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School of Law
Williams Institute



RESEARCH THAT MATTERS

THE CALIFORNIA PAROLE BOARD'S TREATMENT of Transgender Individuals

APRIL 2023

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EXECUTIVE SUMMARY

In this report, we describe findings of research conducted by scholars at the Williams Institute in collaboration with the Social Justice Legal Foundation (SJLF) that aimed to understand how transgender parole seekers fare in the California Department of Corrections and Rehabilitation (CDCR) parole hearings. As a result of a public records request by SJLF, we received transcripts of 42 parole hearings that took place between January 1, 2021 – February 28, 2022, in which persons seeking parole identified as transgender.

Our analysis shows that

- Transgender individuals, aged 30 – 76, for whom transcripts were provided, were granted parole at approximately the same rate as the general population of parole seekers during that period: 31% of the transgender individuals in our sample (13 of 42) were granted parole as compared with 34% of all parole seekers in 2021, as reported by the CDCR.
- Approximately 43% (16 out of 37 with relevant data) of parole hearings for transgender individuals included misgendering and/or insensitive or biased comments.
 - Examples of insensitive or biased statements included parole commissioners questioning whether the parole seeker would remain sober because the “LGBTQ community has big parties,” and one commissioner spending several minutes discussing whether a transgender woman is able to maintain an erection.
 - Examples of misgendering include a parole seeker’s own attorney misgendering them, stating that he felt “weird” about using his client’s preferred pronouns. One nonbinary individual asked the commissioners to be addressed by name, but the commissioners pushed the individual to choose a pronoun.
- Some commissioners appeared moved when parole seekers spoke about how challenges stemming from being closeted as a transgender person (prior to transition) contributed to criminal behavior or how a transition could facilitate rehabilitation.
- Other commissioners had negative reactions to the transgender individuals before them.
 - For example, one commissioner doubted that the incarcerated individual’s transgender status would make life easier on the outside, suggesting that because one parole seeker had never “lived in society as a transgender woman . . . surely it’s going to be difficult.”
 - Another commissioner stated, without prompting, “I don’t want to offend anybody, but your whole . . . , how you identify, is going to be an issue in the community. Right? I mean, that’s going to cause stress.”
- Having an explicit parole housing plan was an important factor in granting parole—10 of 18 (56%) people with a housing plan were granted parole as compared with 3 out of 24 (13%) individuals who did not have an explicit housing plan.
- Although finding appropriate transitional housing is extraordinarily challenging for transgender individuals, parole commissioners heavily consider this factor in their parole determination.

TRANSGENDER INDIVIDUALS IN CALIFORNIA PRISONS

In this report, we describe findings of research conducted by researchers at the Williams Institute in collaboration with the Social Justice Legal Foundation. We aimed to understand how transgender parole seekers are treated in California Department of Corrections and Rehabilitation (CDCR) parole hearings since the implementation of the Transgender, Respect, Agency, and Dignity Act (TRADA). TRADA became effective in January 2021. The law was motivated, in part, by findings that transgender women experience sexual assault at a rate thirteen times higher than the cisgender men housed in the same prisons in California.¹ Findings by the Williams Institute in a national survey also showed that transgender people are at an increased risk of assault and sexual victimization while incarcerated (as compared to non-transgender people).²

TRADA contains provisions designed to ensure that transgender, nonbinary, and intersex³ individuals who are incarcerated should be searched and housed in a way consistent with their gender identity.⁴ The law also mandates that staff, contractors, and volunteers working with the CDCR “not consistently fail to use the gender pronoun and honorific” of any person in CDCR custody.⁵

As of February 2023, there were over 95,000 people (not including parolees) in the custody of CDCR and an estimated 1,671 of them were transgender.⁶ The implementation of TRADA through policies put forward by the CDCR is an ongoing process.⁷ Research is needed to assess the implementation of the law and how it impacts disparities in the experience of violence suffered by transgender people in CDCR custody. The Williams Institute, in collaboration with researchers at University of California Irvine and California State University, Dominguez Hills, is currently engaged in pursuing this research.

¹ Valerie Jenness, Charyl L. Maxson, Kristy N. Matsuda, & Jennifer Macy Sumner, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault*, 2 UC IRVINE CTR. FOR EVIDENCE-BASED CORR. BULLETIN 1, 2 (June 2007), <https://cpb-us-e2.wpmucdn.com/sites.uci.edu/dist/0/1149/files/2013/06/BulletinVol2Issue2.pdf>; See also S.B. 132 § 2(c), 2019-2020 Leg., Reg. Sess. (Cal. 2020), <https://legiscan.com/CA/text/SB132/id/2210293>.

² JODY L. HERMAN, TAYLOR N.T. BROWN, BIANCA D.M. WILSON, ILAN H. MEYER & ANDREW R. FLORES, THE WILLIAMS INST., *Prevalence, Characteristics, and Sexual Victimization of Incarcerated Transgender People in the United States: Results from the National Inmate Survey (NIS-3)* (Oct. 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Incarceration-Violence-Oct-2016.pdf>. See also Ilan H. Meyer, Andrew R. Flores, Lara Stemple, Adam P. Romero, Bianca D.M. Wilson & Jody Herman, *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey 2011-2012*, 107 AM. J. OF PUB. HEALTH 267, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5227944/pdf/AJPH.2016.303576.pdf>.

³ In the legislative findings, TRADA defines transgender as “broad and inclusive of all gender identities different from the gender a person was assigned at birth including, but not limited to, transsexual, two-spirit, and māhū.” The law defines nonbinary as “an inclusive term used to describe individuals who may experience a gender identity that is neither exclusively male nor female or is in between or beyond both of those genders, including, but not limited to, gender fluid, agender or without gender, third gender, genderqueer, gender variant, and gender nonconforming.” Intersex is defined as “a broad and inclusive term referring to people whose anatomy, hormones, or chromosomes fall outside the strict male and female binary.” S.B. 132, 2019-2020 Leg., Reg. Sess. (Cal. 2020).

⁴ S.B. 132, 2019-2020 Leg., Reg. Sess. (Cal. 2020), *codified as* CAL. PENAL CODE §§ 2605 & 2606.

⁵ Cal. Penal Code § 2605(d) (2022).

⁶ CAL. DEP'T OF CORR. & REHAB., *Senate Bill 132 FAQs*, (Jan. 12, 2023) <https://www.cdcr.ca.gov/prea/sb-132-faqs/>.

⁷ See generally, THE MOSS GRP., *SB 132 THE TRANSGENDER RESPECT, AGENCY, AND DIGNITY ACT IMPLEMENTATION REVIEW REPORT*, (Nov. 2022) https://www.cdcr.ca.gov/prea/wp-content/uploads/sites/186/2023/03/Final-SB132-CDCR-Assessment-Report_ADA.pdf.

In this report, we were particularly interested in how parole seekers who identify as transgender and nonbinary people and their identities are treated in parole hearings and in parole plans. We were also interested in parole seekers' access (or lack thereof) to gender-affirming transitional housing. Transitional housing is an important aspect of the parole hearing and weighs heavily on parole decisions.

THE PAROLE PROCESS IN CALIFORNIA

The process by which an individual can seek parole is set forth in the California Penal Code, in which a hearing before the Board of Parole Hearings (BPH), a subdivision of the CDCR, is the first step.⁸ A parole hearing is overseen by two or more parole commissioners, and involves advocacy by (a) the incarcerated individual, (b) the retained or assigned attorney for the incarcerated individual, (c) a district attorney, and, if available, (d) the victim, the victim's family, or a victim representative.⁹

During the hearing, the parole commissioners consider the incarcerated individual's crime, their rehabilitation since the crime (e.g., remorse or new insight, educational or behavioral courses taken while incarcerated, sobriety attained or maintained), and their plans to reenter society if granted parole.¹⁰ Accordingly, one significant factor the parole commissioners consider is where the incarcerated person plans to live and whether they have robust reentry plans. A robust reentry plan would include specific details related to anticipated housing, employment, and medical treatment, among other elements.

If the commissioners grant parole, they set conditions of parole at the end of the hearing. The incarcerated individual must abide by these conditions to avoid re-incarceration. Typical conditions include an order for an individual to refrain from using drugs or alcohol and an order to remain in the county of residence unless granted advance permission.¹¹ While it is very common for parole commissioners to order individuals to reside at transitional housing facilities (sometimes referred to as *halfway houses*), they do not always do so.

If parole is granted, the individual remains incarcerated until another CDCR department, the Division of Adult Parole (DAPO) reviews and finalizes the individual's reentry plan and conditions.¹² During this time, additional or different housing plans and housing-related conditions may be added. After release, DAPO parole agents supervise the individual on parole to ensure they comply with all conditions.

If parole is denied, the individual will be scheduled for another parole hearing within three, five,

⁸ UnCommon Law, *Overview of California Parole Consideration Process & How to Prepare for It* 1 (Spring 2022), <https://static1.squarespace.com/static/5b5f9d4be7494070b92d76f3/t/6254806c805f576301f58de5/1649705069360/22.04.06+Parole+Process+and+Preparation+Overview+Guide.pdf>; CAL. PENAL CODE § 3051; see also CDCR, *Parole Eligibility* (last visited Jan. 18, 2023), <https://www.cdcr.ca.gov/bph/parole-eligibility/> (describing specifics of eligibility).

⁹ *Supra* note 7 at 4.

¹⁰ *Id.* at 5, 7.

¹¹ CDCR, *Parole Conditions* (last visited Jan. 9, 2023), <https://www.cdcr.ca.gov/parole/parole-conditions/>.

¹² UnCommon Law, *Post-hearing Guide: Grant* 1, 3 (Spring 2022), <https://static1.squarespace.com/static/5b5f9d4be7494070b92d76f3/t/625455e8a42bee0539a269e8/1649694184698/22.04.06+Post-Grant+UCL+Guide.pdf>; see also *id.* at 1-2 (noting that during this period, the Governor and Decision Review Unit may also review the decision to grant or deny parole).

seven, ten, or fifteen years.¹³ An individual can petition to advance the date of a subsequent hearing. After completing several rounds of internal appeals at CDCR, individuals can also challenge a parole denial in court by filing a habeas petition in superior court in the county of parole.¹⁴

Transgender Individuals in California's Parole Process

We know little about the California Parole Board's treatment of transgender individuals and the consideration of transitional housing in parole discussions as it pertains to transgender individuals.¹⁵ While studies have examined issues impacting transgender people who are in prison,¹⁶ only a few have focused on experiences while seeking parole or transitional housing. One study indicated that transitioning in prison can serve to help transgender individuals rehabilitate.¹⁷ The study found that when prisons provide gender-affirming services, transgender individuals in prison are more likely to "remain safe, free from disciplinary action, and be involved in prison programming."¹⁸

One ethnographic study examined the experiences of formerly incarcerated transgender individuals seeking transitional housing in San Francisco, but it did not focus on the experience or treatment of transgender parolees.¹⁹ The study's authors described significant barriers transgender individuals faced when seeking housing, namely, that transitional housing is gender segregated and that many facilities simply do not accept transgender individuals.²⁰ The study's findings raise concerns, as exclusion of transgender people from transitional housing facilities likely violates California nondiscrimination laws.²¹ Excluding transgender individuals from this already scarce resource only increases the already steep challenges they face to reentry.²²

¹³ *Id.* at 8-9.

¹⁴ *In re Rosenkrantz*, 29 Cal.4th 616 (2002); *In re Dannenberg* 34 Cal.4th 1061 (2005); *In re Lawrence* 44 Cal.4th 1181 (2008); *In re Shaputis* 44 Cal.4th 1241 (2008); see also Root and Rebound, How Can I Challenge a Parole Condition That I Believe is Unlawful? (last visited Feb. 28, 2023), <https://roadmap.rootandrebound.org/parole-probation/state-parole/how-to-challenge-state-parole-conditions/how-can-i-challenge-a-parole-condition-that-i-beli/#:~:text=To%20challenge%20a%20parole%20condition,process%20before%20going%20to%20court!>.

¹⁵ Scholars have addressed the experience of incarcerated individuals in California who are transgender. See, e.g., Jennifer Sumner, Lori Sexton, Valerie Jenness, Cheryl Maxson, *The (Pink) Elephant in the Room: The Structure and Experience of Race and Violence in the Lives of Transgender Prisoners in California*, ROUTLEDGE INT'L HANDBOOK OF RACE, CLASS, AND GENDER 128 (2014). Other have addressed the role gender plays in parole hearings in California, without focusing on gender identity. See Joss Greene & Isaac Dalke, "You're Still an Angry Man": Parole boards and Logics of Criminalized Masculinity, 25 J. THEORETICAL CRIM. 4 (2020).

¹⁶ See generally, Joanna M. Brooke, Karolina Biernat, Nina Shamaris & Victoria Skerrett, *The Experience of Transgender Women Prisoners Serving a Sentence in a Male Prison: A Systematic Review and Meta-Synthesis*, 102 THE PRISON J. 542 (2022).

¹⁷ Alexandra Kirkpatrick, *The Caged Bird Sings of Freedom: Why Allowing Sex-Reassignment Surgery for Transgender Life Prisoners Facilitates Rehabilitation and Reconciliation* 26 S. CAL. REV. L & SOC. JUST. 37 (2016).

¹⁸ *Id.* at 40.

¹⁹ Joss T. Greene, *Categorical Exclusions: How Racialized and Gender Regulation Reproduces Reentry Hardship*, 66 J. SOC. PROBS. 548 (2019).

²⁰ *Id.*

²¹ Cal. Fair Employment and Housing Act, CAL. GOV'T CODE § 12900-12906; CAL. CODE REGS. tit. 2 § 12005 (2023); Unruh Civil Rights Act, CAL. CIV. CODE § 51.

²² *Id.* at 550.

The California Legislative Analyst's Office (LAO) released a report in January 2023 that focused on potential bias in the parole process, identifying many potential areas where bias can enter the parole system and highlighting areas of improvement.²³ Importantly, the report noted that there is no regular external monitoring of disparities in release rates between subpopulations.²⁴ The report also voiced concerns over attorney effectiveness and disparities between parole applicants with retained or privately hired attorneys compared to applicants with a public attorney assigned to their case.²⁵ Overall, LAO's report concluded that potential bias may impact parole outcomes, and noted that more data are needed on parole outcomes for various subpopulations, including transgender people.

Given the scarcity of research on transgender and nonbinary individuals' experience in the parole process, we sought to gain insight into it. We reviewed transcripts of 42 parole hearings from January 1, 2021 – February 28, 2022, in which the individual seeking parole identified as transgender or nonbinary (there were no parole seekers who identified as intersex among the 42 people whose transcripts we reviewed).

²³ GABRIEL PETEK, CAL. LEGIS. ANALYST'S OFF., PROMOTING EQUITY IN THE PAROLE HEARING PROCESS 1 (Jan. 2023), <https://lao.ca.gov/Publications/Report/4658>.

²⁴ *Id.* at 1, 10.

²⁵ *Id.* at 11-13.

FINDINGS

Parole Grant Rate

Parole seekers were 30 – 76 years old (median age = 51 years old). Our review shows that transgender individuals were granted parole at approximately the same rate as the general population of incarcerated individuals. That is, 31% of the transgender individuals in our sample (13 of 42) were granted parole as compared with 34% of all parole seekers in 2021, as reported by the CDCR.²⁶

Misgendering and Insensitive/Biased Comments

Parole hearings for transgender individuals included misgendering and insensitive or biased comments in approximately 43% (16 out of 37) of the cases that had relevant information in our sample. Examples of insensitive or biased statements included questioning whether a 60-year-old incarcerated person would remain sober because the “LGBTQ community has big parties,” and describing “sexual questions” as “scary.” One commissioner spent several minutes discussing whether a 63-year-old transgender woman would be able to maintain an erection.

Although some parole commissioners made efforts to respect the parole seeker's gender identity, for example by asking about preferred pronouns at the start of a hearing, others pressured individuals seeking parole to use pronouns according to their sex assigned at birth. For example, one commissioner asked what pronouns a 47-year-old incarcerated individual preferred, but before they could answer, the commissioner stated, “it doesn't matter to you, right?” One nonbinary 44-year-old individual asked to be addressed by name, rather than use any pronoun, but the commissioners pushed the individual to choose a pronoun. And on another occasion a parole seeker's own attorney misgendered them, stating that he felt “weird” about using his 55-year-old client's preferred pronouns.²⁷

It is not possible to assess the impact that insensitive and biased statements and misused pronouns may have had on parole outcomes because many other factors are important determinants (e.g., housing plan). Overall, not considering the impact of other factors, individuals who received insensitive or biased comments or faced misgendering from parole commissioners had better outcomes in their hearings than those who did not. Of the 16 people who had experienced biased language in their parole hearing, 50% were granted parole, and 50% were denied parole; this is compared with 19% of the 21 people who did not experience biased language in the hearing who were granted parole.

The Role of Transgender Identity in Parole Hearings

Our review also showed that an individual's gender transition or transgender identity played a role in their rehabilitation narrative. Some parole commissioners appeared moved when parole seekers spoke about how challenges stemming from being closeted as a transgender person prior to

²⁶ CDCR, Parole Suitability Hearing and Decision Information, Calendar Year 2021 Suitability Results (last visited Feb. 14, 2023), <https://www.cdcr.ca.gov/bph/2021/03/15/calendar-year-2021-suitability-results/>. (Finding 1,424 total grants and 2,764 total denials in FY 2021). See also GABRIEL PETEK, *supra* note 23 at 7.

²⁷ Notably, when CDCR employees such as parole commissioners consistently fail to use an individual's pronouns, this could run afoul of S.B. 132. See S.B. 132, *supra* note 4.

transition contributed to criminal behavior or how a transition could facilitate rehabilitation. In explaining why BPH granted parole for one 60-year-old individual, a parole commissioner stated that “contributing significantly to your change has been the integration of your sexual [sic] identity as a female, the development of that congruence resulting in reducing your rage.”

On the other hand, some parole commissioners expressed limited patience for hearing how an individual's gender identity may have contributed to either the crime or the person's experience in prison. For example, in response to an individual describing how they were misgendered in prison, a commissioner stated that people in the community outside prison also use improper pronouns, without recognizing the important differences between prison and the community. The 57-year-old parole seeker, explained that if someone disrespected their gender identity in the community, they would “walk away”—an option that may be unavailable in prison. Other commissioners doubted that the incarcerated individual's transitioning while in prison would make life easier on the outside, despite the individual's assertion that they have been better off since transitioning. One commissioner said, for example, that because one parole seeker who transitioned in custody had never “lived in society as a transgender woman . . . surely it's going to be difficult.” Another commissioner stated, without prompting: “I don't want to offend anybody, but your whole . . . , how you identify, is going to be an issue in the community. Right? I mean, that's going to cause stress.”

The Role of Transitional Housing Plans in Granting of Parole

We also studied the effect of transitional housing plans on transgender individuals seeking parole. Out of the 42 transcripts we reviewed, 18 contained information in the transcript that reflected that the applicant had a specific plan for transitional housing. For example, one individual showed the commissioners a copy of a letter from a specific housing facility that indicated that the parole seeker had been accepted to join the facility upon their release. A comprehensible housing plan seems to have improved an individual's chance of being granted parole: not considering other factors that also determine parole decisions, 10 of 18 (56%) people with a housing plan were granted parole compared with only 3 out of 24 (13%) individuals who did not have an explicit housing plan. This suggests that, although finding appropriate transitional housing is extraordinarily challenging for transgender individuals, parole commissioners rely heavily on this factor in their parole determination.

CONCLUSIONS

Although the records received and described in this brief provide an important first glimpse into the treatment of transgender and nonbinary individuals seeking parole in California, much more data is needed to get a better understanding of these issues. The CDCR could increase opportunities to assess transgender, nonbinary, and intersex individuals' parole experiences by working with researchers to provide complete data on parole hearings. These data should include demographic characteristics of parole seekers, which were not available to us, and information on outcomes. This recommendation echoes the recent conclusion made by the California Legislative Analyst's Office, which recommended that the California Legislature require BPH to "release public data on outcomes by subgroups as well as support periodic quantitative and qualitative studies of the parole process by independent researchers."²⁸ The CDCR should also provide data as to DAPO's treatment of transgender, nonbinary, and intersex individuals who have been granted parole, and in particular whether, for how long, and which specific facilities are available to them for transitional housing. Finally, the CDCR should monitor its own treatment of transgender, nonbinary, and intersex individuals seeking parole and issue reports to the public.

We also suggest that BPH consider whether, in light of our analysis and in view of the difficulties faced by transgender and nonbinary people to secure transitional housing, commissioners should de-emphasize the factor of having secured housing and, instead, work with transgender parole seekers to identify proper placement in the community after parole has been granted. The CDCR should ensure that its contracted transitional housing providers offer inclusive services to transgender nonbinary and intersex individuals. They can do so through mandated training on gender-affirming language and housing and ensure compliance with California laws barring discrimination based on gender identity in access to housing.²⁹

CDCR agency personnel—including BPH and DAPO—should undergo training on explicit and implicit bias and the challenges facing the transgender, nonbinary, and intersex individuals who appear before them. Attorneys representing transgender, nonbinary, and intersex clients in front of the parole board should also be trained and equipped to competently handle the specific needs of gender-diverse people moving through the parole system. This recommendation is also found in the LAO report.

²⁸ GABRIEL PETEK, *supra* note 23 at 1.

²⁹ *See id.* at 16.

METHODOLOGY

On June 23, 2022, with input from community groups who provide services to transgender individuals seeking parole, as well as transgender individuals in the parole system themselves, the Social Justice Legal Foundation submitted a California Public Records Act (CPRA) request to the BPH and DAPO.³⁰ The CPRA sought parole information, including parole transcripts and parole conditions for transgender individuals in CDCR custody.

In response, we received 42 parole hearing transcripts totaling 3,376 pages. These transcripts consisted of individuals who had a parole hearing between January 1, 2021 and February 28, 2022,³¹ and who answered yes on a CDCR questionnaire that asked: "Do you identify as transgender, nonbinary, or intersex?"³² We also received additional records, including general trainings regarding transitional housing and a list of transitional housing facilities that BPH contracts with.

For this brief report, we reviewed the transcripts—by far the richest data received—for the following factors or items:

- Whether the individual was housed in a prison housing men or women;
- What pronouns the individual preferred, and/or their gender identity;
- What age the individual was at the time of their parole hearing;
- Whether parole was granted or denied;
- Whether transitional housing was discussed;
 - If so, was a specific facility discussed;
- Whether transitional housing was ordered;
 - If so, was a specific facility or specific length of time ordered;
- Whether one's gender identity was discussed;
 - If so, was the discussion positive, neutral, or negative;
 - Whether the Parole Commissioners or others utilized insensitive or biased language; and
 - Whether the Parole Commissioners or other participants misgendered the individual.

After compiling this information, we compared the proportions of grant or denial against the general population for the same period.³³ We also compared the proportions of grant or denial between individuals who experienced biased language or misgendering during their hearings with those who did not and the proportions of grant and denial for those who had specific transitional housing plans and those who did not.

³⁰ See Exhibit A (available upon Request); see also CAL. GOV'T CODE § 6250, *et seq.*

³¹ We requested data from January 1, 2020 onward. CDCR agreed to provide said data. However, further review of the data provided revealed that we only received data from January 1, 2021 onward.

³² See Exhibit B (Gender Questionnaire available upon).

³³ CDCR, Parole Suitability Hearing and Decision Information (last visited Jan. 18, 2023), <https://www.cdcr.ca.gov/bph/statistical-data/>

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