

Under the Cloak of Brain Science: Risk Assessments, Parole, and the Powerful Guise of Objectivity

Jeremy Isard*

This Note examines the adoption of two psychological risk assessment protocols used on “lifers” by the California Board of Parole Hearings in preparation for parole suitability hearings. Probation and parole agencies employ risk assessment protocols across state and federal jurisdictions to measure the likelihood that an individual will pose a danger to society if released from prison. By examining the adoption and recent reformulation of risk assessment protocols in California, this Note considers some of the myriad demands that courts and administrative agencies place on brain science. Applying the California parole process as a parable of such pressures, this Note argues that brain science has a unique capacity to supersede legal inquiry itself, and thus should only be used in legal and administrative settings with extreme caution.

Introduction	1224
I. Chronology and Background.....	1227
A. <i>In re Rutherford</i> and the Beginnings of the Modern Risk	

DOI: <https://dx.doi.org/10.15779/Z38NS0KX20>

Copyright © 2017 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

* J.D. Candidate 2018, University of California, Berkeley, School of Law; B.A. 2011, Wesleyan University. My resounding thanks to the *California Law Review* editorial staff for their time and attention to this piece. I owe special thanks to Professor Hank Greely of Stanford Law School for letting a 1L from Berkeley infiltrate his fascinating seminar course on law and neuroscience. I am grateful to Professor Peter Schuck for helping me think through the administrative law component to this Note and for valuable comments on an early draft. I would also like to thank Professor Jennifer Skeem of Berkeley’s School of Social Welfare for explaining how actuarial risk assessments actually work. Lastly, I am indebted to Keith Wattlely, Ritika Aggarwal, and Kony Kim of UnCommon Law and to Philip Thomas of the California Department of Corrections and Rehabilitation for fielding my numerous requests for litigation documents and records. Errors and oversights are my own.

Assessment Protocol in California.....	1227
B. California Code of Regulations Title 15 Section 2240.....	1230
C. Quantifying Insight.....	1231
D. Back to Court: <i>Johnson v. Shaffer</i>	1232
II. The Prejudicial Nature of Psychological Evaluations in Parole	
Suitability Hearings.....	1235
A. A Dubious Administrative History: Opportunism and	
Evidence of Disregard for Scientific Accuracy.....	1235
B. The Risk Assessment Tools Examined: A Prejudicial	
Emphasis on Immutable and Demographic Variables.....	1241
1. A Primer on Risk Assessments.....	1241
2. Historical Clinical Risk Management-20 (HCR-20).....	1243
3. The Hare Psychopathy Checklist-Revised (PCL-R).....	1246
C. Quantifying Subjectivity: The Towering Influence of Insight	
and Remorse.....	1249
D. The Impact of the Drafted Regulations That Revise California	
Code of Regulations Title 15 Section 2240.....	1252
Conclusion.....	1255

INTRODUCTION

In California, there are thirty-two thousand prisoners serving indeterminate life sentences with the possibility of parole.¹ Sentences for such inmates take the form of a range, for example, from fifteen years to life.² Often called “lifers,” these inmates are eligible for parole as soon as they reach the lower threshold of their sentence.³ To be paroled, inmates must go before the Board of Parole Hearings (BPH) for a suitability hearing. BPH operates under the auspices of the California Department of Corrections and Rehabilitation (CDCR), a state administrative agency.⁴ The central inquiry in the suitability hearing is whether the inmate poses an “unreasonable risk of danger to

1. ROBERT WEISBERG, DEBBIE A. MURKAMAL & JORDAN SEGALL, STANFORD CRIMINAL JUSTICE CTR., LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA 3, 6 (2011).

2. Those convicted of three felonies and sentenced under the Three Strikes Law, for example, face a minimum sentence of “25 years to life.” See J. RICHARD COUZENS & TRICIA A. BIGELOW, THE AMENDMENT OF THE THREE STRIKES SENTENCING LAW 119 (2016), <http://www.courts.ca.gov/documents/Three-Strikes-Amendment-Couzens-Bigelow.pdf> [<https://perma.cc/X7DS-PTGS>].

3. Lifers are often eligible for parole before the lower terminus of their sentences. The minimum eligibility parole date (MEPD) is calculated differently based on when, and under what statute, the lifer was sentenced. Worktime credits and good behavior, moreover, can also lower a lifer’s MEPD. See PAROLE SUITABILITY HEARING HANDBOOK, CAL. DEP’T. OF CORR. & REHAB. 16 (2010). http://www.cdcr.ca.gov/victim_services/docs/bphhandbook.pdf [<https://perma.cc/CF7C-952L>].

4. See *About BPH*, CAL. DEP’T. OF CORR. & REHAB., <http://www.cdcr.ca.gov/BOPH> [<https://perma.cc/SW9Q-KZWP>].

society.”⁵ If they do, an inmate “shall be found unsuitable” for parole.⁶ If the panel of parole commissioners recommends parole, the prisoner’s ultimate release is then subject to review by the full Board of Commissioners and the Governor.⁷ If parole is denied, the Board will issue a three-, five-, seven-, ten-, or fifteen-year denial.⁸ Lifers have a substantially lower recidivism rate than other California prisoners.⁹ Over the last twenty years, less than 1 percent of paroled lifers have been arrested or convicted of new felonies.¹⁰ There is a statutory presumption that parole will be granted at a lifer’s first suitability hearing.¹¹ But in reality, less than 1 percent of lifers are granted parole at the

5. CAL. BD. OF PAROLE HEARINGS, REVISED FINAL STATEMENT OF REASONS 15 CCR §2240, at 2 (2010).

6. *Id.* at 24.

7. Historically, even upon a finding of suitability, the Governor’s Office has reversed decisions to release lifers in the vast majority of cases. According to the Stanford Criminal Justice Center report, Governor Davis reversed all findings of suitability during his term (1999–2003). In 2010, by contrast, Governor Schwarzenegger reversed 70 percent of BPH’s suitability findings. WEISBERG ET AL., *supra* note 1, at 13–14. Today, Governor Jerry Brown’s reversal rates are drastically lower, hovering in the vicinity of 20 percent; see David Siders, *Jerry Brown’s Parole Reversal Rate Holds Steady*, SACRAMENTO BEE (Feb. 20, 2015, 4:42 PM), <http://www.sacbee.com/news/politics-government/capitol-alert/article10783583.html> [<https://perma.cc/D5XS-QXDJ>].

8. CAL. PENAL CODE § 3041.5(b)(3)(A)–(C) (2016). Before 2008, subsequent eligibility hearings generally occurred within five years of an inmate’s denial of parole. The possibility of a seven-, ten-, and fifteen-year denial was added to California Penal Code Section 3041 in 2008 under the Victims’ Bill of Rights Act of 2008, a California ballot initiative commonly called “Marsy’s Law.” Victims Rights in Parole Hearings, § 5.1 <http://vig.cdn.sos.ca.gov/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop9> [<https://perma.cc/MQX8-QR6B>].

9. For example, for the 95,690 offenders released from California prisons between July 1, 2010 and June 30, 2011, offenders released after a determinate sentence had a return-to-prison rate of 43.6 percent; lifers had a return to prison rate of 6.3 percent. CAL. DEP’T. OF CORR. & REHAB., OFFICE OF RESEARCH, 2015 OUTCOME EVALUATION REPORT: AN EXAMINATION OF OFFENDERS RELEASED IN FISCAL YEAR 2010–2011 x (2016), http://www.cdcr.ca.gov/adult_research_branch/Research_Documents/2015_Outcome_Evaluation_Report_8-25-2016.pdf [<https://perma.cc/9Q9K-2T6A>] (stating “[a]lthough the majority of offenders released (86.1 percent of the release cohort or 82,392 offenders) served a determinate sentence, offenders sentenced to an indeterminate sentence (lifers), who comprised less than one percent of the release cohort (398 offenders), have a substantially lower return-to-prison rate (6.3 percent) than those serving a determinate sentence (43.6 percent).”).

10. And, only about 10 percent have been arrested for violating parole conditions. Cliff Kusaj, Presentation to the Board of Parole Hearings 4, Long Term Inmates and Recidivism Rates (2016) (on file with author).

11. Section 3041(2) of the Penal Code states, “One year before the inmate’s minimum eligible parole date a panel of two or more commissioners or deputy commissioners shall . . . meet with the inmate and shall normally grant parole as provided in Section 3041.5.” CAL. PENAL CODE § 3041(2). Section 3041.5 of the Penal Code, entitled “Hearings; rights of inmates; written statement by board after granting or denying parole; parole hearing as de novo hearing; request to advance a hearing,” lays out the procedural requirements for BPH-administered suitability hearings. CAL. PENAL CODE § 3041.5. Furthermore, the California Supreme Court in *In re Dannenberg* held that BPH can use the severity of an inmate’s crime as evidence of future dangerousness, reasoning, “in order to prevent the parole authority’s case-by-case suitability determinations from swallowing the rule that parole should ‘normally’ be granted, an offense must be ‘particularly egregious’ to justify the denial of parole.” 104 P.3d 783, 802 (Cal. 2005) (internal quotation marks omitted).

first suitability hearing.¹² Less than 20 percent of lifers are ever granted parole.¹³

In 2006, the procedures surrounding a central component of the parole suitability inquiry underwent a dramatic shift: Psychological evaluations, long considered by the panel of commissioners at suitability hearings, took on a newfound importance. The prison psychologists who had once performed psychological evaluations in preparation for suitability hearings were called off the task and BPH formed the Forensic Assessment Division (FAD), a division of BPH itself, to perform all parole-related psychological evaluations.¹⁴

FAD's protocols became highly standardized. For example, FAD psychologists would perform a series of actuarial risk assessments purporting to measure the statistical likelihood—based on a variety of factors like age, criminal history, and employment history—that a particular inmate will recidivate.¹⁵ FAD psychologists would ask about other things too, such as the lifer's post-release plans, life crime, completion of prison programming, and history of substance abuse.¹⁶ This newly minted and highly standardized psychological evaluation would occur during a single meeting in the months leading up to a lifer's suitability hearing.

With the standardization effort came a marked rise in the influence of psychological evaluations at parole suitability hearings. For example, the Stanford Criminal Justice Center conducted a study in 2011 finding that “[s]cores of psychological examinations administered to predict recidivism risk and inmate psychological stability are significantly correlated with the grant rate. Inmates who receive an average score or higher on these exams virtually never receive parole release.”¹⁷ Indeed, BPH's transfer of the suitability inquiry to FAD psychologists came in the wake of federal scrutiny spurred by prison overcrowding and a lawsuit prompted by the backlog of parole hearings. A close reading of the administrative history, in fact, yields the conclusion that BPH increased its reliance on the psychological evaluations as a means of insulating its parole determinations under the shelter of empirical science.

12. First Amended Complaint for Declaratory and Injunctive Relief ¶ 17, *Johnson v. Shaffer*, 2013 WL 5934156 (E.D. Cal. Nov. 1, 2013) (No. 2:12-cv-1059 GGH P) [hereinafter FAC, *Johnson v. Shaffer*]. In 2016, 6 percent of all inmates (lifers and determinately sentenced inmates) were granted parole at their first suitability hearing. Letter from Philip Thomas, Legal Analyst, Bd. of Parole Hearings (Mar. 10, 2017) (on file with author).

13. WEISBERG ET AL., *supra* note 1, at 13. In 2015, the most recent year for which data is available, the Board's overall grant rate was 17.09 percent. See HANDOUT A, BD. OF PAROLE HEARINGS, PAROLE GRANTS AND COURT-ORDERED HEARINGS 2 (2016).

14. Today, the FAD is comprised of four Senior Psychologist Supervisors and thirty Clinical Psychologists. And in the words of its chief psychologist, “it functions solely to administer risk assessments of indeterminately sentenced inmates for consideration at parole determination hearings.” Declaration of Cliff Kusaj, Psy.d in Support of Defendants Motion for Summary Judgment at 2, *Johnson v. Shaffer*, Case 2:12-cv-01059-KJM-AC (E.D. Cal. Aug. 21, 2013).

15. CAL. CODE REGS. tit. 15, § 2240 (2015).

16. *Id.*

17. WEISBERG ET AL., *supra* note 1, at 5.

This Note argues that the modern psychological evaluation scheme used by BPH in California is more prejudicial than probative in parole suitability hearings for three reasons: first, it abdicates much of the suitability inquiry to an unappealable decision maker; second, the science itself is flawed; and third, and most critically, it short-circuits lifers' due process rights by disguising a categorically legal and administrative examination as a clinical encounter. As a result, BPH's adoption of standardized psychological evaluations in 2006 provides a cautionary tale about the use of brain science in legal proceedings and the outsourcing of juridical inquiry to scientific fact finders.

By investigating BPH's use of two risk assessments, the Historical Clinical Risk Management-20 and the Hare Psychopathy Checklist (Revised), this Note seeks to examine the local adoption and implementation of a risk assessment protocol that is largely predicated on the study of psychology, neuroscience, and statistics. Or, framed in tandem, "brain science." Rather than assessing the efficacy or accuracy of the protocol, this Note instead traces the administrative history of risk assessments and describes some of the myriad administrative and legal demands made upon the science itself. Understanding the role within the criminal justice system that brain science has been asked to play demonstrates that—rather than being a passive and objective informant on legal and administrative matters—brain science has been employed to streamline legal inquiry. As exemplified by California's parole system, brain science has the unique capacity to transform immutable characteristics about a person and their past into appraisals of the present, to evade expert consensus, to quantify distinctly nonscientific variables, to shepherd administrative decisions past judicial review, and to at times supersede legal inquiry itself.

I.

CHRONOLOGY AND BACKGROUND

A. *In re Rutherford and the Beginnings of the Modern Risk Assessment Protocol in California*

On February 6, 2006, the Marin County Superior Court entered an order in *In re Rutherford*. The order was on behalf of the plaintiff-inmates serving indeterminate life sentences in California.¹⁸ The court found that BPH was violating the inmates' rights to timely parole hearings, and it tasked the parties with a directive to eliminate the backlog of hearings, which, by 2005, had reached thirty-two hundred cases.¹⁹ According to the notice of judgment in the case, "the CDRC must develop policies and procedures that will both eliminate the current backlog of overdue parole hearings and make sure that future

18. CAL. DEP'T OF CORR. & REHAB., NOTICE: JUDGMENT IN CLASS ACTION—LIFER PAROLE HEARINGS (2006).

19. *Id.*

hearings are conducted on time.”²⁰ After the court granted class certification in November 2004, joining all inmates serving indeterminate life sentences who had approached or exceeded their minimum eligible parole dates without a hearing, the parties entered a Stipulation Regarding Overdue Consideration Hearings.²¹ The stipulation provided that BPH would hold parole hearings for inmates in the year leading up to their minimum eligible parole date. Notably, the stipulation also provided that by June 6, 2005, the Board would develop “a streamlined psychological risk assessment tool.”²² This latter directive would become the foundation of BPH’s modern risk assessment protocol. And it is the focal point of this Note.

While psychological evaluations have long played a role in parole suitability proceedings for lifers, the current regime of standardized risk assessments was promulgated in the wake of *Rutherford*. As Philip S. Reiser, Staff Counsel for BPH, later memorialized when the Board’s psychological evaluation protocols came under investigation by the Office of Administrative Law for “underground rulemaking,”²³ “[t]he psychological report process . . . is an outgrowth of the *In re Rutherford* class action lawsuit” and seeks to “address the lack of standardization of psychological reports.”²⁴ He noted, “In *Rutherford*, hearing postponements due to incomplete or untimely psychological reports were identified as one of the primary barriers to eliminating the backlog of overdue hearings.”²⁵ But the decision to respond to the *Rutherford* order by redoubling the importance of the psychosocial evaluation in parole hearings was not ordered by the *Rutherford* court.²⁶ Instead, this was a decision made by BPH and FAD alone.²⁷

20. *Id.*

21. *In re Lugo*, 80 Cal. Rptr. 3d 521, 543 (Cal. Ct. App. 2008) (Pollak, J., concurring).

22. *Id.*

23. *Underground Regulations*, CAL. OFFICE OF ADMIN. LAW, http://www.oal.ca.gov/underground_regulations [<https://perma.cc/7FKR-Q6RL>] (“If a state agency issues, utilizes, enforces, or attempts to enforce a rule without following the APA when it is required to, the rule is called an ‘underground regulation.’ State agencies are prohibited from enforcing underground regulations.”).

24. CAL. OFFICE OF ADMIN. LAW, OAL FILE NO. CTU2010-0506-03, OAL DETERMINATION NO. 27 (2010); Letter from Philip S. Reiser, Staff Counsel, Bd. of Parole Hearings, to Susan Lapsley, Dir., Officer of Admin. Law 1–2 (Aug. 23, 2010) (on file with *California Law Review*); see CAL. PENAL CODE § 5068 (2016).

25. Letter from Philip S. Reiser to Susan Lapsley, *supra* note 24, at 2.

26. As a magistrate judge would later opine, “Review of the record in *Rutherford* confirms that the substance of the FAD protocols was neither ordered by nor approved by the *Rutherford* court . . .” See *Johnson v. Shaffer*, No. 2:12-CV-1059 KJM AC, 2013 WL 5934156, at *12 (E.D. Cal. Nov. 1, 2013), *adopted by* *Johnson v. Shaffer*, No. 2:12-CV-1059 KJM AC, 2014 WL 1309289 (E.D. Cal. Mar. 31, 2014).

27. The magistrate judge also noted that as part of the “remedial plan to eliminate the parole hearing backlog . . . [T]he Board explored creation of a lifer psychological evaluation program that would facilitate the effort to provide timely hearings. Respondents committed themselves as part of the remedial plan to develop such a program, but actual program development proceeded unilaterally rather than by agreement with petitioners. Indeed, respondents denied any obligation to meet and confer regarding the new psychological assessment protocol. Petitioners objected during the course of

FAD promulgated “significant procedural change[s] related to the psychological report” system.²⁸ According to a memorandum circulated by FAD, the “New Report Format” would consist of provisions for both a “Comprehensive Risk Assessment” and a “Subsequent Risk Assessment.”²⁹ The Comprehensive Risk Assessment, to be completed every five years, included “an evaluation of the prisoner’s remorse [and] insight” and an evaluation of “the prisoner’s history, such as the role drugs and alcohol played in the commitment offense,” culminating in a report that would provide the clinician’s opinion of the prisoner’s “potential for future violence.”³⁰ Finally, the Comprehensive Risk Assessment would “use the following instruments to assess the potential for future violence: [1] The Historical Clinical Risk Management—20 (HCR-20), [2] The Hare Psychopathy Checklist—Revised (PCL-R), [3] Level of Service/Case Management Inventory (LS/MSI), [4] Static 99—(when deemed appropriate by clinician).”³¹ At the Subsequent Risk Assessment, the memorandum added, clinicians would address changes in the inmate’s case, programming, and parole plans, but would not administer formal risk assessment instruments.³²

While changes have occurred, as detailed below, this remains the general form of BPH’s risk assessment protocol. On November 8, 2010, the California Office of Administrative Law (OAL) reviewed BPH’s “Psychological Evaluation Process for Inmates Prior to Life Parole Consideration Hearings” and determined that the risk assessment protocol constituted an underground regulation that should have been adopted according to the regulations of the Administrative Procedure Act (APA).³³ BPH argued that its adoption of the psychological report process was merely an effort to “eliminate the backlog of overdue life parole” hearings as part of the *Rutherford* stipulation, and that the evaluations fit within the “internal management” exemption to the APA.³⁴ OAL rejected these contentions, finding the psychological report process to be a regulation as defined by Government Code Section 11342.600 because,

the *Rutherford* litigation to various aspects of the new regime as it was developed and implemented. The *Rutherford* court agreed with respondents that the particulars of the new program did not require plaintiffs’ input or court approval. At a hearing on May 10, 2007, the judge specifically ruled that respondents’ selection of a particular risk assessment tool was beyond the scope of the remedial plan. She noted, ‘Obviously, if a risk assessment tool is used that denies procedural or substantive due process to any prisoner, that’s going to be the subject of a separate application or proceeding, but the purview of this one is the timeliness of parole hearings.’” *Id.* (citations omitted).

28. Memorandum from Cal. Dep’t of Corr. & Rehab., Bd. of Parole Hearings, Forensic Assessment Div., Psychological Report Process 1 (Sept. 29, 2008) (on file with *California Law Review*).

29. *Id.* at 2.

30. *Id.* at 2–3.

31. *Id.* at 2 (Static 99, the protocol instructed, was to be used for lifers incarcerated for sex-related crimes).

32. *See id.* at 2–3.

33. OAL DETERMINATION NO. 27, *supra* note 24, at 2.

34. *Id.* at 12.

among other qualities, it “make[s] specific” the law administered by the agency.³⁵

B. California Code of Regulations Title 15 Section 2240

This reprimand from OAL forced BPH to submit its psychological assessment protocol for public comment. The Final Revised Statement of Reasons for California Code of Regulations, Title 15, Section 2240—what would become the codified version of BPH’s psychological evaluation process—included 271 public comments, aggregated and responded to by topic.³⁶ In its written introduction to the new regulation, BPH stated that “[t]he provision of psychological risk assessments is necessary to assist BPH in determining whether an inmate sentenced to life with the possibility of parole poses a current unreasonable risk of danger to society if released on parole.”³⁷ BPH also recounted that, in 2006, it “formed its own Forensic Assessment Division . . . Lifer Unit, comprised of psychologists” to allay “numerous concerns” about the evaluation process and to enable prison psychologists to devote resources to treatment.³⁸ In its first section, the new regulation interpreted Penal Code Section 5068 to provide for “the preparation of a psychological evaluation before the release of an inmate committed to a term of life with the possibility of parole.”³⁹ The regulation then laid out specific parameters for the psychological evaluations.

The second part of the regulation, Section 2240(b), detailed the codified Comprehensive Risk Assessment. It noted that FAD would evaluate “static and dynamic factors,” including the “commitment offense, institutional programming, the inmate’s past and present mental state, and risk factors from the prisoner’s history.”⁴⁰ Furthermore, it provided that the FAD evaluator could

35. *Id.* at 5. Also in 2010, the California Office of the Inspector General (OIG) issued a Special Report censuring BPH for not keeping reliable data on its parole decisions and for deficiencies in its FAD training procedures. Specifically, OIG stated, “The Office of the Inspector General found that the [parole board] lacks reliable data to determine the number of factual errors contained in psychological evaluations and lacks reliable data to determine the number of low-, medium-, and high-risk assessment conclusions. Reliable data would allow the parole board to perform certain analytical procedures to measure performance. In addition, we found weaknesses in the parole board’s oversight of the methods it uses to review psychological evaluations. Specifically, the parole board does not require senior [FAD] psychologists to use source documentation when conducting their reviews, thereby limiting the reviewer’s effectiveness in detecting certain mistakes. In addition, the parole board also does not actively monitor senior psychologists’ activities by requiring them to account for their time by case or by activity. Finally, the parole board failed to provide most of its commissioners, deputy commissioners, and senior [FAD] psychologists with the sufficient number of mandatory training hours.” CAL. OFFICE OF THE INSPECTOR GEN., SPECIAL REPORT—THE BOARD OF PAROLE HEARINGS: PSYCHOLOGICAL EVALUATIONS AND MANDATORY TRAINING REQUIREMENTS 1 (2010).

36. *See* CAL. BD. OF PAROLE HEARINGS, *supra* note 5, at 11.

37. *Id.* at 2.

38. *Id.* at 1, 14.

39. *Id.* at 1.

40. CAL. CODE REGS. tit. 15, § 2240(b) (2015).

use “actuarially derived and structured professional judgment” to arrive at an assessment of the “inmate’s potential for future violence.”⁴¹ The Final Statement of Reasons cited an August 2, 2006, meeting of risk assessment experts who purportedly determined that the “integration of clinical judgment and risk assessment instruments . . . increases the validity and reliability of the psychological evaluation” and that combining actuarial data and clinical judgment provides an “acceptable minimum standard.”⁴² Thus to rectify the “lack[] [of] uniformity” that previously characterized risk assessments, BPH claimed, the new process ensured that FAD psychologists would “anchor[] their clinical opinions regarding violence risk by ensuring overall objectivity and reliability.”⁴³

Such standardized risk assessments were not to be readministered in the Subsequent Risk Assessment. Instead, hewing closely to the earlier formulation of the psychological evaluation protocol, Section 2240(c) dictated that this subsequent inquiry would remain limited to “changes in the circumstances of the inmate’s case, such as new programming, new disciplinary issues, changes in mental status, or changes in parole plans.”⁴⁴

Finally, in its drafted regulation, BPH made it clear that the CDCR “inmate appeal process does not apply to the psychological evaluations prepared by the Board’s psychologists.”⁴⁵ However, an inmate would have some ability to challenge the psychologist’s findings at the suitability hearing itself.⁴⁶

C. Quantifying Insight

The utility of the newly drafted psychological evaluations gained further ground in 2008 when the California Supreme Court issued a set of companion rulings that allocated an even greater share of the suitability inquiry to FAD psychologists. In *In re Lawrence*, the California Supreme Court held that for BPH or the Governor to deny parole, they must show evidence that is “rationally related to a finding of ‘current dangerousness.’”⁴⁷ Indeed, up until *Lawrence*, BPH and the Governor would routinely deny parole based solely on the egregiousness of the crime for which the inmate was originally

41. *Id.*

42. CAL. BD. OF PAROLE HEARINGS, *supra* note 5, at 21–22.

43. *Id.* at 13.

44. CAL. CODE REGS. tit. 15, § 2240(c).

45. § 2240(d).

46. § 2240(d)–(e).

47. Joey Hipolito, *In re Lawrence: Preserving the Possibility of Parole for California Prisoners*, 97 CALIF L. REV. 1887, 1888 (2009) (quoting *In re Lawrence*, 190 P.3d 535, 552–53 (Cal. 2008)) (internal quotation marks omitted).

incarcerated, a circular standard that some argued amounted to a violation of due process.⁴⁸

But while *Lawrence* required evidence of current dangerousness, a companion case, *In re Shaputis*, held that an inmate's "lack of insight" into the original commitment offense could be used as a predictor of current dangerousness.⁴⁹ While *Lawrence* chronicled the case of a woman who killed her lover's wife in a fit of passion, *Shaputis* involved a serial domestic abuser who brutally and dispassionately murdered his wife.⁵⁰ In upholding *Shaputis*'s denial of parole, the court deferred to the Governor's conclusion that the "petitioner's lack of insight and failure to accept responsibility" outweighed the factors favoring suitability.⁵¹ Critically, this assessment in *Shaputis* and other cases was predicated on FAD's evaluation of the lifer's insight and remorse. Indeed, *Shaputis* rendered insight and remorse powerful currency in suitability hearings, and FAD's role in suitability hearings more dispositive than ever before. Tellingly, lifers now contend that, since 2008, BPH has cited a "lack of insight" in every parole denial.⁵² At the same time, BPH's monetary investment in FAD has nearly doubled: In the 2006–2007 budget year, BPH asked for \$3.5 million for psychological evaluations.⁵³ In 2008, it requested \$6 million.⁵⁴

D. Back to Court: *Johnson v. Shaffer*

In an order entered on May 26, 2016, Judge Mueller of the United States District Court for the Eastern District of California approved a settlement in *Johnson v. Shaffer*, another class action brought by California lifers, this time challenging the constitutionality of FAD's psychological evaluation protocol.⁵⁵ The plaintiffs' class, as in *Rutherford*, was comprised of those lifers who had reached the minimum terms of their sentences.⁵⁶ At the time of settlement, two claims had survived summary judgment: (1) a "Due Process violation predicated upon the denial of a fair and unbiased parole procedure," and (2) "a Due Process violation predicated upon the denial of fair and unbiased parole panels."⁵⁷

In its most general terms, the settlement between the lifer class and BPH required three structural changes to BPH's psychological evaluation protocol.

48. See Daniel Weiss, Note, *California's Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1573, 1592–95 (2005) (discussing the circularity of sentencing based on the severity of the crime itself).

49. See *In re Shaputis*, 190 P.3d 573, 584–85 (Cal. 2008).

50. *In re Lawrence*, 190 P.3d 535, 538 (Cal. 2008); *In re Shaputis*, 190 P.3d at 575–77.

51. *In re Shaputis*, 190 P.3d at 585.

52. See FAC, *Johnson v. Shaffer*, *supra* note 12, ¶ 28.

53. See *id.* at ¶ 8.

54. *Id.*

55. *Johnson v. Shaffer*, No. 2:12-cv-1059 KJM AC P, 2016 WL 3027744, at *5–6 (E.D. Cal. May 27, 2016).

56. *Id.* at *1.

57. *Id.*

First, BPH would abandon the Subsequent Risk Assessment and instead conduct the Comprehensive Risk Assessment every three years.⁵⁸ Second, BPH would create “a formal process for inmates or their attorneys ‘to lodge timely written objections asserting factual errors in a CRA [Comprehensive Risk Assessment] before their parole consideration hearing occurs.’”⁵⁹ Third, FAD would no longer administer the LS/CMI risk assessment instrument, and it would limit its formal risk assessment to the HCR-20, the PCL-R, and (for some sex offenders) the Static 99.

In their Amended Complaint, filed in 2012, the lifers argued that BPH formed FAD to protect “its parole decisions from judicial scrutiny” and to “maintain its impermissibly low rate of granting parole by fabricating evidence that would support its unlawful decisions.”⁶⁰ At the time of settlement however, while the parties continued to disagree about the “reliability of the three risk assessment tools,” the plaintiffs failed, the court found, to present evidence “to support the claim that the Board intentionally chose flawed risk instruments.”⁶¹ Because the Constitution does not provide a right to parole, the lifers had to prove that BPH leadership was biased against granting parole.⁶² Their settlement with BPH indicates that lifers were concerned that they had no recourse to challenge the conclusions of the FAD psychologist until the day of their hearing, and that the five-year interval at which risk assessments were to be performed placed too much weight on the conclusions of a single psychologist on a single day.

58. *Id.* at *2.

59. *Id.* at *3.

60. FAC, *Johnson v. Shaffer*, *supra* note 12, ¶ 3.

61. *Johnson v. Shaffer*, No. 2:12-cv-1059 KJM AC P, 2016 WL 3027744, at *4 (E.D. Cal. May 27, 2016).

62. *See Swarthout v. Cooke*, 562 U.S. 216, 219–20 (2011). In the context of a federal habeas petition filed after the denial of a California state court petition for habeas relief from BPH’s decision to deny an inmate parole, the Court stated: “As for the Due Process Clause, standard analysis under that provision proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient. Here, the Ninth Circuit held that California law creates a liberty interest in parole. While we have no need to review that holding here, it is a reasonable application of our cases. Whatever liberty interest exists is, of course, a *state* interest created by California law. There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners. When, however, a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures. In the context of parole, we have held that the procedures required are minimal.” *Id.* (citations omitted); *see also Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 7, 12 (1979) ((holding that “[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. . . . Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determinations. . . . This is especially true with respect to the sensitive choices presented by the administrative decision to grant parole release. (internal citations omitted).”).

On October 24, 2016, BPH filed public notice of a proposed amendment to Section 2240 (now entitled “Comprehensive Risk Assessments”).⁶³ Pursuant to the negotiated settlement in *Johnson*, and a separate Sacramento County Superior Court ruling that called part of Section 2240 “vague and confusing,” BPH submitted a variety of changes to the existing statute to “clarify, and increase efficiency for, comprehensive risk assessments. . . .”⁶⁴ Chief among these changes were requirements that FAD (1) employ risk assessment tools that are “generally accepted,” and (2) institute a “pre-hearing process to lodge objections to factual errors in the comprehensive risk assessment.”⁶⁵ The public comment period for this proposed regulatory action commenced on November 4, 2016, and closed on December 19, 2016.⁶⁶ On January 18, 2017, BPH convened a public hearing in Sacramento for “the regulation package BPH RN 16-01, governing Comprehensive Risk Assessments.”⁶⁷ And at the time this Note went to the publisher, the regulation package remained with BPH, where it is subject to revision.⁶⁸ BPH must submit the final proposed regulation to OAL within a year of the date the rulemaking process begins.⁶⁹ It is due by October 24, 2017.

63. See BPH RN 16-01 Cal. Regulatory Notice Reg. (Oct. 24, 2016).

64. *Id.* at 3.

65. See *id.* at 4. The proposed language concerning the new appeal process is as follows, per Section 2240(e): “(1) If an inmate or the inmate’s attorney believes that a risk assessment contains a factual error that materially impacts the risk assessment’s conclusions regarding the inmate’s risk of violence, the inmate or attorney of record may send a written objection regarding the alleged factual error to the Chief Counsel of the board, postmarked or electronically received no less than 30 calendar days before the date of the hearing. (2) For the purposes of this section, ‘factual error’ is defined as an explicit finding about a circumstance or event for which there is no reliable documentation or which is clearly refuted by other documentation. Factual errors do not include disagreements with clinical observations, or diagnoses or clarifications regarding statements the risk assessment attributed to the inmate.” BPH RN 16-01 Cal. Regulatory Notice Reg. (Oct. 24, 2016).

66. The APA requires agencies to provide a minimum 45-day period for public comment on proposed regulations. See *About the Regular Rulemaking Process*, CAL. OFFICE OF ADMIN. LAW, http://www.oal.ca.gov/rulemaking_participation [<https://perma.cc/V6FH-MA54>].

67. Public Hearing Notice (on file with author); while most, if all, fourteen full-time BPH Commissioners were in attendance, public attendance was sparse. A representative for Keith Wattley, the *Johnson* Plaintiffs’ class counsel, made a statement objecting to certain portions of the proposed changes to the text of Section 2240, and another member of the public added concerns to the record. In sum, the hearing lasted approximately thirty minutes. The author, too, was in attendance.

68. Major revisions require an additional fifteen- or forty-five day notice period, depending on the extent of the changes proposed. For a helpful visual guide to agency rulemaking in California, see CAL. OFFICE OF ADMIN. LAW, REGULAR RULEMAKING FLOWCHART (2014), http://www.oal.ca.gov/files/2016/08/Regular-Rulemaking-Flowchart_FINAL_June-2014-2.pdf [<https://perma.cc/8CXN-23AB>].

69. See *The Regular Rulemaking Process*, CAL. OFFICE OF ADMIN. LAW, <https://cms.portal.ca.gov/oal/SiteEdit.aspx?p=3115> [<https://perma.cc/HWX6-YT4F>]; CAL. OFF. OF ADMIN. LAW, *supra* note 66.

II.

THE PREJUDICIAL NATURE OF PSYCHOLOGICAL EVALUATIONS IN PAROLE
SUITABILITY HEARINGS

Psychological evaluations are more prejudicial than probative in parole suitability hearings. The history of the risk assessment protocol adoption, the influence of risk assessments in parole suitability hearings, the capacity of risk assessments to diagnose personality disorders, and the medicalization of insight and remorse exhibit the prejudicial effect of psychological evaluations. Such prejudice outweighs the asserted benefits of psychological evaluations, including their capacity to offer accurate information about an inmate's potential for further violence. It is clear from the recent settlement in *Shaffer v. Johnson* that lifers and their counsel are attempting to walk back the influence allocated to the FAD psychological evaluation after *Rutherford* came down in 2006. By demanding more frequent Comprehensive Risk Assessments and an avenue to appeal the factual findings of psychologists, lifers have successfully chipped away at the ultimate importance of each evaluation. While this may be a step in the right direction, many problems remain: the risk assessments used are not normed on inmate populations, they frequently produce mental disorder diagnoses without any formal diagnostic protocol, and they effectively foreclose the possibility of a lifer receiving a fair suitability hearing. BPH should disband with the current risk assessment protocol completely.

A. *A Dubious Administrative History: Opportunism and Evidence of
Disregard for Scientific Accuracy*

The post-*Rutherford* regime of psychological evaluations showcases the allure of empiricism in administrative and legal proceedings. In the archives of the California Court of Appeal, Second District, in Los Angeles, there is a memorandum dated January 26, 2006,⁷⁰ that is authored by Dennis Kenneally, the then-Executive Director of BPH.⁷¹ The memorandum exists as an exhibit attached to a habeas petition of an inmate who was repeatedly denied parole despite positive psychological evaluations. It has the subject line "Psychological Reports" and is addressed to all BPH commissioners and deputy commissioners.⁷² It reads as follows:

Psychological reports have traditionally been considered by hearing panels in evaluating suitability [for] parole during the lifer hearing process. The result of this is that these reports have been used [for] purposes for which they were not intended. This is especially true for

70. Petition for Writ of Habeas Corpus, *In re Danny S. Rosales*, 2009 WL 1696150 (Cal. Ct. App. Nov. 06, 2008) (No. B211888); Memorandum from Dennis Kenneally, Exec. Dir., Cal. Bd. of Parole Hearings, to Comm'rs and Deputy Comm'rs (Jan. 26, 2006) (on file with *California Law Review*).

71. Memorandum from Kenneally, *supra* note 70.

72. *Id.*

those inmates who are not part [of] the Mental Health Services Delivery System (MHSDS). Effective immediately psychological reports, using a new format, will be provided during the lifer hearing process only for those inmates who [are] assigned to MHSDS. . . . In cases where the latest psychological report contains a risk assessment, the hearing [panel] shall articulate to the inmate and his counsel that the panel has read and considered the [section] of the report regarding risk assessment, and is not assigning any weight to it in the [panel's] decision. . . . [A]spects of the psychological report other than a risk assessment [can still be taken into account]. You are not bound by the clinician[']s opinion . . . Psychological reports shall not be ordered for the purposes of evaluating parole suitability of non-MHSDS inmates.⁷³

This memorandum does three things. First, it reveals that psychological reports were not always intended to play a role in suitability hearings. Second, it shows that among the components of the evaluation, risk assessments were considered especially ill-fitted for suitability hearings. Third, and perhaps most importantly, it timestamps the Board's conclusion that risk assessments were not appropriate evidence for suitability hearings. The memorandum does not say, however, whether the lifer backlog concerns prompted this decision, which came eleven days before the order in *Rutherford* and just months after the court ordered that CDCR's medical health care system be put in federal receivership.⁷⁴ Dennis Kenneally left his position three months later.⁷⁵

Following this memorandum, a period of reckoning ensued. While Kenneally's memorandum left little doubt about BPH's official position regarding psychological evaluations as of January 26, 2006, and while there is no mention of a policy shift regarding psychological evaluations in BPH's executive board minutes from 2006, BPH had begun, by August, to lay the groundwork for its current emphasis on risk assessment protocols.⁷⁶ It first turned to the California Penal Code.

BPH conducted an act of specious statutory interpretation. It stated, without elaboration, that the internal protocol guiding psychological evaluations "interprets Penal Code section 5068 to provide that all life inmates will receive a Comprehensive Risk Assessment (CRA) prior to their initial

73. *Id.*

74. Notice for Lifer Parole Hearings, *supra* note 18; *see also* CAL. PRISON HEALTH CARE SERVS., FACT SHEET: WHAT IS THE RECEIVERSHIP? (Dec. 1, 2014) (Federal receivership was established over California Prison Health Care on October 3, 2005), <http://www.cphcs.ca.gov/docs/resources/factsheet.pdf> [<https://perma.cc/3WUK-WUUM>].

75. *See Board of Parole Hearings: Executive Officer*, CAL. DEP'T OF CORR. & REHAB., http://www.cdcr.ca.gov/BOPH/executive_officer.html [<https://perma.cc/UQ4Y-MKYB>].

76. I obtained the BPH Executive Board Minutes from most of their monthly meetings in 2006 (BPH reported that minutes from certain months were not available) via a Freedom of Information Act Request. They contain no mention of the psychological evaluations at suitability hearings or the August 2006 convention of experts.

parole consideration hearing.”⁷⁷ But California Penal Code Section 5068, it turns out, does not provide for universal psychological screening in preparation for parole hearings. It provides for an initial examination upon entry into state custody and then specifies that a psychological report may be prepared for the parole hearing of a lifer whose diagnostic study indicates that such a report is appropriate. Last updated in 1989, this portion of the statute reads, in full:

When the diagnostic study of any inmate committed under subdivision (b) of Section 1168 [including lifers] so indicates, the director shall cause a psychiatric or psychological report to be prepared for the Community Release Board [now, BPH] prior to the release of the inmate. The report shall be prepared by a psychiatrist or psychologist licensed to practice in this state.”⁷⁸

By its plain meaning, the statute does not apply to all lifers. Instead, it specifies that psychological reports may be prepared for an express subset of lifers going before the parole board, specifically those whose “diagnostic study” suggests the usefulness of such an evaluation. Indeed, the statutory text is driven by a clear limiting principle: “*When the diagnostic study . . . so indicates.*”⁷⁹ In a tenuous interpretative move, BPH transfigured the statute’s limiting clause into a catchall provision.

On a different front, BPH sought out expert scientific opinion to validate its risk assessment protocol. On August 2, 2006, BPH convened “[a]n independent panel of experts” in Sacramento to “develop a consensus on a psychological assessment methodology for adult inmates sentenced in California to a life term with the possibility of parole.”⁸⁰ In its Final Revised Statement of Reasons to support its psychological evaluation regulation, 15 CCR Section 2240, BPH claimed that the experts arrived at a “[c]onsensus [r]ecommendation” and “agreed that a multi-method psychological assessment battery” should be employed, including a “risk assessment battery” to determine a lifer’s future “risk of violence.”⁸¹ But while the mere reversal of an administrative policy decision does not indicate, on its own, the presence of a concealed motive, the mechanics of the policy shift and BPH’s truncated appeal to the scientific community betray the agency’s impatient and unprincipled use of science.

The evidence shows that BPH failed to listen to the experts that were in attendance on August 2, 2006, and that it misrepresented the panel’s conclusions. At least two of the six experts in attendance at the BPH meeting reported that BPH misrepresented the outcome of the meeting. In an interview at

77. BPH would disclose this interpretation in its Revised Final Statement of Reasons for the newly issued Title 15 Section 2240. CAL. BD. OF PAROLE HEARINGS, *supra* note 5, at 2.

78. CAL. PENAL CODE § 5068 (2012).

79. *Id.* (emphasis added).

80. CAL. BD. OF PAROLE HEARINGS, *supra* note 5, at 5–6.

81. *Id.* at 6.

the University of California, Berkeley, on May 3, 2016, Professor Jennifer Skeem, a nationally recognized risk assessment expert who attended the BPH meeting and whose scholarship is heavily cited in BPH literature, recounted that BPH “pretended that we decided on a battery of assessment instruments.”⁸² But such a consensus, Skeem reported, was never reached.⁸³ Instead, Skeem said, experts vocalized some of the drawbacks of using the assessment tools the Board proposed. For example, Skeem observed, the HCR-20 and the PCL-R—two of the three measures that BPH later claimed that experts recommended—were not validated for individuals who had been incarcerated for more than ten years.⁸⁴ Skeem further stated that “[t]ypically, instruments do not take into account aging, an inmate’s time away from the community, and the institutional environment of prison—so it is critical to test whether they work for lifers.”⁸⁵ Professor Skeem was not the only expert to balk at the purported consensus.

Dr. Barry Krisberg, the Director of Research and Policy at the Chief Justice Earl Warren Institute on Law and Social Policy at the University of California, Berkeley, School of Law, also served as an expert at the August 2 conference in Sacramento. In a letter to BPH submitted in response to the publication of the Revised Initial Statement of Reasons to its Proposed Regulation 15 CCR Section 2240, Dr. Krisberg stated that BPH “has misrepresented my participation in a meeting with the Board on August 2, 2006.”⁸⁶ He continued:

The Board’s Statement of Reasons appears to imply that this panel reached such a consensus and agreed that a battery of risk assessment tools should be administered to term-to-life prisoners [lifers] . . . This is a misrepresentation of the meeting that I attended; the panel reached no such consensus, and I continue to disagree with the administration of these risk assessment tools [the LS/CMI and HCR-20] to term-to-

82. Interview with Jennifer Skeem, Professor and Assoc. Dean of Research, U.C. Berkeley Sch. of Soc. Welfare, in Berkeley, CA. (May 3, 2016).

83. *Id.*

84. *Id.*

85. *Id.* The LSI—the third assessment tool that BPH employed in the wake of the experts’ panel—is validated for lifers. Because of her participation in the BPH panel, Skeem and her students obtained data from Washington State, and tested whether “lifer status” (being incarcerated for ten years or longer) reduced the predictive capacity of the LSI. Skeem reported that it did not. Therefore, unlike with the HCR-20 and the PCL-R, there is at least some evidence that the LSI predicts recidivism within the lifer population. Curiously, however, pursuant to the recent settlement between BPH and California lifers, BPH agreed that it would stop using the LSI and would rely exclusively on the HCR-20 and the PCL-R instead. This is further evidence that the predictive accuracy of these tests is not BPH’s foremost concern.

86. Letter from Dr. Barry Krisberg, Dir. of Research and Policy and Lecturer in Residence, Chief Justice Earl Warren Inst. on Law and Soc. Policy, U.C. Berkeley Sch. of Law, to Anne Cervantes, Regulations Coordinator, Bd. or Parole Hearings (Jul. 11, 2011) (on file with *California Law Review*).

life prisoners.⁸⁷

Krisberg then turned to the specifics. Explicating BPH's decision to employ the LS/CMI, the HCR-20, and the PCL-R, Krisberg explained that such instruments have (1) not been validated for California's lifer population, (2) were not designed for the prison context, and (3) overpredict recidivism by failing to account for a prisoner's age. In his letter to BPH, Krisberg continued:

Neither the LS/CMI⁸⁸ nor the HCR-20/PCL-R has been validated for a population such as California's term-to-life prisoners. These risk assessments were designed primarily to identify those people who have been convicted of crimes but who do not need incarceration and can be better managed in the community; they were not created to predict future violence of people who have matured in age while serving long sentences in prison. Data has shown that the California lifer population has an extremely low recidivism rate—under 2% according to most observers—and the LS/CMI and HCR-20/PCL-R tend to over-predict the failure rate for these prisoners, classifying their risk of violence as higher than it truly is. In particular, these standard risk assessments do not take into account a prisoner's age, which is a major factor in predicting current dangerousness, especially as the population of California lifers who are currently eligible for parole is on average over 35 years old and therefore less likely to recidivate.⁸⁹ These risk assessment tools therefore do not add much to the Board's consideration of a prisoner's suitability for parole, and may in fact lead to higher rates of denial of parole than is necessary for public safety.⁹⁰

87. *Id.*

88. Skeem pointed out that Krisberg's statement was technically true here because he only referred to California. Interview with Jennifer Skeem, *supra* note 82. As pointed out above, the LS/CMI has been validated on lifers in Washington State. Manchak, S.M., Skeem, J.L. & Douglas, K.S., Utility of the Revised Level of Service Inventory (*LSI-R in Predicting Recidivism After Long-Term Incarceration*), 32 LAW AND HUMAN BEHAVIOR 483–84 (2008), https://www.researchgate.net/publication/5768774_Utility_of_the_Revised_Level_of_Service_Inventory_LSI-R_in_Predicting_Recidivism_After_Long-Term_Incarceration [<https://perma.cc/9YUY-D8MR>].

89. According to the study conducted by the Stanford Criminal Justice Center in 2011, “The average age of inmates at the time of the parole hearing is 50.8 [years]. The average age of inmates granted parole is 49.9 years, and the average age of inmates denied parole is 51. Surprisingly, age does not appear to be a significant factor in release decisions.” WEISBERG ET AL., *supra* note 1, at 5.

90. Letter from Dr. Barry Krisberg, *supra* note 86. BPH's responses to such criticisms can be gleaned from a Declaration submitted by the FAD's chief psychologist in the recent *Johnson v. Shaffer* litigation. While this Note is about the administrative employment of brain science, and not about the empirical validity of any particular risk assessment measure, the FAD's response to validation criticisms nevertheless show that the FAD publically conceived of risk-assessment measures as providing instructive benchmarks of risk, not unassailable, nor even highly predictive, forewarnings of violence or recidivism. It also shows a perceived division of labor between the agency responsible for assessing risk potential (FAD), and the “decision makers” who ultimately decide the impact of such analyses of the parole suitability inquiry itself (BPH). Dr. Cliff Kusaj, Psy. D, Chief Psychologist of CDCR, BPH, and FAD states that (1) the general applicability of the risk assessments used does not obviate their applicability to lifers despite their unique demographic or risk characteristics; (2) the dynamic variables weighed by the risk assessment tools capture changes in risk over time; (3)

Notably, in its Revised Final Statement of Reasons for 15 CCR Section 2240, published after Krisberg's letter, BPH maintained its assertion that the August 2, 2006 panel had reached a consensus. Kenneally's memorandum, Skeem's recollections, and Krisberg's letter reveal a substantial appeal to empirical

validation studies on lifers would be impossible because one cannot measure the recidivism rate of inmates never released; (4) the FAD does not predict recidivism, it just gives risk information to the parole suitability panel; (5) low recidivism among paroled lifers has little bearing on the hypothetical recidivism rate of all lifers; (6) lifers, on average, demonstrate lower risk on assessment measure than other inmates. Declaration of Cliff Kusaj, Psy.d in Support of Defendants Motion for Summary Judgment at 2, *Johnson v. Shaffer*, Case 2:12-cv-01059-KJM-AC, ¶ 13 (E.D. Cal. Aug. 21, 2013). In full, Dr. Kusaj wrote,

"I am aware that critics of the FAD's administration of risk assessment instruments contend the instruments are inappropriate for use with life inmate populations because they were not designed to predict future violence in life inmate populations. Critics note that because individual studies and meta-analyses of risk assessment instruments were not conducted with inmates the instruments are likely to over predict the risk of violence by life inmates because this is a population of offenders who are older and who have matured during periods of lengthy incarceration. Proponents of this view often cite statistics showing that California's life inmate population has a low risk of recidivism upon release. These criticisms are misplaced for a number of reasons. First, structured risk assessment instruments administered by the FAD are based on risk factors with broad support in the violence literature. Selection of risk factors was not limited to any particular sample for the specific purpose of facilitating broad applicability of measures. That is, risk factors that make-up the instruments have shown across many different types of studies to be associated with violence. In support of this goal, meta-analytic research has demonstrated that predictive validity is moderately strong and comparable across numerous samples (prison, forensic, psychiatric), settings (institutional violence, community violence), gender, country, and length of follow-up (rating from weeks to years) [*See supra* note 111.] The reason that predictive validity is robust across these potential moderators is because of the general applicability of empirically established risk factors and the decision making processes that structured risk assessments rely. [*sic*]. The fact that life inmates may possess unique demographic or risk characteristics by virtue of their long-term incarceration does not mean that structured risk assessments are inappropriate with this population or that the extensive research on violence and risk is somehow inapplicable. Second, the FAD adopted instruments that weigh dynamic risk not to disregard changes in risk associated with age and maturation. The FAD does not rely exclusively on measurement of historical or static risk. Third, the fact that no validation studies have been conducted with California's life inmate population does not reflect negatively on the predictive validity of structured risk assessments with this population, but instead reflects the reality that it is not possible to conduct a validation study with an indeterminately sentenced population. Because only a segment of the life inmate population is determined not to represent an unreasonable risk of dangerousness and is granted parole, and because those who do parole are likely to be lower risk and to recidivate less frequently, one should not presume that empirical analysis of risk and recidivism within *paroled life inmates* will generalize to *the entire population of life inmates*. Fourth, FAD psychologists do not *predict* risk but instead provide decision makers analyses of *risk potential*. Suggestions that FAD psychologists over-predict or under-predict violence risk reveal a fundamental misunderstanding of the purpose and scope of Comprehensive Risk Assessments. Fifth, the finding that few *paroled* life inmates recidivate upon release does not suggest that the entire population of life inmates would, if paroled, demonstrate similarly low recidivism rates. Sixth, risk assessment data collected by the FAD and analyzed by the University of Massachusetts Medical School indicates that life inmates demonstrate lower risk (and not higher risk) relative to younger and determinately sentenced prison populations. Life inmates demonstrate fewer risk factors across each of the instruments and nearly 80% are categorized as low to moderate risk on a continuum of low to high risk."

Id.

science in a period of administrative change; they also reveal that scientific accuracy was not BPH's foremost priority.

B. The Risk Assessment Tools Examined: A Prejudicial Emphasis on Immutable and Demographic Variables

According to Keith Wattley, lead attorney for the plaintiffs in both *Rutherford* and *Shaffer*, psychological evaluations in the pre-*Rutherford* era often came back positive.⁹¹ Mr. Wattley explained that “[w]hen the Board ignored those reports and denied parole anyway, reviewing courts were granting habeas petitions challenging those decisions.”⁹² But when BPH replaced prison-based psychologists in 2006 with BPH's own FAD, it removed the possibility of institutional disagreement over a lifer's suitability for parole. Furthermore, it instituted a companion rule to its new psychological evaluation regulations dictating that FAD's findings would not be subject to appeal.⁹³ While the recent settlement in *Shaffer* provides inmates with an avenue for relief in the face of factual error, it appears from the proposed regulatory text promulgated after *Shaffer*, that no recourse remains for lifers when there is a dispute over the final risk or clinical judgment determinations.⁹⁴ Instead, the low-, medium-, or high-risk classification given to a lifer in the months leading up to their suitability hearing is shrouded in clinical empiricism and remains out of reach on appeal.⁹⁵ A look at the risk assessment tools themselves reveals their distinct ability to reframe historical, immutable, and demographic variables as contemporaneous risk factors.

1. A Primer on Risk Assessments

According to a seminal meta-analysis conducted by psychologists at the University of Minnesota in 2000, mechanical prediction techniques and statistical actuarial tools—across medicine, finance, and criminal justice—are about 10 percent more accurate than clinical judgment when predicting human behavior.⁹⁶ In California, and elsewhere, the use of risk assessments in the

91. E-mail from Keith Wattley, Founder and Exec. Dir. of UnCommon Law (Jun. 5, 2016) (on file with author).

92. *Id.*

93. CAL. CODE REGS. tit. 15, § 2240(d) (2015).

94. See BPH RN 16-01 Cal. Regulatory Notice Reg. (Oct. 24, 2016). To give an example of the raw numbers, the FAD conducted over 2000 comprehensive risk assessments in 2015. 33.6 percent resulted in Low Risk determinations, 48.6 percent resulted in Moderate Risk determinations, and 17.6 percent resulted in High Risk determinations. Cliff Kusaj, Presentation to the Board of Parole Hearings about Comprehensive Risk Assessments Administered in 2015, at 3 (on file with *California Law Review*).

95. CAL. CODE REGS. tit. 15, § 2240(d).

96. William M. Grove et al., *Clinical Versus Mechanical Prediction: A Meta-Analysis*, 12 PSYCHOL. ASSESSMENT 19, 19 (2000).

criminal justice system is on the rise.⁹⁷ These measures purport to quantify an individual's propensity for future violence and harm to public safety. Such measures are commonly used at parole hearings and criminal sentencing proceedings.⁹⁸ According to a survey conducted by the Association of State Correctional Administrators, states and their respective parole boards use markedly different techniques for assessing future risk.⁹⁹ Some techniques bridge clinical and actuarial models for future risk.¹⁰⁰ Others do not. Per California's statute, California's battery of assessment tools combines clinical and actuarial tools.¹⁰¹

In their 2014 review of the most prominent violence risk assessment measures, Monahan and Skeem deconstructed the evaluation process into four structured parts. First, these assessment tools "identify[] empirically valid . . . risk factors."¹⁰² Second, they quantify such risk factors, a process known as "scoring."¹⁰³ Third, they combine the scores.¹⁰⁴ Fourth, they "produc[e] an estimate of violence risk."¹⁰⁵ Critically, however, not all risk assessment tools go the distance to the fourth step. Of the four tools assessed by Monahan and Skeem, only one type (exemplified by the Violence Risk Appraisal Guide) produces a final risk estimate.¹⁰⁶ Instead, tools like the HCR-20 identify risk factors and score them, but do not have structured mechanisms to combine risk factors or to produce a final risk estimate. In this domain, unstructured clinical evaluation and structured (actuarial) evaluation occupy the poles of the assessment continuum.¹⁰⁷ This means that where a structured component of a risk assessment leaves off, it is then up to the clinician to perform the

97. John Monahan & Jennifer L. Skeem, *The Evolution of Violence Risk Assessment*, 19 CNS SPECTRUMS 419, (2014).

98. *Id.*

99. ASS'N OF STATE CORR. ADM'RS, ASCA SURVEY, (2014) (on file with *California Law Review*).

100. Monahan & Skeem, *supra* note 97, at 420.

101. CAL. CODE REGS. tit. 15, § 2240(b) (2015).

102. Monahan & Skeem, *supra* note 97, at 420.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 420 ("The best known forensic instrument that structures all [four] of the components of the violence risk assessment process . . . is the Violence Risk Appraisal Guide (VRAG)."). For a comparison of several risk assessment tools, see *id.* at 422 tbl.2 (reproduced *infra*).

Approach/tool	Structured components of the violence risk assessment process			
	Identify risk factors	Measure risk factors	Combine risk factors	Produce final risk estimate
Clinical judgment				
Standard list of risk factors	X			
HCR-20	X	X		
COVR	X	X	X	
VRAG	X	X	X	X

Note: HCR-20 = Historical Clinical Risk-20; COVR = Classification of Violence Risk; VRAG = Violence Risk Appraisal Guide. Adapted from Skeem and Monahan.⁷

107. *Id.* at 420.

remaining steps according to their clinical experience and judgment.¹⁰⁸ The fewer structured components of a risk assessment instrument there are, the more clinical discretion is required. Monahan and Skeem concluded that for the validated risk assessment instruments studied to date, “there is little evidence that one instrument predicts violence better than another.”¹⁰⁹ Professor Skeem also confirmed that there is little meaningful variance in accuracy among the well-validated structured assessment tools (semi-structured to fully-structured).¹¹⁰ According to Cliff Kusaj, the Chief Psychologist of CDCR, BPH, and FAD, “the scores and ratings on structured risk assessments are moderately predictive of violence recidivism and . . . they clearly outperform unstructured or unaided clinical judgment.” Recent meta-analyses corroborate Dr. Kusaj’s assertion.¹¹¹

2. *Historical Clinical Risk Management-20 (HCR-20)*

According to BPH’s Revised Final Statement of Reasons, the “HCR-20 is an assessment tool that provides an estimated overall risk of violence.”¹¹² Its utility, in part, is that it is an actuarial tool that takes into account both static and dynamic risk factors. Static variables do not change. They are factors like an individual’s age at the time of the offense, the number of prior convictions, and an offender’s relationship to the victim.¹¹³ Dynamic variables, by contrast, can be in flux. Such factors include an individual’s amenability to treatment and acceptance of responsibility.¹¹⁴ “Violent offense recidivism,” BPH claims, “is best predicted by prior violence offenses, mental illness, and a history of substance abuse.”¹¹⁵ To locate such information about lifers, FAD turns to institutional documents like intake reports and case files that “typically include the offender’s educational level, employment status, relationship history, substance abuse . . . known or suspected mental disabilities, [and the]

108. *Id.*

109. *Id.* at 419.

110. Interview with Jennifer Skeem, *supra* note 82.

111. See, e.g., Mary Ann Campbell, Sheila French, & Paul Gendreau, *The Prediction of Violence in Adult Offenders*, CRIMINAL JUSTICE AND BEHAVIOR, Vol. 36 No. 6, 567–590 (June 2009); Min Yang, Stephen C. Wong, & Jeremy Coid, *The Efficacy of Violence Prediction*, PSYCHOLOGICAL BULLETIN, Vol. 136 No. 5, 740–767 (2010); Seena Fazel, Jay P. Singh, Helen Doll, & Martin Grann, *Use of risk assessment instruments to predict violence and antisocial behavior in 73 samples involving 24,827 people: systematic review and meta-analysis*, BMJ (July 2012); KIRK HEILBRUN, EVALUATION OF RISK OF VIOLENCE IN ADULTS (2009).

112. CAL. BD. OF PAROLE HEARINGS, *supra* note 5, at 11.

113. *Id.* at 7–8.

114. *Id.*

115. *Id.* at 8. Professor Skeem took issue with the assertion that mental illness predicts offenders’ recidivism. See Interview with Jennifer Skeem, *supra* note 82. She argued that the link between psychosis and violence is particularly exaggerated because of the stigma of mental illness. *Id.* She explained that the main diagnosis in the Diagnostic Statistical Manual that correlates with recidivism is antisocial personality disorder (ASPD). *Id.* But ASPD is a poor predictor of recidivism, she continued, because in her estimate nearly 80 percent of the prison population is diagnosed with ASPD, making it an undiscerning measure. See *id.*

individual's criminal history."¹¹⁶ All told, the HRC-20 aggregates these variables using a scoring system and then compares them to statistical data compiled from thousands of other individuals in the criminal justice system. In the end, the HRC-20 produces a score ostensibly designed to inform the FAD psychologist's larger risk profile of the particular lifer. A lifer's HCR-20 score correlates highly with the FAD's final risk assessment: lifers who are found to be low risk have on average 9.6 of the 20 risk factors measured by the HCR-20; lifers who are found to be moderate risk lifers have on average 13.8 of the 20 risk factors; lifers who are found to be high risk lifers average 16.5 of the 20 risk factors.¹¹⁷ As Professor Skeem explained, the HCR-20 was developed with forensic psychiatric patients and for forensic psychiatric patients.¹¹⁸ It was designed to predict violence, not general recidivism.¹¹⁹

The administration of the HCR-20 begins with an assessment of ten variables about the inmate's past. As listed in the Revised Final Statement of Reasons, they are: (1) previous violence, (2) young age at first violent incident, (3) relationship instability, (4) employment problems, (5) substance abuse problem[s], (6) major mental illness, (7) psychopathy, (8) early maladjustment, (9) personality disorder, and (10) prior supervision failure. BPH neglects to list the second variable.¹²⁰ After questions about each topic, the FAD psychologist will assign the particular "domain" or rating. A rating of zero indicates that "available evidence contradicts the presence of the item"; a rating of one indicates that "available information suggests the possible presence of the item"; a rating of three is appropriate when "available information indicates the presence of the item."¹²¹ The FAD psychologist then applies this rating system to five dynamic variables, assessed through the FAD psychologist's clinical expertise: (1) lack of insight, (2) negative attitudes, (3) active symptoms of a major mental illness, (4) impulsivity, and (5) unresponsiveness to treatment.¹²² Finally, the FAD psychologist applies the rating system to five future-oriented variations: (1) plans lack feasibility, (2) exposure to destabilizers, (3) lack of personal support, (4) noncompliance with remediation attempts, and (5) stress.¹²³

116. CAL. BD. OF PAROLE HEARINGS, *supra* note 5, at 8.

117. Kusaj, *supra* note 94, at 3.

118. Interview with Jennifer Skeem, *supra* note 82.

119. *Id.*

120. The second variable in the Historical Scale of the HCR-20 reads, "Young Age at First Violent Incident." See KEVIN S. DOUGLAS ET AL., SIMON FRASER UNIV., HCR-20 VIOLENCE RISK ASSESSMENT SCHEME: OVERVIEW AND ANNOTATED BIBLIOGRAPHY 5 (2008), <https://www.umassmed.edu/globalassets/center-for-mental-health-services-research/documents/products-publications/reports/adult-criminal-justice/hcr-20-violence-risk-assessment-scheme-overview-and-annotated-bibliography.pdf> [<https://perma.cc/9NHT-YB8V>].

121. CAL. BD. OF PAROLE HEARINGS, *supra* note 5, at 11.

122. *See id.* at 12.

123. *See id.*

The historical variables measured by the HCR-20 run the risk of repenalizing inmates for immutable factors outside their control and for which they have already been held legally accountable. Many lifers were incarcerated for violent offenses. A lifer's original sentence necessarily took their criminal record and previous violence into account through the mandatory presentence probation report.¹²⁴ To conjure this static variable again, in the context of the suitability hearing, can thus be tantamount to punishing the inmate again for the same crime. In *Lawrence*, the 2008 California Supreme Court case that addressed whether an inmate could be denied parole based only on the egregiousness of their life crime, the court reasoned that “the immutable circumstance that the commitment offense involved aggravated conduct” is not enough to satisfy the requisite “some evidence” standard of current dangerousness needed to deny parole.¹²⁵ While the court did not rule that such a factor was irrelevant, mechanisms like the HCR-20 convert the historical and immutable facts of the life crime into an assessment of current dangerousness, thereby evading *Lawrence*'s prohibition. In this way, the HCR-20 resuscitates the egregiousness factor that the court discounted in *Lawrence*, by turning it into an assessment of the present rather than of the past. By marshalling such variables into its algorithms, the HCR-20 provides scientific cover for a rather simple discretionary legal inquiry: Has this person served their time?

The remaining historical variables quantified by the HCR-20 have the potential to trap inmates in a thicket of demographic variables outside of their control. As discussed, the HCR-20 assigns statistical meaning to an inmate's former relationship complications, employment problems, mental illness, and substance abuse. But because the HCR-20 is normed on the actions of thousands of prisoners, it gives further weight to historical and immutable factors that are rendered meaningful based on the actions of prisoners who are not necessarily lifers. This is where demographic unfairness can enter the picture. Even if these factors are statistically correlated with recidivism—which is an assumption itself—using an inmate's history of unemployment, for example, against him in determining his parole eligibility, bears the risk of penalizing socioeconomic status. In the same way, permitting an evaluator to consider an inmate's history of substance abuse has the potential to disproportionately impact those who come from communities where drug use is frequently criminalized. Under the guise of statistics, and through mechanisms like the HCR-20, actuarial assessments of family relationships, employment, and maladjustment can become proxies for race and poverty. Indeed, some

124. Rule 4.411. Presentence investigations and reports. http://www.courts.ca.gov/cms/rules/index.cfm?title=four&linkid=rule4_411. TOGETHER WITH, Rule 4.411.5 “Probation officer's presentence investigation report.” http://www.courts.ca.gov/cms/rules/index.cfm?title=four&linkid=rule4_411_5 [https://perma.cc/GZ9E-BT7].

125. *In re Lawrence*, 190 P.3d 535, 546 (Cal. 2008).

scholars have asserted that risk assessment tools like the HCR-20 are unconstitutional under the Equal Protection Clause because of this discriminatory effect.¹²⁶ While it is beyond the scope of this Note, a regression analysis could track the relationship between race, socioeconomic status, and scoring outcomes on the HCR-20. Quantifiable numbers that show these discrepancies could play an important role in affecting change in risk assessments and their use.

The present and future variables measured by the HCR-20 are equally prejudicial because they supersede much of the function of the suitability hearing itself. The BPH suitability panel amasses a trove of documents and data on each inmate, including treatment reports, prison records, and the inmate's account of their support networks and release plans.¹²⁷ By including a similar analysis of prison programming, the feasibility of post-parole plans, and an assessment of the lifer's personal support resources, the HCR-20 exceeds the bounds of a scientific assessment. Moreover, by coding such variables into a risk assessment score, the HCR-20 shields the conclusions derived from these variables from appeal.¹²⁸

Finally, lifers have no right to counsel at the psychological evaluation.¹²⁹ While outsourcing these inquiries to the FAD psychologist likely serves to expedite the suitability analysis, this stage of the psychological evaluation simply mirrors the suitability inquiry without the hindrances imposed by counsel and appeal procedures. And yet, the suitability panel is permitted to defer to the findings of the FAD psychologist when making parole decisions. Thus, the inclusion of such present- and future-oriented variables in the HCR-20 serves to compound the discretion given to suitability panels by insulating their administrative inquiries from appeal under the protection of science, leaving many lifers without the possibility of parole.

3. *The Hare Psychopathy Checklist-Revised (PCL-R)*

To score Item Six on the HCR-20, the FAD psychologist must complete a separate risk assessment instrument called the Hare Psychopathy Checklist. Psychopathy has a storied history in America, one that is beyond the purview of this Note, but one that is deeply intertwined with the criminal justice system and the history of psychology.¹³⁰ The PCL-R is an influential tool that has its

126. See Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 806 (2014). On the perils of prediction in criminal sentencing, see generally BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2007).

127. CAL. CODE REGS. tit. 15, § 2402 (2015).

128. § 2240(d).

129. § 2240 (The statute that governs psychological risk assessments for life inmates does not provide a right to counsel.).

130. See Josh Fischman, *Criminal Minds*, CHRON. OF HIGHER EDUC. (Jun. 12, 2011), <http://www.chronicle.com/article/Can-This-Man-Predict-Whether/127792> [https://perma.cc/3PN2-

roots in Hervey Cleckley's clinical profiles and his 1941 volume, *The Mask of Sanity*.¹³¹ Robert Hare, a Canadian psychologist and the chief developer of the PCL-R, contended that “[p]sychopathy is among the oldest and arguably the most heavily researched, well-validated, and well-established personality disorder.”¹³² He explained that the PCL-R “arose [to be] a reliable, valid, and generally accepted tool for the assessment of psychopathy.”¹³³ Hare further described that “[t]he PCL-R is a clinical construct rating scale that uses a semi-structured interview, case history information, and specific scoring criteria to rate each of 20 items on a 3-point scale. . . . Total PCL-R scores can vary from 0 to 40 and reflect the degree to which the individual matches the prototypical psychopath.”¹³⁴ Like the HCR-20, a lifer's results on the PCL-R also correlate with FAD's final risk determination: lifers who are found to be low risk have an average score of 13.6 on the PCL-R, those found to be moderate risk have an average score of 23.8 points, and those lifers who are found to be high-risk lifers score an average of 23.8.¹³⁵ Importantly, for purposes of parole suitability in California, while the PCL-R's assessment of psychopathy is dimensional—Hare, for example, asserted that a score of thirty or above on the PCL-R indicates psychopathy—the labeling effect of psychopathy is not. Instead, psychopathy is considered a categorical, dispositional, and untreatable character trait.¹³⁶

The use of psychopathy and related personality disorders in risk assessments and suitability hearings generates an undue bias against a lifer's release from prison. While psychopathy is not a formal mental health diagnosis and is not listed in the Diagnostic and Statistical Manual of Mental Disorders (currently, the “DSM-V”), BPH understands the “data [to] suggest[] that the presence of psychopathy is correlated with violence.”¹³⁷ Symptoms of psychopathy, BPH states, include “lack of a conscience or sense of guilt, lack

6N3K]; John Seabrook, *Suffering Souls: The Search for the Roots of Psychopathy*, NEW YORKER (Nov. 10, 2008), <http://www.newyorker.com/magazine/2008/11/10/suffering-souls> [<https://perma.cc/4RHD-RJQG>].

131. Robert D. Hare, Craig S. Neumann & Thomas A. Widiger, *Psychopathy*, in THE OXFORD HANDBOOK OF PERSONALITY DISORDERS, 478, 479 (Thomas A. Widiger ed., 2012).

132. *Id.* at 478.

133. *Id.* at 478–80.

134. *Id.* at 479–80. The PCL-R takes stock of twenty variables: (1) glib and superficial charm, (2) grandiose (exaggeratedly high) estimation of self, (3) need for stimulation, (4) pathological lying, (5) cunning and manipulateness, (6) lack of remorse or guilt, (7) shallow affect (superficial emotional responsiveness), (8) callousness and lack of empathy, (9) parasitic lifestyle, (10) poor behavioral controls, (11) sexual promiscuity, (12) early behavior problems, (13) lack of realistic long-term goals, (14) impulsivity, (15) irresponsibility, (16) failure to accept responsibility for own actions, (17) many short-term marital relationships, (18) juvenile delinquency, (19) revocation of conditional release, (20) criminal versatility. Robert D. Hare, David J. Cooke & Stephen D. Hart, *Psychopathy and Sadistic Personality Disorder*, in OXFORD TEXTBOOK OF PSYCHOPATHOLOGY 555, 558 (Theodore Million et al. eds., 1999).

135. Kusaj, *supra* note 94, at 8.

136. Hare et al., *Psychopathy*, *supra* note 131, at 480.

137. CAL. BD. OF PAROLE HEARINGS, *supra* note 5, at 12.

of empathy, egocentricity, pathological lying, repeated violations of social norms, disregard for the law, shallow emotions, and a history of victimizing others.”¹³⁸ Moreover, BPH contends that “psychopaths are often repeat offenders who demonstrate a likelihood of committing sexual assaults or other violent crimes.”¹³⁹ But as Professor Skeem explained, the leading measure of psychopathy captures not only features of psychopathy (e.g., lack of empathy, shallow emotions) but also nonspecific features of antisocial personality disorder (e.g., repeated violations of social norms, disregard for the law).¹⁴⁰ It is the latter features—not psychopathic traits themselves—that predict violence and recidivism.¹⁴¹

Antisocial personality disorder (ASPD)—a modern DSM-codified analogue to psychopathy and a diagnosis that FAD psychologists frequently confer upon lifers using the PCL-R checklist—is also problematically nondescriptive. Professor Skeem explained that while ASPD is predictive of recidivism,¹⁴² the ubiquity of the diagnosis in prisons makes it a poor measure for who should get released. A 2002 meta-analysis published in *The Lancet* found that 21 percent of incarcerated women and 47 percent of incarcerated men had ASPD.¹⁴³ Some scholars have estimated the prevalence of ASPD among incarcerated men to be as high as 80 percent.¹⁴⁴

In their trenchant normative argument for why it is necessary to exclude ASPD and psychopathy from capital sentencing, Kathleen Wayland and Sean O’Brien explained that “ASPD is often used as a counter-narrative to major mental illness evidence,” and labeled “as an immutable fact” as opposed to a treatable or mitigating illness.¹⁴⁵ Moreover, they argued that ASPD suffers from an innumeracy problem because the polythetic classification scheme—which is used for DSM diagnoses—gives rise to “3.2 million symptom combinations.”¹⁴⁶ Such variability obscures the conclusions that can fairly be derived from the diagnosis.¹⁴⁷ “In sum,” they concluded, “serious ethical

138. *Id.*

139. *Id.*

140. Interview with Jennifer Skeem, *supra* note 82.

141. *Id.*

142. *Id.*; see also Eyal Aharoni et al., *Neuroprediction of Future Rearrest*, 110 PNAS 6223, (2013).

143. Seena Fazel & John Danesh, *Series Mental Disorder in 23000 Prisoners: A Systematic Review of 62 Surveys*, 359 LANCET 545 (2002).

144. Mark D. Cunningham & Thomas J. Reidy, *Antisocial Personality Disorder and Psychopathy: Diagnostic Dilemmas in Classifying Patterns of Antisocial Behavior in Sentencing Evaluations*, 19 BEHAV. SCI. L. 333, 340 (1998).

145. Kathleen Wayland & Sean D. O’Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFSTRA L. REV. 519, 528–30 (2014).

146. *Id.* at 540. Such diagnoses are formed by selecting a specified number of required symptoms from a longer list. For example, to meet the DSM-V requirements for ASPD, an individual must have at least three out of the fifteen symptoms listed under “Criterion A.” *Id.* at 540 n.126.

147. See *id.* at 540.

questions have been raised about whether the PCL-R provides any probative value in capital sentencing procedures. The PCL-R stigmatizes defendants because of its associated label of ‘psychopath’ and the morally damning judgment implicit in many of the PCL-R items.”¹⁴⁸ While parole commissioners may be less likely than capital jurors to equate psychopathy or ASPD with “wickedness” or “evil,” the PCL-R’s focus on a lifer’s failure to conform to social norms and failure to obey the law exhibits circular and prejudicial reasoning that contributes little to an impartial prediction of future violence.¹⁴⁹

C. *Quantifying Subjectivity: The Towering Influence of Insight and Remorse*

While the actuarial tools BPH employs are prejudicial, the harm imposed by FADs psychological evaluations is further compounded by another appeal to brain science: the medicalization of remorse and insight. While BPH has routinely cited a “lack of insight” into its parole denials since *Shaputis*, the plaintiffs in *Johnson* alleged that before the modern era of standardized risk assessments, lifer psychological evaluations expressly excluded judgments concerning insight and remorse.¹⁵⁰ While the paper trail runs thin in the era preceding *Rutherford*, published appellate decisions betray the sheer ubiquity of insight determinations in the modern era. As the lifers also noted in their lawsuit against BPH, “[i]n the year after *Shaputis* was decided, a purported ‘lack of insight’ was cited in twice as many [California] appellate opinions as had been the case in the 31 years before *Shaputis*.”¹⁵¹ As described above, the HCR-20 and the PCL-R measure a lifer’s insight and remorse, respectively. But, crucially, while FAD psychologists factor insight and remorse into these actuarial assessments, they are also instructed to provide a separate clinical “evaluation of the prisoner’s remorse [and] insight.”¹⁵² Untethered from the prescribed questions of the HCR-20 and the PCL-R, the FAD psychologist can provide a clinical judgment of an inmate’s remorse and insight. This clinical judgment, coupled with the expanded authority given by *Shaputis*, can quickly become dispositive of the suitability inquiry.¹⁵³ By issuing a clinical opinion

148. *Id.* at 561 (footnote omitted).

149. *Id.* at 558.

150. See FAC, *Johnson v. Shaffer*, *supra* note 12, ¶ 19.

151. *Id.* ¶ 29. Plaintiffs also noted that “the Governor cited a lack of insight in only 12% of his decisions blocking parole in the year preceding *Shaputis*, but he did so in . . . 78% of his decisions the year after *Shaputis* was decided. Overall, the Governor cited FAD evaluations in nearly 90% of his decisions blocking parole in 2009, a rate that continued into 2011.” *Id.*

152. Memorandum from Cal. Dep’t of Corr. & Rehab., *supra* note 28, at 2.

153. See Lilliana Paratore, Note, “*Insight*” into *Life Crimes: The Rhetoric of Remorse and Rehabilitation in California Parole Precedent and Practice*, 21 BERKELEY J. CRIM. L. 95, 111 (2016) (“The central inquiry for the Board of Parole Hearings and the Governor when evaluating an inmate’s suitability for parole, as elucidated by *Lawrence* and *Shaputis*, requires the deciding body to determine

that a lifer lacks insight, even after the settlement in *Shaffer*, a FAD psychologist can lay a complete and unappealable foundation for a denial of parole.¹⁵⁴

The quantification of remorse and insight—and the codification of these variables into a risk assessment algorithm—is not a clean interpretive move. In fact, a close read of *Lawrence* and *Shaputis* shows that the biggest difference between the two murders was that BPH and the Governor merely considered Shaputis’s cold-blooded murder to be more deserving of continued punishment than Lawrence’s fit of passion. The *Shaputis* court admitted that “the relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense.”¹⁵⁵ Specifically, insight and remorse calculations are the vehicle through which “facts in the record” remain “predictive of current dangerousness.”¹⁵⁶ The court concluded that “lack of insight into the murder and the abuse of his wife and family” was enough to justify Shaputis’s indefinite incarceration.¹⁵⁷ In this way, while formal risk assessments render a lifer’s pre-prison life circumstances predictive of future violence, insight analysis renders the facts of the life crime predictive of future violence.

After the conclusion of *Shaputis I* in the California Supreme Court, Mr. Shaputis refused to be interviewed by another FAD psychologist.¹⁵⁸ Instead, “he hired his own psychologist.”¹⁵⁹ In 2009, Shaputis was denied parole yet again.¹⁶⁰ Here too, the panel based its denial on “the circumstances of the offense as well as petitioner’s failure to gain insight into his behavior and take responsibility for his crime.”¹⁶¹ By 2011, having been denied relief for a third time by the California Court of Appeals, Mr. Shaputis was back before the California Supreme Court challenging the Board’s practice of considering a “lack of insight” as a “parole unsuitability factor.”¹⁶² Perhaps piqued by Shaputis’s speedy return, the California Supreme Court used the opportunity to offer “some general guidance” on “lack of insight” as a suitability factor, noting that this factor was playing an “increasingly prominent” role in parole decisions.¹⁶³ Shaputis stated, “In the past I never knew what they meant by

whether or not the inmate poses a current risk to society, most often based on their ‘insight’ into the life crime.”).

154. See Order Granting Plaintiffs’ Motion to Dismiss All Defendants Except Jennifer Shaffer, No. 2:12-cv-1059-KJM AC (E.D. Cal. Jun. 23, 2016).

155. *In re Shaputis*, 190 P.3d 573, 581 (Cal. 2008).

156. *Id.*

157. *Id.* (quotation marks omitted).

158. *In re Shaputis*, 265 P.3d 253, 257 (Cal. 2011) [hereinafter *Shaputis II*].

159. *Id.*

160. *Id.* at 258.

161. *Id.* (citation omitted).

162. *Id.*

163. *Id.*

insight . . . [b]ecause of a fading memory, probably due to my age and illnesses, I do not have a vivid recollection of all of my previous conduct, but I do remember that I abused my wife and at least one of my daughters. I also recall my drinking habits and severe addiction to alcohol.”¹⁶⁴ Overturning the lower appeals court, the California Supreme Court chastised Shaputis for “limit[ing] the evidence available to the Board, by refusing to participate in an evaluation by a CDCR psychologist.”¹⁶⁵ Further, it credited BPH’s argument that “‘insight’ . . . is a commonly understood term.”¹⁶⁶ Most of all however, the state Supreme Court emphasized the tremendous deference that is due to executive branch agency regulations.¹⁶⁷

For “lack of insight” to stand as an “unsuitability factor,” the California Supreme Court reasoned that the parole panel must “establish[] . . . a rational nexus” between such a deficiency and “current dangerousness.”¹⁶⁸ The court rightly warned that “[p]recisely because lack of insight is such a readily available diagnosis, its significance as an indicator of current dangerousness must be rationally articulated under the individual circumstances of each case—lest ‘lack of insight’ become, impermissibly, a new talisman with the potential to render almost all life inmates unsuitable for parole.”¹⁶⁹ But while this was a prescient observation, the court’s directions to future parole panels quickly abandoned it. The court continued, stating that the “deferential standard of review in parole cases requires the court to credit the Board’s findings when they are supported by a modicum of evidence.”¹⁷⁰ Then, in sweeping terms, the court proclaimed,

Although the social science literature does not identify lack of insight per se as one of the predictors of criminal recidivism, the term “lack of insight” as used by the Board and the Governor may encompass a number of attitudes or behaviors associated with criminal recidivism. For example, lack of remorse or failure to accept responsibility for past criminal activity may be indicative of an antisocial, psychopathic personality that is correlated with greater recidivism.¹⁷¹

Here, the circular logic of the suitability inquiry is on full display: a “lack of insight,” assessed as part of the HCR-20 and the PCL-R, becomes grounds for the diagnosis of a personality disorder; at the same time, the Board uses that very same personality disorder to substantiate findings of “lack of insight.” And so, while there may be circumstances in which an inmate’s denial of a crime or insufficient understanding about the causes of a crime impacts their

164. *Id.* at 262.

165. *Id.* at 265.

166. *Id.* at 263.

167. *Id.* at 272.

168. *Id.* at 270, 272.

169. *Id.* at 278.

170. *Id.* at 263.

171. *Id.* at 277.

current dangerousness, the Board's nebulous, yet frequent, use of "lack of insight" serves only to grant BPH further discretion to evade due process in suitability hearings. And the numbers bear this out: In 2010, the year before *Shaputis II*, 239 California lifers successfully appealed their parole suitability denials; by 2012 that number was forty-one; by 2013 it was eight; and by 2015, the last year reported, it was two.¹⁷²

In sum, BPH's ubiquitous emphasis on "lack of insight" shows two things: (1) that the agency successfully housed an admittedly subjective inquiry in an ostensibly objective and empirical evaluation, and (2) that science and administrative deference are a uniquely impenetrable pair. On the one hand, the scientific findings of FAD psychologists are ineligible for review because they are the product of clinical assessment, and, unlike the suitability hearing itself, are not considered administrative or legal in nature. On the other hand, the deferential standard given to BPH's decisions to deny parole—that it must merely find "some evidence" of current dangerousness—shields against most legal avenues of interrogation. Thus, when the "some evidence" is comprised of unimpeachable science, a lifer's hopes of challenging a parole denial effectively vanish in a double-bind. The science, considered objective, necessarily meets the "some evidence" standard, foreclosing review of the parole decision; the "some evidence" standard, which is satisfied by a mere "modicum" of evidence, forecloses the only review process through which a lifer might challenge the science. By forming FAD, and rendering scientific inquiry and agency findings one and the same, BPH has effectively rendered the components of its suitability inquiry mutually affirming and impervious to legal challenge. In doing so, BPH is violating the due process rights of lifers in California.

D. The Impact of the Drafted Regulations That Revise California Code of Regulations Title 15 Section 2240

The current revisions to Section 2240, for which BPH issued public notice on October 24, 2016 are unlikely to rectify the structural deficiencies that plague the Board's use of psychological risk assessments. At the time this Note was sent to the publisher, the forty-five-day public comment period had concluded, but BPH had yet to submit its proposed revisions to OAL.¹⁷³ Simply put, the proposed revisions as they currently stand would change very little. All inmates seeking parole would still receive psychological evaluations, not merely those with a documented history of mental illness. As Keith Wattley, the plaintiffs' class attorney, remarked in a letter to BPH:

As a preliminary matter, we must object to the claimed necessity for

172. See *BD. OF PAROLE HEARINGS*, *supra* note 13, at 2.

173. When BPH's proposed text for Section 2240 is submitted to OAL, it will be listed here: *Proposed Regulations Under Review*, CAL. OFFICE OF ADMIN. LAW, <http://www.oal.ca.gov/proposed-regulations> [https://perma.cc/JP72-V4A7].

this regulation. It is true that the *Johnson v. Shaffer* settlement requires a meaningful appeal process regarding the Board's use of Comprehensive Risk assessments . . . ; however, this requirement is only necessary because the Board has unlawfully determined that it should conduct psychological risk assessments for all prisoners appearing for parole suitability hearings.¹⁷⁴

Indeed, this Note's look to the genesis of the decision to administer these assessments to all inmates seeking parole reveals the Board's true motivation for adopting its current protocol. Its motivation was not to obtain necessary medical or psychological information that would bear on the suitability decision; instead, it was administrative efficiency. This origin story sustains the plaintiffs' contention that the Board could return to a protocol that administers psychological risk assessments to a subset of inmates without jeopardizing the accuracy or integrity of the suitability inquiry as a whole. It should do so.

While the proposed changes to the text of Section 2240—promulgated in the wake of the settlement between BPH and the lifer class in *Johnson v. Shaffer*—make a variety of procedural changes, they also attempt to provide an avenue for inmates to appeal their psychological evaluations.¹⁷⁵ This proposed text states, “If an inmate or the inmate’s attorney of record believes that a risk assessment contains a factual error that materially impacts the risk assessment’s conclusions regarding the inmate’s risk of violence,” the inmate can appeal.¹⁷⁶ Critically, however, the proposed regulation then curtails the content of what can be appealed. It states:

For the purposes of this section, “factual error” is defined as an explicit finding about a circumstance or event for which there is no reliable documentation or which is clearly refuted by other documentation. Factual errors do not include disagreements with clinical observations, opinions, or diagnoses or clarifications regarding statements the risk assessment attributed to the inmate.¹⁷⁷

The plaintiffs, understandably, demurred.¹⁷⁸

174. Letter from Keith Wattle, Exec. Dir. of UnCommon Law, to Heather L. McCray, Senior Staff Att’y, Bd. of Parole Hearings (Dec. 19, 2004) (on file with *California Law Review*).

175. The other component of the revised text that is meaningful to the discussion of brain science presented here is a clause that states that “psychologists shall incorporate standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate’s risk of violence.” BPH RN 16-01 Cal. Regulatory Notice Reg. (Oct. 24, 2016). There was no such provision in the preamendment text requiring the assessment measure to be “generally accepted.” This change however has not provoked significant dissent because, despite the debate over whether measures like the HCR-20 and PCL-R are appropriate and necessary in the parole setting, it is unlikely that they would be considered anything less than “generally accepted” by the psychology community.

176. *Id.*

177. *Id.*

178. See, e.g., Letter from Michael J. Brennan, Dir. & Supervising Att’y of the Post-Conviction Justice Project, USC Gould Sch. of Law, to Jennifer Shaffer, Exec. Officer, Cal. Bd. of Parole Hearings (Sept. 12, 2016) (on file with *California Law Review*).

Beyond the underlying contention that these assessment measures have no place in a routine suitability inquiry, the plaintiffs have argued that (1) FAD-administered psychological evaluations should be audio recorded, and (2) the confinement of the newfound avenue to appeal to a “factual error that materially impacts the risk assessment’s conclusions regarding the inmate’s risk of violence”¹⁷⁹ is “so narrow that it is meaningless in many situations.”¹⁸⁰ So far, BPH has refused to entertain the possibility of tape recording the FAD evaluations. It argued that “[t]his requirement would place a substantial burden on the board of having to purchase new recording equipment, catalog and store the audio recordings, and transcribe the recordings when issues arose.”¹⁸¹ Plaintiffs argued, by contrast, that “the Board’s refusal to create an objective record of CRA interviews, combined with its refusal to even *consider* objections based on false reports of inmates’ statements . . . , make the proposed appeal process practically meaningless” and far short of the meaningful appeals process promised in the settlement.¹⁸² Concerning the scope of appeal, the Board maintained that “[t]he purpose of the pre-hearing review process is to correct risk assessments that contain actual errors that actually had a material impact on the clinician’s conclusions.”¹⁸³ Plaintiffs contended that any appellate process that does not allow inmates to appeal misquoted statements—which they argued is a pervasive issue—falls short of due process. Moreover, the plaintiffs continued, harboring clinical diagnoses and expert opinions away from objections renders scientific findings that are based on erroneous information out of reach on appeal.¹⁸⁴

179. Proposed Regulatory Text, Cal. Code Regs. tit. 15, § 2240.

180. See Letter from Michael J. Brennan, *supra* note 178. “First, the proposed regulations permit challenges only of ‘factual errors,’ which are limited to ‘explicit findings about a circumstance or event’ that an inmate contends are wrong. This definition extends far beyond precluding inmates from challenging a psychologist’s observations or subjective diagnoses; rather, it also forecloses an inmate’s ability to challenge things like *inaccurate statements about what an inmate said* during an interview, or a psychologist’s *failure to include information* provided by an inmate in the CRA. Indeed, the definition of ‘factual error’ *expressly excludes* ‘clarifications regarding statements . . . attributed to the inmate.’ This overly limited definition of what constitutes a ‘factual error’ prevents inmates from being able to challenge fundamental inaccuracies that have nothing to do with a psychologist’s subjective impressions. Second, the proposed regulations only allow inmates to challenge factual errors that ‘materially impact the risk assessment’s conclusions regarding the inmate’s risk of violence.’ This limitation is far too broad. Even if a factual inaccuracy did not materially alter the conclusion of the particular psychologist preparing a CRA, there is no way to control how subsequent hearing panels, the Governor, or other evaluators will rely on those inaccuracies or the conclusions they will draw from them. Refusing to allow inmates to challenge such factual errors unfairly exposes them [to] negative consequences down the road based on false information.” *Id.* (modifications omitted).

181. Letter from Heather L. McCray, Senior Staff Att’y, Bd. of Parole Hearings, to Keith Wattley, Exec. Dir. of UnCommon Law (Aug. 9, 2016) (on file with author).

182. Letter from Keith Wattley, *supra* note 174.

183. Letter from McCray, *supra* note 181.

184. Letter from Keith Wattley, *supra* note 174.

This is the current state of the debate over the use of psychological risk assessment tools in parole suitability hearings in California. Notably, the debate has strayed from the normative question of whether psychological risk assessments should be administered to all inmates seeking parole, to the mechanics of the process, which are currently grounds for compromise. This is a mistake. While the plaintiffs' contention that clinical diagnoses shield factual determinations from review is reminiscent of the shortcomings that have plagued the psychological evaluation process since 2006, the problem is that such insulation is precisely the value proposition of using such assessment measures. As displayed in Part II.B, these assessment tools are useful because they aggregate information in stable diagnoses and scientific labels. The Board predictably objected to allowing inmates to appeal the component parts of such diagnoses because such a prerogative would dismantle the administrative efficiency gained by using the metrics in the first place.

Tape recording psychological evaluations and expanding the grounds for appeal would be steps in the right direction, but the debate should also concern whether such tools should be used on every inmate seeking parole and not merely the mechanics of how they should be administered. Because these tools trawl up immense quantities of information—information with bearing on insight and other nonmedical determinations—the plaintiffs in *Johnson* are well advised to seek a meaningful process for appeal. But a look to the administrative history shows that BPH has never made a persuasive case for why psychological assessments are necessary, or even probative, absent special circumstances involving mental illness. Instead, BPH adopted the protocols in a political climate that demanded administrative efficiency. The nexus of the current debate over the mechanics of administering actuarial risk assessments is a red herring. The important question is whether psychological risk assessments should play a significant role in parole suitability determinations. Until the Board puts forth substantive reasons for psychological risk assessments that outweigh the prejudicial effect of these protocols on inmates' chances of obtaining a fair and transparent suitability hearing, they should be disbanded with completely.

CONCLUSION

According to the Stanford Criminal Justice Center's 2011 assessment, "a lifer now stands an 18 percent chance of being granted parole by the Board of Parole Hearings. The grant rate has fluctuated over that last 30 years—nearing zero percent at times and never arising above 20 percent."¹⁸⁵ As the statute reads, and as the California Supreme Court has repeatedly affirmed, BPH "shall normally set a parole release date" following a suitability hearing.¹⁸⁶

185. WEISBERG ET AL., *supra* note 1, at 4.

186. *In re Shaputis (Shaputis II)*, 265 P.3d 253, 278 (Cal. 2011) (citing *In re Lawrence*, 190 P.3d 535, 546 (Cal. 2008)).

This Note has attempted to detail one primary reason for the dissonance between the statutory mandate and the number of parole grants. Specifically, it has detailed the development and implementation of a particularly questionable use of brain science that shields parole determinations from review and justifies BPH's statutorily impermissible rate of denying parole. Indeed, a sober appraisal of BPH's (1) permissive statutory interpretation, (2) misrepresentation of the opinions of scientific experts, (3) selection of risk assessments that are not validated for the lifer population and that emphasize immutable and demographic characteristics, (4) emphasis on unduly permanent labels like psychopathy and personality disorders, and (5) decision to insulate subjective determinations like "lack of insight" under the pretense of empirical assessment, shows that its psychological evaluation protocol is scarcely probative, and highly prejudicial.

But beyond such a BPH-specific conclusion, the timeline of BPH's adoption of psychological evaluations, formation of FAD, and choice of risk assessment instruments reveals something deeper: brain science can provide a uniquely hermetic proxy for legal and administrative inquiry. In the California parole system, brain science functions as a vehicle that hoists the past into the courtroom in justiciable form. It has the powerful capacity to reframe historical characteristics into modern-day assessments of risk. By adding coefficients to various events in a lifer's past, and to abstruse situational variables like insight and remorse, the FAD psychologist's assessment can quickly prove fatal to a lifer's chances of parole. This power takes the form of a closed scientific finding delivered to the adjudicating panel. And this is key. Under current California Supreme Court case law, as detailed in *Shaputis II*, a scientific finding of current dangerousness can quickly foreclose the subsequent suitability inquiry. Given this singularly dispositive capacity, the use of risk assessments by California's Parole Board makes a compelling case to hold the brain science underlying these risk assessments to the highest of scientific standards. In California, such standards have not been met. Instead, administrative pressures at the time of implementation asked too much of brain science. And thus, the science itself was compromised.

The history and anatomy of BPH's psychological evaluations tells a foreboding tale, a tale that suggests that tasking a single administrative body with both scientific inquiry and the legal application of that inquiry can lead to deleterious results. At its heart, this is a story about the division of scientific and administrative labor. The pitfalls spanning the timeline between BPH's early statutory analysis in 2006 through the formalization and implementation of the psychological evaluation protocol show that, time and again, the customization of science for administrative purposes corrupted the integrity of the science itself. All appeals to brain science in legal and administrative settings should proceed with caution. As seen in the California system, this caution is especially warranted when the clinical and empirical protocols are

devised and administered by the very same agencies that derive legal conclusions from such measures.

Readers should be on alert when they encounter a system like this one. As this Note shows, it is no coincidence that integrating brain science assessments into the existing procedure for parole suitability—assessments that are given too much weight because they are “empirical” and administered by a doctor—was BPH’s method of choice for making its administrative process more efficient. This change created a reliance on clinical and scientific analysis that shrouded the legal inquiry under an impenetrable cloak. And the consequence of this cloak is grave: the routine violation of California lifers’ right to due process.

