reiterating the need.[410] The goal of treatment should not be conceptualized as whether an individual is able to pass a standardized test but rather whether an individual has been effectively treated. Shifting the burden of success from the individual to the DOC as an institution could make a difference in this space.

*Individuals should not be disciplined for behaviors related to mental illness or cognitive/behavioral disability*. Again, the DOC has previously been afforded an opportunity to address this issue.[411] While the DOC has implemented a pilot program to address this need, that pilot is currently restricted to individuals with serious mental health needs whom the DOC has already identified and categorized.[412] The need for greater mental health input into the disciplinary process is not isolated to individuals who have a well-defined and visible mental illness. The problem calls for a broader cultural shift in the DOC's use of sanctions and punishment for behaviors outside individuals' control, which is beyond the scope of this Comment. This shift is needed not only in the disciplinary hearing process; staff mental health training and exposure is necessary in preventing staff from feeling the need to issue an infraction in the first place.[413] Such a shift may not retroactively help individuals with a long history of discipline during confinement, but it would begin to protect individuals currently confined who have a long road ahead of them.

*The ISRB should stop denying release based on the possibility of a later RCW 71.09 determination*. The court of appeals made itself abundantly clear: that an individual's psychological evaluation *may* be subject to RCW 71.09 civil commitment upon release is *not* determinative of their

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405. *E.g.*, Belgarde, No. 905798 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Apr. 2, 2018) (Decision and Reasons).

406. *E.g.*, Smith, No. 278891 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Apr. 26, 2021) (Decision and Reasons).

407. *E.g.*, McVay, No. 628500 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Aug. 26, 2019) (Decision and Reasons).

408. *Id.*

409. *See* OCO MENTAL HEALTH SYSTEMIC REPORT, *supra* note 142, at 11; *supra* section I.C.

410. *See* OCO MENTAL HEALTH SYSTEMIC REPORT, *supra* note 142, at 26.

411. *Id.* at 22.

412. *Id.*

413. *Id.* at 27.

releasability.[414] According to that court, this assumption by the ISRB is based on an erroneous statutory interpretation.[415] The governing statute states that individuals are only to be denied parole if they are "subject to" commitment under RCW 71.09,[416] and the court made clear that a prefiling psychological evaluation does not trigger RCW 71.09 proceedings.[417] Yet, as recently as 2021, the ISRB continues to refer to an individual's possible eligibility for commitment under RCW 71.09 as a reason to deny release.[418] The court has stated that this is not a determinative factor of releasability; [419] the ISRB has no authority to continue to give it weight as a determinative factor in its decision-making process. Civil commitment is a separate legal process, involving a judicial determination after significant findings—a process in which a person has rights to counsel, to present a defense, and other procedural safeguards. The ISRB, a body concerned with *criminal* sentences for *criminal* convictions, should not be taking on the role of executing de facto civil commitment through the extension of a criminal sentence.

*The ISRB should give the presumption of release more weight in Community Custody Board cases*. Despite clear guidance from the Washington State Supreme Court,[420] neither the ISRB nor the attorneys who represent clients before the ISRB seem to approach the presumption of release standard for individuals who commit sex offenses.[421] Presumption of release can be a valuable persuasive tool for ISRB Members to guide their balancing efforts when considering an individual's other determinative factors.[422] Currently, in Community Custody Board determinations, there is no pre-existing balancing factor in favor of release but multiple pre-existing factors that weigh against individuals (e.g., public safety,[423] political concerns[424]) before their individual case is even heard. A presumption of release could effectively

414. *See In re* Parejo, 5 Wash. App. 558, 575, 428 P.3d 130, 140 (2018).

415. *Id.*

416. WASH. REV. CODE § 9.95.115 (2001).

417. *See In re Parejo*, 5 Wash. App. at 574, 428 P.3d at 140.

418. *See* Green, No. 680340 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Apr. 15, 2021) (Decision and Reasons); Boggs, No. 127261 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. July 26, 2021) (Decision and Reasons).

419. *In re Parejo*, 5 Wash. App. at 574–76, 428 P.3d at 140.

420. *See In re* McCarthy, 161 Wash. 2d 234, 241, 164 P.3d 1283, 1286 (2007).

421. *See supra* section III.A.

422. *See, e.g.*, Feazell, No. 786882 (Wash. State Dep't of Corr. Indeterminate Sentence Rev. Bd. Dec. 3, 2018) (Decision and Reasons) (finding the presumption outweighed concerns about lack of empathy that would likely have carried more weight in a non-juvenile case).

423. *See supra* section IV.A.

424. BARKOW, *supra* note 11, at 75.

mitigate that imbalance, and there is court precedent to support it.[425]

*Change the makeup of the ISRB*. The proposed change[426] of the makeup of the ISRB to the broader and more diverse "Post-Conviction Review Board"—ultimately unsuccessful in the 2019 session—does not address the underlying inequity of ISRB criteria. Individuals would still be assessed based, at least in part, on their disciplinary history as well as other factors indicating a positive carceral experience.[427] However, it does address some of the limitations—access to counsel and Board makeup and training—that persist in the ISRB's current structure,[428] which could make a change of this nature worth pursuing.

### *B. Determinate-Plus Sentencing Must Be Abolished*

The measures listed in section V.A are by no means exhaustive, but they paint a picture of the small steps the DOC might take simply to catch up with modern standards of care for people in its custody. But returning to the ISRB and the court's implicit endorsement of the ISRB's operations, a more significant structural change is necessary to disrupt and dismantle the current cycle of disparate and inequitable releasability determinations.

This analysis of mental health as it applies to ISRB determinations is meant to portray our current system through one specific critical lens. What if, alongside a mental health lens, a critical race theory lens were applied? A feminist or queer critique? Incarcerated people are not monoliths, and experiences overlap; what if multiple lenses were applied at once? The intent of this Comment is not to show how one vulnerable group of individuals is disadvantaged within an otherwise legitimate system. Rather, I hope this Comment pushes the reader to consider just how fragile and arbitrary our current determinate-plus sentencing system starts to look when even one critique is applied. Washington State instituted the Sentencing Reform Act (SRA) scheme of majority-determinative sentencing as a reform in response to uneven application of sentences across the population.[429] Yet, now we have a new system of determinate-plus sentencing that once again disproportionately applies longer sentences—in this analysis, to individuals with mental illness. If

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425. *See In re McCarthy*, 161 Wash. 2d at 241, 164 P.3d at 1286 ("RCW 9.95.420(3) creates a limited liberty interest by restricting the Board's discretion and establishing a presumption that offenders will be released to community custody upon the expiration of their minimum sentence.").

426. *See supra* section I.A.

427. S. B. REP., S.B. 5819, 66th Reg. Sess., at 5 (Wash. 2019).

428. *Id.* at 4–5.

429. *See* WASHINGTON PRACTICE SERIES, *supra* note 21, § 42:6.

the same public that pushed for the SRA saw that this problem had re-emerged, a logical response would be to abolish the sentence structure and start anew.

Conceptually, the risks of determinate-plus sentencing are high. A system that puts the onus of release determinations on political appointees rather than sentencing courts is an open invitation for distorted incentives.[430] Tough-on-crime appointees have little reason to release "dangerous" individuals and cause public outcry if they have the opportunity instead to extend that person's sentence with little pushback from the public or the court. The extended sentences that result from the ISRB's determinations are not statistically likely to reduce recidivism any more than a sentence in the standard range.[431] And even more broadly, discretionary release as a part of the larger prison reform movement is built on the implicit understanding that some individuals are worthy of release while others are not.[432] This kind of thinking can be damaging for individuals who consistently fall into over-criminalized groups because it legitimizes their over-incarceration.[433]

In practice, a review of ISRB decisions reveals a decision-making structure that is resoundingly arbitrary, inconsistent, and at times confusing and inhumane. Each of the factors used can be manipulated to serve the ISRB's ultimate determination. Decisions are just as likely to be based on emotional perceptions of rehabilitation and remorse as they are to be based on someone's carceral experience, risk factors, or re-entry prospects. Even when specific statutory factors (like disciplinary history or programming participation) are used, there is limited likelihood that

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430. *See* BARKOW, *supra* note 11, at 75.

431. *Id*. at 44–47.

432. *See Reformist Reforms vs. Abolitionist Steps to End IMPRISONMENT*, CRITICAL RESISTANCE (2021), https://criticalresistance.org/wp-content/uploads/2021/08/CR_abolitioniststeps_antiexpansion_2021_eng.pdf [https://perma.cc/GF9D-BB3V]; MARIAME KABA, *Toward the Horizon of Abolition*, *in* WE DO THIS 'TIL WE FREE US 93, 95 (Tamara Nopper ed. 2021) ("That's the case when you think about the conversation around nonviolent, non-sexual-offending prisoners. We focus a bunch of attention on getting those people out. But in doing so we make it impossible for people who have used violence—the majority of the state prison population, by the way—to ever get out."); Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/Z2TJ-JUPM] ("Reactionary responses to the *idea* of violent crime often lead policymakers to categorically exclude from reforms [like shorter sentences or discretionary release] people convicted of *legally* 'violent' crimes." (emphasis in original)).

433. *See* LISA MARIE CACHO, SOCIAL DEATH 17 (Nov. 2012) ("Ascribing readily recognizable social value [i.e., worthiness of release] always requires the devaluation of an/other [i.e., those who deserve to remain incarcerated], and that other is almost always poor, racialized, criminalized, segregated, legally vulnerable, and unprotected.").

they are actually probative of someone's rehabilitation.[434] Factors that the ISRB treats as discrete and measurable—like the number of infractions a person receives or whether they graduate from SOTAP—are, in reality, incredibly nuanced. Mental health can impact every facet of someone's carceral experience and at the same time go unacknowledged during the ISRB's facial analysis of a carceral record. While the ISRB's statutory structure rewards "rehabilitation,"[435] the present analysis suggests that access to the kind of rehabilitation sought by the ISRB is impossible for some. And, at the end of it all, the court system is ill-equipped to provide adequate oversight for this process. Little remains, then, of determinate-plus sentencing that is worth saving.

Recall the discussion regarding actuarial risk assessments.[436] Scientists, researchers, and psychology and criminology professionals have worked to create structured analyses that might be relied upon to assess rehabilitation, by way of assessing recidivism.[437] If we were to keep to those specific actuarial tools, perhaps the ISRB would be making more scientifically sound determinations.[438] But, despite express warnings from the developers of those tools against supplementing actuarial outcomes with additional discretionary judgements,[439] that is exactly what the ISRB does by using actuarial assessments as only one of a handful of other factors. And worse, the ISRB relies on certain factors—empathy, seriousness of index offense, and others—that research proves are *not* predictive of a person's risk of recidivism.[440] By misusing a tool and supplanting the result with its own personal judgements, the ISRB ignores an entire field of science that has soundly invalidated some of the factors the ISRB clings to in its decision-making model. This misuse is only one of many issues within the ISRB's decision-making process, but it is serious in its own right.

Further, should the criminal system be considering recidivism at all? Recall the earlier recommendation in this section on RCW 71.09 determinations.[441] Washington State has a constitutionally validated civil system in place, the sole purpose of which is to make determinations on

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434. *See supra* section I.B.3.

435. *See* WASH. REV. CODE § 9.95.100 (2001).

436. *See supra* section II.A.1.

437. Hanson & Morton-Bourgon, *supra* note 182, at 14.

438. This is not to discount research that suggests actuarial tools, in themselves, are subject to structural inequities. For a more thorough dive into that argument, see Bell, *supra* note 188, at 37.

439. HANSON & MORTON-BOURGON, *supra* note 197, at 14.

440. *See supra* section I.B.3; *supra* text accompanying note 194.

441. *See supra* text accompanying notes 414–418.

which people are dangerous enough to merit civil confinement.[442] Under RCW 71.09 civil commitment, a person's risk of recidivism may be properly litigated as a civil matter.[443] But here, the ISRB is playing the role of both a criminal and civil court by assuming the authority to confine individuals indefinitely based on the possibility of a future crime. This blurring of responsibility is precisely what Justice Kennedy warned against when the Supreme Court originally upheld civil commitment.[444]

At first glance, pure abolition in this space presents a dilemma: abolishing the current structure of ISRB review would likely have significant negative consequences for currently incarcerated individuals. Absent ISRB review, Parole Board individuals would likely revert back to serving the entirety of their statutory maximum sentence in total confinement. For some, that means life behind bars with no hope of release.[445] The same goes for Community Custody Board individuals, for whom a sentencing court may impose a life sentence depending on their criminal history.[446] Given public sentiment surrounding sex offenses,[447] the legislature is unlikely to revise current statutory max sentences to require less time served. But there is an important distinction to be made here. What dooms those individuals to a life of incarceration is not the lack of discretionary release; *it is the sentence itself*. The determinate-plus structure was erected during a time of unbridled felony sentence expansion.[448] There was a time, before the Sentencing Reform Act, when sex offenses did not carry mandatory maximum life sentences.[449] Perhaps the (limited) possibility of release under the ISRB creates an intellectual workaround allowing us to be less critical of the exorbitant sentences for sex offenses. Removing determinate-plus sentencing places that problem front and center for examination. At least then we may be more

442. WASHINGTON PRACTICE SERIES, *supra* note 122, § 5406.

443. In fact, during that litigation, the burden falls on the state to prove that a person merits civil confinement, rather than the ISRB system that effectively forces incarcerated individuals to prove why they should *not* be confined. *See* 6A WASH. STATE SUP. CT. COMM. ON JURY INSTRUCTIONS, WASHINGTON PATTERN JURY INSTRUCTIONS—CIVIL, WPI 365.10 (7th ed. 2022).

444. *See supra* note 272 and accompanying text.

445. Importantly, this does not have to be the only option. The legislature has the authority to alter and remove criminal offenses from the books as much as it has the authority to create them; it is a question, not of political ability, but of motivation.

446. WASHINGTON PRACTICE SERIES, *supra* note 21, § 42:11; WASH. STATE INST. FOR PUB. POL'Y, *supra* note 54, at 13.

447. *See* Sawyer & Wagner, *supra* note 432 ("Instead of considering the release of people based on their age or individual circumstances, most officials categorically refused to consider people convicted of violent or sexual offenses, dramatically reducing the number of people eligible for earlier release.").

448. *See supra* section I.A.

449. WASHINGTON PRACTICE SERIES, *supra* note 21, § 42:2.

intellectually honest with ourselves about who we think deserves to be punished for a lifetime. Perhaps it would lead the public (or, at least, the legal community) to fully face the realities of incarceration. If people are not truly being rehabilitated in the current system, why do we incarcerate them in the first place?

Opponents may argue that the absence of discretionary release would disincentivize positive carceral behaviors for individuals previously under the ISRB's jurisdiction. But other mechanisms still exist that counter that argument. Washington's DOC operates with an "Earned Release Time" system,[450] wherein individuals can gain or lose time toward an earlier release than their initial sentence. This is true for all individuals, both in and out of ISRB jurisdiction.[451] Custody levels and facility placements are similarly governed by behavior and programming, and good outcomes are rewarded with better conditions and access to resources.[452] This argument falters without considering those other incentives. The incentivization narrative also forgets that, in many cases, an individual's failure to succeed in discipline, programming, or reentry is not for lack of effort. Many unintentional and uncontrollable factors can impact success even if an individual is trying their best. Finally, it seems clear that in many cases, impending ISRB review does little to incentivize individuals who have lost trust in the ISRB's decision-making process.[453] If these individuals know the ISRB will not give them what they perceive to be a fair shake, their behavior will remain unchanged. Incentivization of success is not a strong enough factor to uphold this otherwise broken system.

Think back to D.O., our introductory example. He is still incarcerated at the time of this writing, and he will have served 470 months for a crime with a minimum sentence of only 110 months. His statutory maximum sentence is life in prison. D.O.'s cognitive impairment prohibits his participation in SOTAP, yet it does not seem to have merited him any structural accommodations such that he might have the opportunity to succeed. Whether he decides to participate in future ISRB hearings is up to him; but, if the ISRB continues on its current path to require the unachievable in terms of program participation and attendance at his hearing, D.O. is likely to continue in the same pattern for the rest of his life. The ISRB, in turn, will continue to demand the same result from someone who has made clear they cannot achieve it.

We owe D.O. a better outcome than this. Perhaps it was the state's goal

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450. EARNED RELEASE TIME, *supra* note 218.

451. *See id.*

452. *See id.*

453. *See supra* note 96 and accompanying text.

all along to keep people like D.O. out of sight and out of mind. But, if we are willing to consider that it is the DOC's burden to accommodate D.O. with appropriate treatment and assistance, perhaps we would be moved to question why the DOC failed to achieve its rehabilitative aims during D.O.'s initial 110-month sentence. If the state's goal truly is rehabilitation, then the DOC must actually be willing to center an individual's rehabilitation, rather than simply measuring what it perceives to be "success" according to a set of rote criteria. Or, if we are honest with ourselves, perhaps the state's goal really is to keep D.O. incarcerated for life. If that is the truth, and if it gives you pause, then the answer is not to manufacture a misleading and subjective pathway to discretionary release based on the nebulous concept of "rehabilitation." A more compelling question is: what ends are served by issuing D.O. a statutory maximum life sentence in the first place?

D.O.'s experience with the ISRB is one of many, and his continued denial of release is likely not the only way that the state has failed him throughout his period of incarceration. Abolishing determinate-plus sentencing is not the only step in correcting that failure, but it is a step nonetheless. Let a fairer and more honest sentencing structure be our first goal and not our last one.

## CONCLUSION

Washington State's determinate-plus sentencing structure currently requires certain individuals to show that they have been adequately "rehabilitated" before they merit release, but rehabilitation in practice is difficult to assess with accuracy. People's experiences while incarcerated are diverse, dynamic, and often riddled with nuance. Such is the case for individuals with mental illness, whose condition often influences their experience in unseen but incredibly significant ways. To simplify that experience to a static list of factors, on which an individual can either succeed or fail, is a reductive approach that can harm individuals whose successes or failures are complicated by outside factors like a cognitive or behavioral health condition (among many other systemic factors not examined by this Comment). The authority in charge of making these assessments, the ISRB, has exhibited a history of inconsistent and, at times, bias-driven decision making, reinforced by a hands-off legal appeal process. The demonstrably disparate impact this arbitrary and nuance-less determinate-plus structure has on vulnerable populations reveals the need to take another look at how the state calculates who deserves to be incarcerated and for how long.

The legal appeals process for releasability determinations does not hold the answer to this problem. Some stopgap measures may be implemented

in the short term to protect vulnerable populations and make release more accessible for some. However, abolishing the current determinate-plus structure is the only way to return honesty and transparency to sentencing for individuals who commit sex offenses. Abolishing determinate-plus sentencing is a bold move, but the depth of flaws in the current structure requires nothing less. Any piecemeal reform short of abolition risks cementing this harmful structure and creating more intractable harms further down the road. Work remains to address deeper systemic concerns—like our carceral system's incompetency in dealing with mental illness or our societal reliance on staggeringly harsh sentences for sex offenses. Abolition of the current system, which allows those concerns to remain un-interrogated, is the best place to start.