Article

Parole Hearings and Victims’ Rights: Implementation, Ambiguity, and Reform

KATHRYNE M. YOUNG

Despite the increasing recognition of victims’ rights, and despite the large role parole hearings play in the criminal justice system, discussion of the intersection between these two issues has been curiously sparse. Across the United States, victim participation in parole hearings is currently expanding, yet little is known about how this participation operates on the ground. This Article uses a California victims’ rights initiative called “Marsy’s Law” to think critically about the role that crime victims and their loved ones should play in parole hearings. I use in-depth interviews with California releasing authorities to describe the implementation of Marsy’s Law and its effects on parole hearings for lifer inmates.

While this Article details victims’ actual participation in the parole process, it is even more usefully read as an article about how we think about victims’ participation in parole. To this end, “victims’ rights” are relevant both as individual legal entitlements and as broader political objectives. Toward the end of this Article, I identify several areas of possible policy reform with national implications. The data and analysis reveal an urgent need to identify the true purposes of victim testimony and align these purposes with parole hearing procedures. I argue that hearings could be better tailored to meet the most pressing needs of releasing authorities, offenders, and victims themselves.
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Parole Hearings and Victims’ Rights: Implementation, Ambiguity, and Reform

KATHRYNE M. YOUNG *

INTRODUCTION

Since the inception of the victims’ rights movement in the 1970s, victims’ role in the criminal justice process has expanded enormously. Once relegated merely to testifying at trial at the prosecution’s request, victims are now legally entitled to dozens of rights in all fifty states. Perhaps unsurprisingly, the vast majority of work on the subject has dealt with the investigation, trial, and sentencing phases, with little attention paid to victims’ participation or the implementation of victims’ rights measures after an offender is sentenced. This Article, by contrast, considers victims’ involvement at a much later stage: when an offender is being considered for parole release.

“Victims’ rights” is a somewhat problematic term. Politically, it is often used to describe various “tough-on-crime” measures, whether or not those measures enumerate rights that can be claimed or exercised by an individual victim. Most of the scholarly work on victims’ involvement in criminal justice focuses (quite sensibly) on individually enforceable entitlements. For purposes of this Article, however, I include the broader political language—not as an endorsement of its accuracy, but as a rhetorical exercise to think through the ways in which the adoption of “victims’ rights,” in a more phenomenalistic sense, has affected parole decision making. Marsy’s Law, a 2008 California voter initiative, is an apt instantiation of this broad definition.¹ Also known as the “Victims’ Bill of Rights,” it includes some provisions with specific procedural or substantive entitlements for victims, and some (namely, increased parole denial lengths) that are “for victims” only in the most general, retributive sense.²

² Id. at 176.

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refer to these two categories of rights, respectively, as “enforceable victims’ rights” and “rhetorical victims’ rights.”

While this is partly an article about victims’ participation in the parole process, it is even more usefully read as an article about how we think about victims’ participation in parole. To this end, “victims’ rights” are relevant both as individual legal entitlements and as broader political objectives.

This Article examines the implementations of victims’ rights in the parole context by analyzing the first-hand experiences of the parole commissioners responsible for implementing most of the parole-related components of a 2008 voter initiative in California: Marsy’s Law. Marsy’s Law was promoted as a way to make the criminal justice system fairer for victims, and added the California Victims’ Bill of Rights to the state constitution. The law changed the parole process in multiple ways. It directly created new legal entitlements for victims and enshrined existing victims’ rights in the state constitution. Additionally, it contained broader provisions with no such entitlements, most notably lengthening the minimum and maximum parole denial lengths for prisoners serving term-to-life sentences. But differently, Marsy’s Law created enforceable victims’ rights and rhetorical victims’ rights.

I begin this Article in Section I with a brief overview of the victims’ rights movement in the United States, explaining the difference between victims’ participation at sentencing and victims’ participation at parole hearings. In Section II, I discuss the specific parole process for lifer inmates in California, including the historical context, the composition of the Board of Parole Hearings, and the parole decision-making process. Section III outlines my methodological approach, discussing how my interviews with parole decision makers were conducted and how their content was systematically analyzed through a series of coding procedures.

I discuss my empirical findings in Sections IV, V, and VI. Section IV focuses on enforceable rights: the individual entitlements Marsy’s Law created for victims and their families. In Section V, I shift to the rhetorical victims’ rights created by Marsy’s Law: increased minimum and maximum parole denial lengths. In both Section IV and Section V, I look at the on-the-ground effects of Marsy’s Law for the hearing commissioners charged with carrying out these new victims’ rights provisions, with an eye toward both the legal and practical challenges to its implementation, as well as to the hearing commissioners’ subjective relationship to victims’ rights in the context of their decision-making roles. Section VI assesses the substantive influence of Marsy’s Law, looking at the concrete, overarching effects of Marsy’s Law on parole hearings.

The final two Sections contemplate the broader questions Marsy’s Law raises for victims’ rights in the parole context. Section VII revisits the conceptual vagaries of “victims’ rights” and underscores the
inconsistencies between different uses and functions of victims’ rights. I argue that when it comes to victims’ participation in parole hearings, there is a serious mismatch between means and ends—and that looking closely at how victims’ rights function on the ground reveals insufficient clarity about their purpose, which results not only in a murkier process, but in unfairness to victims themselves. Finally, Section VIII contains policy proposals designed to clarify and improve victims’ participation in parole hearings. Instead of making pronouncements about what victim testimony should or should not do in all jurisdictions, I concentrate instead on how to discern these values in a particular jurisdiction, translate them into procedural guidelines, and implement them while recognizing the complicated stakes that inmates, releasing authorities, and victims all have in the parole process.

I. Victims’ Rights and Parole Hearings

A. The Victims’ Rights Movement

Until the 1970s, victim involvement in the criminal justice system was mostly defined by prosecutorial interests. Victims sometimes assisted with police investigations or testified at trial, but this participation took place at law enforcement’s behest in the service of convicting criminal defendants, not from any recognition of a victim’s prerogative to be involved. For centuries, crime victims’ participation in the criminal justice process “aroused little comment or interest. Suddenly, they were ‘discovered,’ and afterwards it was unclear how their obvious neglect could have gone so long without attention and remedy.” One seminal event that spurred public sympathy for victims’ rights was a child support case in which the child’s mother wanted the child’s father prosecuted for nonpayment. The prosecutor refused the mother’s request because the couple was not married. The United States Supreme Court ruled for the prosecutor, holding that “a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another,” but added that if it wished, Congress could confer this standing by creating legal rights for victims.

In 1982, the President’s Task Force on Victims of Crime brought additional recognition to the now-growing movement, declaring that instead of being vindicated by the criminal justice apparatus, crime victims

6 *Linda R.S.*, 410 U.S. at 617 n.3, 619.
were actually “burdened by a system designed to protect them”—an imbalance that “must be redressed.”7 The movement turned its attention primarily to individual states, lobbying for state constitutional amendments and statutory recognition of victims’ rights, including input at various stages of investigation and adjudication.8 As the importance of victims’ rights continued to germinate in the public consciousness, advocates passed numerous federal acts throughout the 1980s and 1990s.9 In 2004, the Crime Victims Rights Act enumerated several entitlements for federal crime victims, including the right to be “reasonably protected from the accused”10 and “reasonably heard” at district court proceedings and parole proceedings.11 Nor is the United States unique in its recognition of the importance of victims’ rights,12 though it was the first country to allow victim input in the parole release process.13

B. Victim Participation

1. At Sentencing

Most of the empirical work on victims’ participation in criminal justice proceedings has dealt with victims’ participation in the sentencing stage of trials.14 In virtually all United States jurisdictions,15 victims have an official role; this participation may take the form of a direct appeal to the judge, a victim impact statement submission, or some other kind of entitlement to discuss the crime.

Relatively few victims take advantage of these entitlements,16 but we might imagine many reasons why a judge would find victim testimony influential at sentencing. For example, an additional reminder of a crime’s

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11 Id. § 3771(a)(4).
13 Id. at 113.
14 Id. at 118 (noting that “there is less research on parole than sentencing”).
15 Julian V. Roberts writes that victims’ participation in sentencing has become so ubiquitous that “[i]t is hard to conceive of a contemporary justice system that would exclude victims from some degree of participation in the sentencing process.” Julian V. Roberts, Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole, 58 CRIME & JUST. 347, 399 (2009).
16 Id. at 362. As Roberts explains, the relatively low rate of victim-impact statement submission may simply reflect the desire of many victims to extricate themselves entirely from a painful process.
harshness immediately before sentencing might cause a judge to view a defendant as less rehabilitable or the commitment offense as more heinous. A victim might offer substantive information about the crime, which may undercut or counterbalance mitigating factors detailed in the presentencing report. The presence of the victim may incline a judge to vindicate the victim’s experience on a more personal level, or may even make the judge blanch at the prospect of announcing a “too-light” sentence, for fear of implicitly minimizing the victim’s suffering. Judges themselves believe that victim participation is valuable and benefits the sentencing process. Nonetheless, this theoretical impact does not appear to manifest in tangible sentencing differences. As Julian V. Roberts has written, “[t]here is no systematic evidence that impact statements make sentencing harsher.”

Of course, the absence of a difference in sentencing outcomes does not mean the absence of any benefit. In addition to any psychological benefits that participation may offer for the victim, hearing about the effects of the crime may spur additional recognition or reflection for the offender, which may help prompt rehabilitation. And allowing more parties to participate may be “good for the process” in a more diffuse sense as well, enhancing the sentencing court’s relationship to the community it serves, and perhaps to the criminal justice system at large.

As others have pointed out, though, the dearth of a substantial relationship between victims’ testimony at sentencing and the sentence imposed is a little surprising. It makes a kind of intuitive sense that the victim’s input should matter at sentencing. The victim, after all, has first-hand experience of the crime for which punishment is being assessed, and even the victims’ next of kin can often speak to the severity of a crime’s impact. Punishment is partly retributive; even though the retribution is compensation for harm sustained by the state or the “community” rather than by specific victims, the specific victims and the people who know

17 Id. at 378. Studies in Canada and Australia suggest that sentencing judges themselves view victim impact statements as a useful source of information that they cannot get anywhere else. JULIAN V. ROBERTS & A. EDGAR, DEP’T OF JUSTICE CAN., JUDICIAL ATTITUDES TO VICTIM IMPACT STATEMENTS: FINDINGS FROM A SURVEY IN THREE JURISDICTIONS 11–15 (2005); Michael O’Connell, Victims in the Sentencing Process—South Australia’s Judges and Magistrates Give Their Verdict, 4 INT’L PERSP. IN VICTIMOLOGY 50 (2009). Note, however, that one problem with victim impact statements is that it is often unclear to the judge precisely how, in a practical sense, he or she is supposed to take the victim’s statement into account, or incorporate the statement into the sentencing decision. Roberts, supra note 15, at 358. As we will see infra, a parallel problem arises in the parole hearings context.


them well are usually the best experts on the extent of this harm. This principle of proportionality is at least somewhat legally compelling, since “impact statements allow courts to make a more accurate calibration of the harm inflicted upon the crime victim.”

2. At Parole Hearings

Most of the justifications for allowing victim participation at sentencing do not apply equally to victim participation at parole hearings. The central difference is the determination with which the releasing authority is tasked. At a parole hearing, the appropriate punishment for the crime was already assessed years earlier by the sentencing judge. The purpose of the parole hearing is generally not to reassess the crime, but to assess the social, psychological, and/or moral distance the inmate has travelled since he or she committed the offense—to what extent is he or she “rehabilitated?”

In California, the specific inquiry is whether an inmate “will pose an unreasonable risk of danger to society if released from prison.” A parole denial cannot be based on the egregiousness of the crime alone; insofar as the commitment offense is incorporated into the decision, a “nexus” must exist between the commitment offense and the inmate’s “current level of dangerousness.” (Or, as several commissioners phrased it, “[w]ho was he then, and who is he now?”) The inmate, not the crime, is at the center of the inquiry. While victims certainly possess information pertinent to the conditions of an inmate’s release (for example, victims might ask that an offender not be placed in their community), in most states there is little reason to believe that victims possess information directly germane to assessing an inmate’s rehabilitative progress.

20 Roberts, supra note 12, at 106.
22 CAL. CODE REGS. tit. 15, § 2281(a) (2016).
23 In re Lawrence, 190 P.3d 535, 536 (Cal. 2008) (clarifying that a parole denial could not be based solely on the heinousness of the commitment offense); see also Carrie L. Hempel, Lawrence and Shaputis and Their Impact on Parole Decisions in California, 22 FED. SENT’G REP. 176, 176 (2010) (“The circumstances of the commitment offense may be relevant, but a decision relying on those circumstances as the basis for denial will only survive due process scrutiny if the decision articulates a rational nexus between the past offense and current dangerousness.”).
24 E.g., Interview with Burt Betances, Comm’r, Cal. Dep’t of Corr. & Rehab. (July 2012); Interview with Ellen McDonald, Deputy Comm’r, Cal. Dep’t of Corr. & Rehab. (Nov. 2011).
25 Some states explicitly direct the Board to take into account factors outside of the inmate’s rehabilitative progress. For example, the Alabama Board of Pardons and Paroles considers the “community attitude toward the offender.” About Us: Rules, Regulations, and Procedures, ALA. BD. OF PARDONS & PAROLES, http://www.pardons.state.al.us/Rules.aspx [https://perma.cc/DX9A-MDPF] (last
Despite the absence of a clear role for victim impact statements in parole hearings, however, “victim input provisions at parole are almost as common as at sentencing.” In recent years, victims’ rights in the parole context have expanded both substantively and geographically. More than thirty states allow victims to give oral statements at parole hearings, and most states allow victims to submit a written statement to parole decision makers at or before a hearing. Some states, such as Florida, even allow the victim to appear in front of the parole board, but exclude the inmate from the hearing.

Even with this continuing expansion, little is known about how these rights operate, how they shape parole hearings, or how these contributions are implemented by releasing authorities. And despite the increasing frequency of victim input into parole decisions, the body of literature examining the on-the-ground implementation of victims’ rights initiatives remains thin.

C. What Counts as “Victims’ Rights”?

As the modern victims’ rights movement has evolved, “victims’ rights” has become a blanket descriptor, not only denoting victims’ legal entitlements, but also evoking various personifications of “toughness” on crime, such as longer sentences. This rhetorical co-optation pits victims against offenders, painting supporters of shorter sentences or rehabilitative efforts not merely as “soft” on crime, but as taking a stand against crime victims. Some scholars, such as Professor Markus Dirk Dubber, have pointed out that subsuming victims’ rights in larger war-on-
crime efforts has turned attention from victims themselves and allowed them to become “a tool for the achievement, maintenance, and expansion of state power.”\textsuperscript{31} The victims’ rights movement continues to be powerful, but it is hard to argue that its message has not been somewhat diluted by association—even conflation—with tough-on-crime measures more generally. Regardless, the rhetorical move is common. For example, introductions of harsher sentencing laws might be paired with expanded entitlements to individual victims, then promoted jointly, with emphasis on “victims’ rights.”\textsuperscript{32}

For purposes of this Article, it is useful to draw a distinction between actual rights that can be exercised\textsuperscript{33} by individual victims and legal developments that are described by proponents as “victims’ rights,” but—regardless of whether this description is accurate in some broader sense—create no legal entitlements for individual victims. As a shorthand, I refer to the former as “enforceable rights”\textsuperscript{34} and to the latter as “rhetorical rights.”\textsuperscript{35} The distinction ends up being analytically useful, albeit not perfectly neat.\textsuperscript{36}

II. LIFER PAROLE IN CALIFORNIA

A. The Historical Landscape

In California, parole was originally introduced as a form of clemency, “provid[ing] ‘early’ release for prisoners who were deemed to be serving ‘excessive’ terms.”\textsuperscript{37} As the state’s prison population grew, parole was increasingly viewed as a mechanism for reducing it to a more manageable

\textsuperscript{31} Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims’ Rights 7 (2002).

\textsuperscript{32} For example, this is currently happening in Nevada. See e.g., Scott Sonner & Riley Snyder, Top Nevada Prosecutors Tout New ‘Tough on Crime’ Measures, KSL (June 10, 2015, 4:31 PM), https://www.ksl.com/?sid=35012643 [https://perma.cc/5VGD-L2VP] (“Nevada Attorney General Adam Laxalt and other prosecutors are touting the passage of three ‘tough on crime’ measures they say will help victims . . . .”).

\textsuperscript{33} Here, I mean “exercised” in the sense of legal enforceability.

\textsuperscript{34} For example, the right to be informed about when a parole hearing is going to take place, or the right to speak at a parole hearing, would be categorized as an enforceable right.

\textsuperscript{35} For example, lengthening sentences for a particular category of offender would be categorized as a rhetorical right, since it does not create an individually enforceable right for a victim.

\textsuperscript{36} After all, we might imagine a number of measures that could be enforceable rights or rhetorical rights, depending on how they are framed. For example, suppose a law forbade released offenders from relocating to their county of origin. On one hand, the right is rhetorical: it restricts all offenders, and does not appear to create an “entitlement” for victims. On the other hand, we might imagine that many victims live in their offender’s county of origin, and if we think of it as a victim’s right to live without fear of running into his or her offender, it starts to feel more like an enforceable right. And it would certainly be an enforceable right if a victim had a specific legal entitlement to exclude an offender from living in a particular place.

California has the country’s largest prison population; one out of every seven prisoners in the United States is incarcerated there. 39 Approximately 32,000 of these inmates (20% of the state’s prison population) are “lifers”—that is, inmates serving term-to-life sentences with the possibility of parole. 40 This number has grown significantly. Two decades ago, it was 7,500, comprising only 8% of the inmate population. 41

Compared to the general California prison population, the lifer population is more male (96% compared to 93%), more violent (71% are serving sentences for first- or second-degree murder, 10% for attempted murder, and the remainder for kidnapping, rape, or other sex crimes), and older (38% are over age forty-five, compared to less than a quarter of the general population). 42 Lifers’ comparatively advanced age also makes them expensive to house. 43 Inmates over age fifty cost between $98,000 and $138,000 annually to imprison in California, compared to $51,889 for the average state prisoner. 44

For many years, a sentence of life with the possibility of parole was tantamount to a sentence of life without the possibility of parole. From 1991 to 2000, the chance of a parole hearing resulting in a grant hovered under 5%, and remained under 10% until 2009. 45 Even when the California Board of Parole Hearings (BPH) voted to grant parole, most grants were overturned by the Governor. 46 California is one of only a few states where

38 Id. This, in turn, led to more surveillance and monitoring of parolees. Id.  
41 Id. at 4, 6.  
42 Id. at 15–16. The racial composition of lifers differs little from that of the general inmate population.  
44 Id.  
46 Shafer, supra note 45. This was true regardless of the political party to which the governor belonged. Id.; CALIFORNIA: Past GOVERNORS’ BIOUS, NAT’L GOVERNORS’ ASS’N, https://www.nga.org/cms/home/governors/past-governors-bios/page_california.html [https://perma.cc/
a governor may single-handedly block a parole grant; as the result of a 1988 ballot measure, the governor may do so in murder cases and can remand the decision to the Board in non-murder cases. During their respective tenures, Democratic Governor Gray Davis, who served from 1999 to 2003, and Republican Governor Arnold Schwarzenegger, who served from 2003 to 2011, both overruled the majority of parole grants that the BPH gave to lifer inmates.

This trend began to shift in the early- and mid-2010s due to a combination of factors, including the election of Governor Edmund G. “Jerry” Brown, who showed more deference to BPH decisions than his predecessors did, and measures such as Senate Bill 9, which in 2013 converted life without parole sentences to sentences of life with the possibility of parole for many inmates who were convicted as juveniles.

This shift not only made the BPH more likely to grant parole, but also the Governor less likely to block parole. Governor Jerry Brown, for example, blocked only 545 parole grants from 2003 to 2011, while Governor Arnold Schwarzenegger blocked 5299 parole grants from 2003 to 2011. California Governor Jerry Brown’s high rate of parole grant approval has been attributed to his belief in the importance of saving taxpayer money by releasing inmates early. Brown’s predecessor, Governor Arnold Schwarzenegger, on the other hand, had a more conservative approach to parole, and blocked many parole grants as a way to keep inmates in prison longer.

47 Gouvernor’s Parole Rev., California Proposition 89 (1988), http://repository.uchastings.edu/ca_ballot_props/1006 (listing the political affiliations of past California governors).

48 Wattley, supra note 47, at 271.


50 CAL PENAL CODE § 1170(d)(2) (West 2016).

51 See also Joan Petersilia, California Prison Downsizing and Its Impact on Local Criminal Justice Systems, 8 Harv. L. & Pol’y Rev. 327, 352–54 (2014) (discussing the concerns of some individuals regarding the erosion of victims’ rights under realignment). As Spencer and Petersilia point out, victims’ advocacy groups were given no formal representative in the policy negotiations that preceded Realignment’s adoption. Spencer & Petersilia, supra, at 226–27. It is also worth noting that the 2011 U.S. Supreme Court decision Brown v. Plata ordered California to decrease its prison population to alleviate overcrowding so severe that it violated the Eighth Amendment. Brown v. Plata, 563 U.S. 493, 545 (2011). But although this case was an important backdrop, the standards for parole remained the same before and after the decision; commission members were not permitted to “loosen” the standards for release to help alleviate overcrowding. As of March 2015, California’s prison population was at 112,300, or 135.8% of capacity. Ryken Grattet & Joseph Hayes, Just the Facts: California’s Changing Prison Population, PUB POL’Y INST. OF CAL. (Apr. 10, 2014),
B. The Conduct of Parole Hearings

1. Commissioners and Deputy Commissioners

A lifer’s first hearing occurs approximately one year before his \(^{53}\) minimum eligible release date (MERD). \(^{54}\) Two officials from BPH preside over each hearing: one Commissioner and one Deputy Commissioner (DC). \(^{55}\)

The Governor appoints Commissioners, and there are typically eight to fifteen at any given time (twelve as of this writing). \(^{56}\) They often serve terms of just a few years and are not always reappointed when a new governor takes office. Deputy Commissioners, on the other hand, are hired through the civil service appointment process. \(^{57}\) Historically, most DCs ascended the California Department of Corrections and Rehabilitation ranks as prison guards or other corrections staff members, but in recent years it has become commonplace for DCs to have legal backgrounds. \(^{58}\) There are sixty to seventy DCs, which until 2013 also included “Retired Annuitant” Deputy Commissioners (RA-DCs)—that is, people who were usually (but not always) retired DCs. \(^{59}\) This group heard cases on an irregular basis for hourly compensation, serving the same role in parole

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\(^{53}\) Since twenty-four out of every twenty-five of California lifers are male, I use masculine pronouns to refer to lifers in the abstract. However, unless otherwise specified, all references to lifer inmates include female lifers.

\(^{54}\) CAL. PENAL CODE § 3041(a)(2).

\(^{55}\) Id. Both presiders could also be Commissioners, with no Deputy Commissioners present but all available data suggest that this rarely—if ever—occurs. Id.; see, e.g., Board of Parole Hearings: Commissioners, CAL. DEP’T OF CORR. & REHAB, http://www.cdcr.ca.gov/BPH/commissioners.html [https://perma.cc/R9XR-8QD8] (last visited Nov. 7, 2016) (noting that a Commissioner and a Deputy Commissioner consider all relevant information at parole hearings).

\(^{56}\) CAL. DEP’T OF CORR. & REHAB., supra note 55.

\(^{57}\) Deputy Commissioner, Board of Parole Hearings (9743), CAL. DEP’T OF RES., http://www.ca.dhr.ca.gov/state-hr-professionals/Pages/9743.aspx [https://perma.cc/7HRV-83EW] (last visited Nov. 7, 2016).

\(^{58}\) Interview with Jonathan Duckworth, Comm’r, Cal. Bd. of Parole Hearings (Mar. 2012). As of 2014, a law degree was still not a formal requirement for the job. See CAL. DEP’T OF HUMAN RES., supra note 57 (noting that one can meet the educational qualifications for the deputy commissioner job with the “equivalent to graduation from college”). At the time I conducted this research, many DCs did not have law degrees. However, as of 2016, all but one DC has a law degree. A J.D. has been a requirement for new hires since 2015, when DCs were formally categorized as Administrative Law Judges. Interview with Jennifer Shaffer, Exec. Comm’r, Bd. of Parole Hearings (Sept. 2016).

\(^{59}\) See Charole Sarosy, Parole Denial Habeas Corpus Petitions: Why the California Supreme Court Needs to Provide More Clarity on the Scope of Judicial Review, 61 UCLA L. REV. 1134, 1178 (2014) (stating that there are approximately seventy deputy commissioners).
hearings as the other DCs.\textsuperscript{60}

It is also important to note that between the time this research was conducted and the time this Article is written, commissioner training has expanded tremendously, and now encompasses multiple \textit{weeks} instead of multiple days.\textsuperscript{61}

2. \textit{Parole Hearings Procedures}

Lifer hearings take place at the prison where the inmate is housed, typically in a small meeting room.\textsuperscript{62} The inmate, his legal counsel, and the commissioners\textsuperscript{63} are present.\textsuperscript{64} Victims and victims’ next of kin are also permitted,\textsuperscript{65} and a representative from the District Attorney’s Office in the county where the inmate was convicted nearly always attends all or part of the hearing, either in person or via telephone or video link.\textsuperscript{66} The hearings I attended felt more akin to business meetings than courtroom trials, and my impression was shared by the commissioners, who sometimes lamented the lack of public attendance, as well as the lack of courtroom regalia and ceremony.\textsuperscript{67} At the same time, the sense of a “meeting” (albeit often an emotionally intense meeting), as opposed to a trial, means that much of the time lifer parole hearings do not have the same adversarial “feel” as many other criminal justice proceedings. Plenty of hearings contain some adversarial elements, but the overall process does not resemble a commitment offense retrial. The inmate is not actually required to discuss the details of the commitment offense at all, though in practice these details end up being a key part of many hearings.\textsuperscript{68}

On any given hearing day, the two-person team of one Commissioner

\textsuperscript{60} At the time of this research, it was not uncommon for the DCs assigned to lifer hearings to be RA-DCs. CAL. DEP’T OF HUMAN RES., \textit{supra} note 57. For this reason, RA-DCs are included here, and comprise about half the DC population in this sample. For the sake of simplicity, in the remainder of this Article, I do not make a distinction between RA-DCs and other DCs. The term “Deputy Commissioner” or DC, refers to \textit{all} DCs, including those who were technically employed as Retired Annuitants.

\textsuperscript{61} Interview with Jennifer Shaffer, \textit{supra} note 58.


\textsuperscript{63} When I refer to “commissioners” (uncapitalized), I am referring to the entire body of people who sit on lifer hearings: BPH Commissioners, Deputy Commissioners, and Retired Annuitants. When I am referring to a specific subset of commissioners, I capitalize the title.

\textsuperscript{64} Young et. al, \textit{supra} note 62, at 269.

\textsuperscript{65} \textit{Id}.

\textsuperscript{66} Friedman and Robinson note that “District Attorneys . . . seem to be taking full advantage of their opportunity to weigh in on suitability decisions. In fact, they do so almost as frequently as the inmates themselves.” Friedman & Robinson, \textit{supra} note 43, at 198.

\textsuperscript{67} Interview with Jonathan Duckworth, \textit{supra} note 58.

\textsuperscript{68} Young et. al., \textit{supra} note 62, at 269.
and one DC presides over two to four lifer cases.\textsuperscript{69} Hearings typically last one to four hours.\textsuperscript{70} Because the traditional rules of evidence do not apply,\textsuperscript{71} the range of topics tends to be broad, with the bulk of time spent on the inmate’s suitability for release: the reasons he committed the offense, his activities in prison (disciplinary infractions as well as trainings completed and honors achieved), psychological evaluations, remorse, post-release plans, and the presence or absence of other risk factors.\textsuperscript{72} As I will detail infra, the victim or victim’s next of kin are permitted to give a statement. At the commissioners’ discretion, information submitted by members of the public in advance of the hearing (for example, letters from an inmate’s minister, family member, or boss) may be read into the record as well.\textsuperscript{73}

The commissioners use this mass of information in their deliberations,\textsuperscript{74} which according to their accounts typically last around thirty minutes.\textsuperscript{75} Title 15 of the California Code of Regulations enumerates specific factors for the commissioners to consider, nine of which tend to show suitability for parole and six of which show evidence of unsuitability.\textsuperscript{76} When the hearing reconvenes, the commissioners announce their decision, either recommending that a parole date be set or announcing how much time will elapse before the inmate’s next parole hearing (a decision generally referred to as the “denial length”).\textsuperscript{77} The commissioners briefly explain their reasoning and sometimes give the inmate concrete suggestions for rehabilitative steps he should take before his next hearing.\textsuperscript{78}

In murder cases, which comprise the large majority of lifer cases, the Governor may affirm, reverse, or modify the Board’s decision, provided he

\textsuperscript{69} At the time the interviews were conducted, commissioners commonly heard three to four lifer cases per day. However, the caseload as of September 2016 is two cases per day at Level 2 and Level 3 prisons. Hearings at Level 4 facilities tend to be shorter and can still number up to four in a single day. Interview with Jennifer Shaffer, \textit{supra} note 58.

\textsuperscript{70} At the time the interviews were conducted, hearings typically lasted between one and three hours. However, the more typical length of hearings now is two to four hours; one-hour hearings are exceedingly rare now. \textit{Id}.

\textsuperscript{71} Parole hearings are “administrative hearings,” and any relevant evidence may be admitted, including hearsay. \textit{Cal. Penal Code} § 3044(a)(B)(5) (West 2008).

\textsuperscript{72} Young et. al., \textit{supra} note 62, at 269.

\textsuperscript{73} \textit{See Board of Parole Hearings: Lifer Parole Process, Cal. Dep’t of Corr. & Rehab., http://www.cder.ca.gov/BOPH/lifer_parole_process.html} [https://perma.cc/XZE2-5KRR] (last visited Nov. 7, 2016) (“Any person may submit information to the Board of Parole Hearings concerning any inmate or parolee . . . . Those comments will be included in the inmate’s or parolee’s Central File and will be considered by future hearing panels.”).

\textsuperscript{74} \textit{See Cal. Penal Code} §§ 3041, 3041.5, 3042 (West 2016) (discussing the Board’s use of an inmate’s file in the determination of parole suitability).

\textsuperscript{75} \textit{E.g.}, Interview with Jennifer Shaffer, \textit{supra} note 58.

\textsuperscript{76} \textit{Cal. Code Regs. tit. 15, §§ 2402(c), (d)} (2016).

\textsuperscript{77} \textit{E.g.}, Interview with Jennifer Shaffer, \textit{supra} note 58.

\textsuperscript{78} \textit{See generally} Young et al., \textit{supra} note 62 (providing an empirical analysis of the factors that predict parole, drawing on more than 700 lifer parole hearing transcripts and subsequent decisions).
or she relies on the same rationale the Board is permitted to consider.\textsuperscript{79} In all other lifer cases, the Governor may ask the Board to review a grant or denial, stating the reasons for the request.\textsuperscript{80} The request must then be reviewed by a majority of sitting Commissioners.\textsuperscript{81} The grant rate fluctuates based on numerous factors.\textsuperscript{82} Between 1990 and 2010, the actual grant rate—that is, the chances that a given lifer was granted parole and that the Governor did not reverse this grant—was under 7%.\textsuperscript{83} More recent statistics suggest that the grant rate has been increasing modestly since at least 2012.\textsuperscript{84}

C. Victims’ Rights Legislation in California

1. Political Context

California was one of the first states to enshrine victims’ rights in its state constitution or its penal code.\textsuperscript{85} Proposition 8, passed in 1982\textsuperscript{86} and codified in the California Constitution,\textsuperscript{87} announced that the rights of victims should “pervade the criminal justice system.”\textsuperscript{88} Explained to voters as a “victim’s bill of rights,” Proposition 8 nonetheless touched on multiple areas of the criminal justice process, some directly relevant to victims’ rights (including safety measures and the right to be heard at sentencing and parole hearings) and others more sweeping reforms to state criminal procedure.\textsuperscript{89} In 1986, California legislators passed Penal Code § 679.02, which enumerated victims’ rights at various stages in the criminal justice process.\textsuperscript{90} The Crime Victims Justice Reform Act, or Proposition 115,
followed in 1990 with additional changes to state criminal procedure.91

According to the findings and declarations of Marsy’s Law—the California Victims’ Bill of Rights Act of 2008—these prior measures were collectively insufficient; “victims of crime continue[d] to be denied rights to justice and due process.”92 Marsy’s Law was named after Marsalee “Marsy” Nicholas,93 who was murdered in 1983 by her ex-boyfriend, Kerry Conley.94 One week after Marsy’s death—and just a few hours after her funeral—Marsy’s mother, Marcella Leach, stopped at a grocery store.95 As Marsy’s brother, Henry Nicholas, recalls, “there in the checkout line was my sister’s murderer, glaring at her.”96 Unbeknownst to Marsy’s family, Conley had been released on bail.98 Marsy’s brother, billionaire and co-founder of the semiconductor company Broadcom,99 donated over four million dollars to help put the victims’ rights law on the ballot.100 In a provision particularly important to Nicholas and Leach,101

91 Crime Victims Justice Reform Act, Initiative Measure Prop. 115 (approved June 5, 1990) (codified at CAL. CONST. art. I, §§ 14, 24, 29, 30; CAL. CIV. PROC. CODE § 223; CAL. PENAL CODE §§ 189, 190.2, 190.41, 190.5, 206, 206.1, 859, 866, 871.6, 872, 954.1, 987.05, 1049.5, 1050.1, 1054–54.7, 1385.1, 1511) (West 2016). Note the foreshadowing of Proposition 8’s broad tough-on-crime procedural reforms. Despite its victim-centered title, Proposition 115’s primary contributions were to limit procedural protections for criminal defendants, ensuring that defendants would not be afforded any more procedural rights under the California constitution than they were afforded under the U.S. Constitution. See CAL. CONST. art. I, § 24(b) (“This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States . . . .”). The measure, which passed with 57% of the vote, Philip Hager, Key Portion of Prop 115 OK’d by High Court, L.A. TIMES (Dec. 10, 1991), http://articles.latimes.com/print/19911210-news/mn-159_1_preliminary-hearing [https://perma.cc/UXF8-2YYF], also expanded certain criminal provisions—for example, defining torture and expanding the definition of first-degree murder, CAL. PENAL CODE §§ 206, 189 (West 2016).


94 I am mindful that the decision about whether to refer to the law as “Proposition 9” or “Marsy’s Law” is fraught. On one hand, “Proposition 9” is arguably more “neutral” since it does not contain a victim’s name. However, I opt to refer to the measure as “Marsy’s Law” in this Article, since that is the terminology used by the vast majority of the Commissioners and Deputy Commissioners with whom I spoke.


96 Id.

97 Id.


100 Colker, supra note 95.

101 Id.
Marsy’s Law ensured that victims and their families would be notified about an offender’s bail status, and that the safety of victims’ families would be considered in release decisions.\(^\text{102}\) The full ballot measure also contained expansive reforms designed to give victims’ rights sharper teeth and greater specificity.\(^\text{103}\)

Each state has its own political dynamic surrounding victims’ rights, and California’s has a good deal to do with the California Correctional Peace Officers Association (CCPOA), often colloquially referred to as the “prison guards’ union.” Comprising some 30,000 members, the CCPOA is one of the “wealthiest and most organized labor entities in the country.”\(^\text{104}\) The CCPOA actually created Crime Victims United of California, a political action committee (to which CCPOA was the sole donor for many years)\(^\text{105}\) that donated $100,000 to the passage of Marsy’s Law\(^\text{106}\) and played a key supportive role in its publicity. One scholar has even called Crime Victims United of California the union’s “alter ego[].”\(^\text{107}\) I will return to the discussion of political motivations in the passage on victims’ rights measures toward the end of this Article, but for now it is simply worth noting that the implementation of Marsy’s Law, like other victims’ rights measures, is not necessarily limited to a substantive effect on victims themselves.

2. Scope and Purpose

The bulk of the changes Marsy’s Law brought about were contained in an amendment to Article I, Section 28 of the California Constitution, which enumerated seventeen rights “personally held and enforceable” by anyone who met the new definition of “victim.”

As used in this section, a “victim” is a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission

\(^{102}\text{Id.}\)

\(^{103}\text{Some scholars have argued that Marsy’s Law was particularly ill-suited to a ballot initiative, and that it reveals some of the problems inherent in allowing voters to modify law directly. See, e.g., Ryan S. Appleby, Note, Proposition 9, Marsy’s Law: An Ill-Suited Ballot Initiative and the (Predictably) Unsatisfactory Results, 86 S. Cal. L. Rev. 321 (2013). Others have criticized the “findings and declarations” supporting the law. Friedman and Robinson write that this section “consisted solely of a few anecdotal stories about the frequency with which certain murderers continue to be considered for release and some general statements about the toll on victims of going to parole hearings.” Friedman & Robinson, supra note 43, at 208.}\)

\(^{104}\text{Norma M. Ricucci, Public Personnel Management (2015).}\)


\(^{107}\text{Vitello, supra note 105.}\)
of a crime or delinquent act. The term “victim” also includes the person’s spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated.\textsuperscript{108}

In addition to primary victims (people directly victimized by the crime), this definition also includes many “secondary victims”\textsuperscript{109} (people traumatized by the victimization of the primary victim\textsuperscript{110}). It also includes “lawful representatives,” regardless of whether these individuals experienced trauma as a result of the crime.\textsuperscript{111}

The guarantees provided to individuals defined as “victims” under Marsy’s Law spanned a wide ambit, ranging from vague (for example, the right to “fairness and respect”\textsuperscript{112}) to specific (for example, the right to refuse an interview or discovery request made by the defense\textsuperscript{113}), and from the beginning of a criminal proceeding (for example, the right to confer with the prosecutor about the defendant’s arrest and the filing of charges\textsuperscript{114}) to the end (for example, to have the victim’s safety considered in parole release\textsuperscript{115}). For purposes of this Article, I focus on the changes that affected parole hearings, but it is important to realize that parole-related changes make up only a fraction of the victims’ rights measures, both in the sense of enforceable rights and rhetorical rights, that Marsy’s Law contained.\textsuperscript{116}

Despite the small number of parole hearings that were actually resulting in release at the time it was passed, Marsy’s Law argued that

\textsuperscript{108} CAL. CONST. art. I, § 28(e); see also Proposition 9, supra note 93, at 130.
\textsuperscript{109} Note that the California definition does not automatically include all secondary victims: lovers, workmates, close friends, and so on. See Proposition 9, supra note 93, at 130 (“The term ‘victim’ also includes the person’s spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or psychologically incapacitated.”).
\textsuperscript{110} Id. Some scholars have leveled other critiques at this definition of “victim.” For example, Geoffrey Sant has argued that on its face, Marsy’s Law appears to exclude many individuals we would commonly consider “victims” simply because they are “in custody.” Geoffrey Sant, “Victimless Crime” Takes on a New Meaning: Did California’s Victims’ Rights Amendment Eliminate the Right to Be Recognized as a Victim?, 39 J. LEGIS. 43, 44 (2013).
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} See, e.g., 2008 California Criminal Law Ballot Initiatives, supra note 1, at 178–84 (detailing the wide range of changes Marsy’s Law brought about and discussing how these changes modified existing California law).
existing law governing parole hearings—particularly lifer hearings—was too lenient: “The current process for parole hearings is excessive, especially in cases in which the defendant has been convicted of murder. The parole hearing process must be reformed for the benefit of crime victims.” It brought about two main categories of changes to the parole hearings process for lifer inmates, one which affected the denial lengths imposed and one which affected the conduct of the hearings.

3. Enforceable Victims’ Rights Created by Marsy’s Law

The first major set of changes dealt with victims’ right to attend and speak at parole hearings. In 1982, Proposition 8 had already given victims the right to be present at parole hearings, but Marsy’s Law put this right, and the right to be notified of all parole hearings, into the state constitution. It amended Article I to recognize crime victims’ right “[t]o be informed of all parole procedures, to participate in the parole process, to provide information to the parole authority to be considered before the parole of the offender, and to be notified, upon request, of the parole or other release of the offender.” The final provision affirmed the right of a victim to be informed of these rights, which was crucial in ensuring a meaningful right to exercise the new (and revised) guarantees.

The shape of victims’ participation at parole hearings was set out more precisely in a set of penal code reforms passed as part of Marsy’s Law. Previously, a victim (or the victim’s next of kin if the victim was deceased) had been allowed to speak at the hearing, plus two members of the victim’s immediate family or two “victim representatives.” As mentioned above, Marsy’s Law granted the primary victim, as many family members as wished to testify, and two victims’ representatives the right to speak at the hearing, which meant that many more people were now entitled to give oral statements at lifer parole hearings.

Additionally, previous law had required anyone speaking at a parole hearing on a victim’s behalf to confine his or her remarks to “comments concerning the effect of the crime on the victim.” While there was no

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118 2008 California Criminal Law Ballot Initiatives, supra note 1, at 185, 187.
119 Id. at 179.
120 CAL. CONST. art. I, § 28(b)(15).
121 See 2008 California Criminal Law Ballot Initiatives, supra note 1, at 183–84. It is not entirely clear what the remedy would be in the event that the state fails to comply with this requirement.
122 It is worth reiterating that since most lifer inmates are serving sentences for murder, the direct victim is often deceased.
123 CAL. PENAL CODE § 3043 (West 2008) (prior to Prop. 9).
124 CAL. PENAL CODE § 3043(b)(1) (West 2016). Nor is California unique in allowing a large number of attendees on the victim’s behalf. For example, Arkansas places no limit to the number of “support people” a victim may bring to a parole hearing (though they are not all allowed to speak). Roberts, supra note 15, at 394.
specific time limit, they were permitted to speak only as long as was necessary to “adequately and reasonably express their views concerning the crime and the person responsible.” Marsy’s Law removed both the topical and the temporal limitations, guaranteeing victims, victims’ next of kin, and victims’ representatives the right to talk for as long as they desired and about whatever they wished to address. It also forbade inmates and their attorneys from interrupting victims’ statements, from questioning a victim or victim representative who gives a statement, and from questioning a victim about the crime. Empirical evidence suggests that Marsy’s Law may have increased victim participation in parole hearings, but only very slightly.

4. **Rhetorical Victims’ Rights Created by Marsy’s Law**

Before Marsy’s Law, California Penal Code Section 3041.5(b) required that when the Board denied an inmate parole, it presumptively defaulted to scheduling his next hearing for one year hence. This denial length could be increased to two, three, four, or five years if the commissioners deemed that it “was not reasonable to expect that parole would be granted” after a single additional year of incarceration. Marsy’s Law amended the state penal code to triple both the minimum and maximum denial lengths, such that a lifer inmate whose parole was not granted would have to wait a minimum of three years and a maximum of fifteen years for his next hearing.

The law also changed the legal standard for determining denial lengths. Instead of beginning at the minimum (formerly one year, now three years) and adding additional years to the denial length based on an inmate’s readiness for release or the dangerousness he posed to the community, commissioners were required to start their inquiry with a default denial length of fifteen years. They were permitted to decrease

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125 2008 California Criminal Law Ballot Initiatives, supra note 1, at 187.
126 CAL. CONST. art. I, § 28; CAL. PENAL CODE §§ 3041.5(a), 3043(b) (West 2016).
128 CAL. PENAL CODE § 3041.5(b)(2) (West 2008).
129 Id. §§ 3041.5(b)(2)(A)–(B).
130 Id. §§ 3041.5(b)(3)(A)–(C). 3041.5(b)(2)(A)–(B).
131 Id. § 3041.5(b)(2).
132 Id. § 3041.5(b)(3)(A).
133 Id. § 3041.5(b)(3)(A). Proponents of Proposition 9 pointed out that increasing the maximum denial length to fifteen years would prevent serious offenders with virtually no chance of release from wasting the Board’s time and resources. See, e.g., Dan Levey, Yes: It Improves a Flawed Justice System, SAN DIEGO UNION-TRIBUNE (Oct. 17, 2008), http://legacy.sandiegouniontribune.com/uniontrib/20081017/news_lz1e17levey.html [https://perma.cc/4UXP-5EJ5] (“Proposition 9 would also streamline California's needlessly costly and duplicative parole process by providing parole commissioners with the flexibility to increase the number of years between parole hearings for those who have already earned a 'life sentence.'”). They pointed, for example, to two followers of Charles Manson, Bruce Davis, and Leslie Van Houghton that had thirty-eight hearings in the thirty years before
this length only if there was “clear and convincing evidence” that “consideration of the public and the victim’s safety does not require a more lengthy period of incarceration for the prisoner than ten additional years.”\textsuperscript{134} If such evidence was present, the denial length would be reduced to ten years.\textsuperscript{135} An additional finding of “clear and convincing evidence” could then decrease the denial length to seven, five, or three years.\textsuperscript{136} No explanation was provided as to why a separate finding of “clear and convincing” evidence was required for a reduction of the denial length from fifteen years to ten years and from ten years to seven years, but not from seven years to five years or five years to three years. The new scheme was also somewhat counterintuitive. The state penal code stated that the Board “shall normally set a parole release date” at an inmate’s initial hearing—that is, the \textit{default}, absent a finding that “public safety requires a more lengthy period of incarceration,” is that a release date will be set.\textsuperscript{137} But if a date is \textit{not} set, the default leaps all the way to the maximum denial of fifteen years.\textsuperscript{138}

Marsy’s Law requires the parole board to consider the “views and interests of the victim” when setting denial lengths.\textsuperscript{139} As I will discuss in more detail later in this Article, no clarification is provided as to how, precisely, these “views and interests” are supposed to be incorporated.

\section*{III. METHODOLOGY}

\textbf{A. Data Collection}

\begin{itemize}
  \item \textbf{1. Access}
  
  In studies of parole decision making, one of the most overlooked sources of data is the account of parole decision makers themselves—largely because it is usually difficult to get access to this population for qualitative study. With the assistance of the Board of Parole Hearings, however, I was able to access this population. In thinking about victim participation in a holistic sense, including incorporation of both rhetorical

\end{itemize}

\footnotesize

Marsy’s Law. See \textit{id.} (“Perhaps the most egregious example of the system's misuse is by ‘Helter Skelter’ inmates Bruce Davis and Leslie Van Houten, [who were] followers of Charles Manson and convicted of multiple brutal murders. Since their conviction, they have had 38 parole hearings in 30 years—that’s 38 times the families involved have been forced to relive the painful crime and pay their own expenses to attend the hearing, not to mention that taxpayers have had to absorb the costs of each and every one of those hearings.”).

\textsuperscript{134} \textit{CAL. PENAL CODE § 3041.5(b)(3)(A)} (West 2016).
\textsuperscript{135} \textit{Id.} § 3041.5(b)(3)(A)-(B).
\textsuperscript{136} \textit{Id.} § 3041.5(b)(3)(A)-(C).
\textsuperscript{137} \textit{Id.} § 3041(a)-(b) (West 2015) (amended 2016). For a discussion of the constitutional implications of this section of the California Penal Code, see Wattley, \textit{supra} note 47, at 271.
\textsuperscript{138} \textit{CAL. PENAL CODE § 3041(b)(1)} (West 2016); \textit{id.} § 3041.5(b)(3)(A).
\textsuperscript{139} \textit{Id.} § 3041.5(b)-(c).
rights and enforceable rights, it was absolutely crucial to access decision makers to get a sense of how these various types of rights were implemented on the ground.

After obtaining BPH’s permission (as well as IRB approval from my home institution), I wrote to about fifty Board members and requested interviews. More than half agreed to be interviewed. One trained graduate research assistant and I conducted all of the interviews, which typically entailed driving to prisons throughout California and speaking with commissioners before or after they completed their week of hearings at that prison. When possible, we attended the hearings as well. Our unusual access to this population of decision makers gave us an opportunity to discuss various aspects of the decision-making process in great depth. The data discussed herein are only those related to Marsy’s Law and victim participation.140

2. Interviews

I draw on twenty-five in-depth interviews, ten with Parole Commissioners and fifteen with Deputy Commissioners,141 conducted from 2011 to 2013. The interviews were semi-structured, designed to focus on particular topics (victim participation and Marsy’s Law among these) while allowing respondents considerable freedom in directing the conversation. Interviews ranged from about forty-five minutes to about three hours in length, with the average interview lasting an hour and fifteen minutes. With commissioners’ permission, the interviews were audio recorded and transcribed, resulting in approximately 350 single-spaced pages of interview transcripts. Interviewers also took notes during and immediately after the interviews, which were recorded and coded along with transcriptions.142

The commissioners were promised anonymity as a condition of their interviews. This proved important; several respondents indicated that they would not have been willing to speak freely without this condition. In keeping with this agreement, pseudonyms are used for all of the commissioners quoted or mentioned individually in this Article. As an additional precaution, I have altered the gender and other personal details of some of the respondents without altering the overall demographic makeup of the group. Each time I refer to a specific commissioner in this

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140 Given the changes to the BPH in recent years, it would have been ideal to conduct interviews more recently as well. However, the Governor’s office declined my repeated requests to conduct additional interviews with commissioners in 2015 and 2016.

141 The commissioners interviewed were demographically consistent with the group of commissioners overall. Here, “Deputy Commissioners” or “DCs” comprises a combination of DCs and RA-DCs.

142 Sixteen of the interviews were conducted by the author; the remaining nine were conducted by a trained graduate research assistant.
Article, I use only his or her pseudonym. However, because the distinction between Commissioner and Deputy Commissioner is so significant (each denotes a different substantive role in a parole hearing, as well as a different appointment process\textsuperscript{143}), the Commissioner/Deputy Commissioner designations are accurate with regard to individual respondents.\textsuperscript{144}

3. Additional Sources

In addition to the twenty-five interviews with parole commissioners, I gathered information through other sources as well: sitting in on a few parole hearings, visiting prisons and talking with a handful of inmates about their experiences, attending two separate, day-long training sessions for attorneys who represented lifer inmates at parole hearings, conducting informal interviews with half a dozen of these attorneys, reviewing commissioner training materials, and having informal conversations with a number of Board of Parole Hearings (BPH) and California Department of Corrections and Rehabilitation (CDCR) employees. While the central data source for this Article is the commissioner interviews, the interviews were facilitated, informed, and contextualized by these other sources of information.

B. Data Analysis

The coding process took place in three stages. First, I selected 25% of the interview transcripts at random to code by hand, using an “open coding” system to identify every legal, political, and sociological theme I detected. The result was a list of fifty-three codes. A trained research assistant replicated this process, independently generating a list of codes from the same randomly selected group of transcripts. I compared these lists, which were substantially similar, and grouped these codes into six thematic “code families,”\textsuperscript{145} one of which was “victims.”\textsuperscript{146}

\textsuperscript{143} Commissionors are Governor appointees; DCs are not. Additionally, DCs outnumber Commissioners and have a lower salary. CAL. DEP’T OF CORR. \& REHAB., supra note 55; Board of Parole Hearings: Deputy Commissioners, CAL. DEP’T \& REHAB., http://cdcr.ca.gov/BOPH/deputy_commissioners.html [https://perma.cc/3SWU-GRV4] (last visited Nov. 7, 2016); TRANSPARENT CAL., http://transparentcalifornia.com/salaries/search/?q=Commissioner%2CBoard%20Parole%20Hearings [https://perma.cc/2EC5-VAMW] (last visited Nov. 7, 2016).

\textsuperscript{144} As mentioned supra note 60, I make no distinction, however, between RA-DCs and DCs. Part of the reason is to maintain anonymity; fewer RA-DCs than DCs were interviewed, so identifying certain respondents as RA-DCs would not effectively protect their identities. Additionally, though, the function served by RA-DCs in lifer parole hearings is (or rather, was, since they no longer sit on lifer panels) identical to that served by DCs.

\textsuperscript{145} This process is consistent with a modified grounded theory approach in coding qualitative data. MONICA MCDERMOTT, WORKING-CLASS WHITE (2006).
Deviating slightly from the method I have employed in prior qualitative work, I used the code families I had identified to code the entire body of transcripts through a “closed coding” process—that is, I coded the transcripts manually, categorizing information only in terms of these six pre-existing code families. “Outlier” information—information that did not fall into any of the six code families—was categorized separately. Finally, the third round of coding, which I did by hand for each code family, involved another “open coding” process much like the first. That is, using the transcript excerpts that fell into each family, I coded (and in 25% of cases, re-coded) the data using an inclusive open-coding system to identify themes and ideas.

Each of the three labor-intensive rounds of coding served a specific purpose. The first round let the data itself generate the major themes, rather than imposing my pre-existing assumptions and interests onto the data. The second examined all of the interview data through the lens of these themes. The third used a modified grounded theory approach to return to the data anew, seeing which ideas and patterns emerged within each theme.

IV. “ENFORCEABLE RIGHTS:” IMPLEMENTING EXPANDED VICTIM PARTICIPATION

Marsy’s Law created a number of new entitlements and constitutionalized a number of existing entitlements for individual victims with regard to parole hearings. These entitlements can be exercised or realized by individual victims, and thus fall into the category of “enforceable rights” described above. These provisions included a victim’s right to speak at a parole hearing for as long as he or she wished, as well as a victim’s right to complete discretion over the topics he or she addressed.

146 See Kathryn M. Young, Everyone Knows the Game: Legal Consciousness in the Hawaiian Cockfight, 48 LAW & SOC. REV. 499, 506–07 (2014) (detailing the methodology used in my previous interviews on cockfighting). My slightly different approach proved more appropriate for this particular data set, since the interviews were structured around specific themes, and virtually every one of the interviews touched on these themes.

147 Readers unaccustomed to qualitative data analysis may wonder how “representative” this sample is. With regard to California parole commissioners, very representative, since it includes an enormous slice of the actual population. With regard to parole commissioners in the United States overall, it is extremely difficult to say. In some ways, California is like the rest of the country; in other ways, it is not. More importantly, though, it is important to remember that in general, qualitative data does not “prove” or “test” a hypothesis. Most of the time, its purpose is to describe a particular social phenomenon in order to accomplish a slightly different purpose, such as generating or contributing to a theory about how people think, interact, or function in a particular situation, or (relatedly) to think through a case of something in depth in order to shed light on a larger point, context, or idea. For additional discussion about the role of qualitative research methods in legal scholarship, see Kathryn M. Young, Criminal Behavior as an Expression of Identity and Form of Local Resistance: The Sociolegal of the Hawaiian Cockfight, 104 CAL. L. REV. 5 (2016).
while doing so.

Overwhelmingly, California parole commissioners voiced support for the “enforceable rights” mandates Marsy’s Law created, even though they described numerous challenges to implementation. These challenges took two primary forms: logistical and emotional; implementation raised numerous logistical hurdles for commissioners, and added a significant emotional burden to their jobs.

In the latter part of this Section, I discuss commissioners’ understanding of the substantive impact of victims’ testimony on parole hearings, and conclude that despite the commissioners’ broad support for victims’ participation, they view victim testimony as having minimal practical utility. Commissioners maintain that apart from a few rare exceptions, victim participation has no substantive impact on a hearing’s outcome. This creates a kind of paradox wherein victim participation is seen as both procedurally crucial and substantively irrelevant.

A. Logistical Impact

Although victims only attend about 10% of hearings—a number consistent with their attendance at parole hearings in other states—this frequency still creates a significant impact. Victim testimony arises an average of one to two times every week for every commissioner in California who sits on lifer panels. Put differently, of the approximately 4,700 lifer hearings conducted each year, victim-attended hearings number around 470. Interestingly, commissioners estimated that victims attend 20% to 30% of lifer hearings, which may suggest that these hearings loom particularly large in commissioners’ minds.

Commissioners’ discussion of victim testimony often centered around the administrative complications associated with their attendance. For example, Marsy’s Law gives victims the right to be notified about a hearing ninety days in advance, but only requires them to notify the BPH thirty days before the hearing if they plan to attend. The schedule usually allows two to three hours per hearing, with two to four hearings scheduled

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150 See also Board of Parole Hearings: Parole Suitability Hearing Results, CAL. DEP’T CORR. & REHAB., http://www.cdc.gov/BOPH/psirResults.html [https://perma.cc/7DAP-KGXX] (last visited Nov. 7, 2016) (showing that the average number of hearings in the last four years was 4,733, with 4,759 hearings in 2012, 4,168 in 2013, 4,705 in 2014, and 5,300 in 2015).


153 Id. § 3043(A)(2). The victim must also inform the Board of “the name and identifying information of any other person entitled to attend the hearing who will accompany him or her.” Id.
for each hearing day. This makes for a tight schedule even when victims are not present, and it can become untenable when victims—particularly multiple victims—show up to a hearing. Because victims do not need to give the BPH much advance notice that they will attend, and because they usually do not attend, the hearings schedule is necessarily created without regard to victims’ attendance. Not only does victim testimony extend the time that a hearing can take to complete, but the increased number of people at the hearing may increase the need for security personnel.

Victims, victims’ next of kin, and anyone else designated as a victim under Marsy’s Law, may speak as long as they wish—and they sometimes speak at great length. Commissioners overwhelmingly supported this lack of a time limit, noting that in order to be present, many victims had to sacrifice a day or two of work and travel hundreds of miles. As Commissioner Chris Doolan said, “[t]hat crime did not affect me; it affected them. This is their time to tell . . . how they feel about the situation. It’s wrong for us to say, ‘You’ve got 5 minutes to talk about something that’s going to affect you for the rest of your life.’”154 DC Chase Hatch said that the commissioners encouraged victims to take as long as they needed: “Sometimes we have to stop and take breaks because they are, you know, crying or so beside themselves, we need to—you know, we’re very, very careful with the victim’s next of kin.”155 This was consistent with the other commissioners’ answers as well, even those who lamented that victims tended to “go on and on.”156

Nonetheless, commissioners reported that extensive statements from victims could take a hearing well past the two- or three-hour mark, and sometimes late into the evening. By and large, the commissioners viewed these long hearings not only as a major inconvenience, but as a threat to the integrity of the hearings process itself. They reported that it is difficult to keep themselves in top form for more than seven or eight hours in a hearings day.157 For example, the following is an excerpt from an interview with DC Cherise DeLand:

Q: What’s the hardest thing about your job?
A: Um, honestly, the thing that I am kind of a little bit concerned about is . . . you think about somebody’s

156 Interview with Carmen Garcia, supra note 151.
157 Little empirical evidence exists to support or refute this point anywhere in the United States, though a recent study of California parole hearings suggested that start time was not a significant predictor of whether an inmate received a grant. Young et al., supra note 62. However, one Israeli study has shown that morning hearings, and hearings that took place after meal or snack breaks, were associated with parole grants in parole hearings in Israel. Shai Danziger et al., Extraneous Factors in Judicial Decisions, 108 PROC. NAT’L ACAD. SCI. U.S. AM. 6889, 6890 (2011).
life and what the most important dates are in their life. Those lifer hearing dates are right up there, right up there. In the top ten, at least, right?

Q: Yeah.

A: In this one case, we gave this gentleman a parole date with nine witnesses, and the next of kin, [and] we started that hearing, if I’m not mistaken like at 3:45 [pm] . . . and we finished it, I think, at 8:15 [pm]. That’s a long hearing.

Q: Yeah.

A: [T]he next of kin, wants to speak and rightfully so, and I want to hear what they have to say, but my point is, I may not be, I’m not at my sharpest at 6:30 at night. I’m sharper at, you know, 10:30 in the morning. And that’s the thing that I’m, that I am concerned about . . . Like, you know, you’re going to have an operation. You don’t want the doctor at 6 o’clock at night, you want the guy at 8 o’clock in the morning when he’s on top of his game. Right? I don’t think it’s unfair to want commissioners and deputy commissioners on top [of their games as well].

Some commissioners described presiding over hearings that lasted six hours or more. And when I asked many of these commissioners if there was anything they wished they could change about lifer hearings, they responded much like DC DeLand, citing “marathon” days that leave them “emotionally drained.”

Though the commissioners did not believe that they treated morning hearings any differently from afternoon hearings, several of them did report difficulty paying attention when hearings extended into the evening. “It’s not right to ask the panel to stay there till midnight,” one commissioner explained. “You can’t function very well. The last guy doesn’t get a good deal. And when we find ourselves in that situation, sometimes we just have to postpone the hearing. Because if we are not sharp and ready, it’s just not fair.” The same commissioner mentioned that although postponing a hearing solved the problem of commissioners’ attentiveness, it was rarely an ideal solution, since it meant working around multiple attorneys’ and commissioners’ schedules. Additionally, some victims traveled several hours to attend a hearing, and

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160 Interview with Chase Hatch, supra note 155.
it was too much of a hardship for them to come back just a few days, weeks, or months later.\textsuperscript{161}

Surprisingly, no commissioners suggested limiting the amount of time that victims could speak, instead stressing that the hearings schedule needed to accommodate victims’ tendency to speak at length. We might imagine many possible accommodations. Perhaps victims could request a block of time from the BPH in advance; the hearing could then be scheduled according to this estimation—for example, an eight-hour hearing would get its own day on the schedule, a two-hour and a six-hour hearing might be scheduled on the same day, and so on. More simply, the BPH could avoid scheduling multiple victim-attended hearings on the same day. Alternatively, the BPH could schedule one hearing fewer on days where a victim indicated that he or she would be in attendance. Of course, any of these approaches would require some rejiggering of the scheduling process.\textsuperscript{162}

B. \textit{Emotional Impact}

The vast majority of commissioners and deputy commissioners—all but two—reported that the victims’ presence made granting parole an emotionally harrowing experience. This difficulty tended to fall into two categories: anger and grief. Six commissioners mentioned anger—sometimes describing the victims’ anger toward the inmate and sometimes toward the commissioners. “You’re hearing a gut wrenching statement . . . we had one where we weren’t going to give him a date anyway . . . this guy wasn’t ready. But the family was so angry, I thought we were going to have to pull them off [the inmate]!”\textsuperscript{163} Commissioner Burt Betances said, “They’re eyeballing you if you give him a grant. They’re staring you down when you leave, making comments.”\textsuperscript{164} Multiple commissioners reported being threatened, harassed, or yelled at by victims during or after the hearings.\textsuperscript{165} Still, they did not report feeling endangered, nor were they unsympathetic to victims’ anger toward them. “I know why they do it,” Commissioner Doolan said. “It’s emotional. I know they don’t know

\textsuperscript{161} Interview with Maria Ruiz, Deputy Comm’r, Cal. Dep’t of Corr. & Rehab. (Aug. 2011).

\textsuperscript{162} Namely, the notice requirement for victims would probably need to change. While victims’ advocacy groups might argue that victims cannot know that far in advance whether they will be able to attend, presumably there would be no penalty imposed for a victim’s failing to show up as scheduled. Thus, a victim could indicate attendance if he thinks there is any chance he will come. If it turns out at the last minute that his boss is not willing to give him the necessary time off, the victim can simply cancel. This approach’s efficiency is an empirical question. In the abstract, at least, underscheduling seems preferable to overscheduling.

\textsuperscript{163} Interview with Bill Carlan, Deputy Comm’r, Cal. Dep’t of Corr. & Rehab. (July 2012).

\textsuperscript{164} Interview with Burt Betances, supra note 24.

\textsuperscript{165} E.g., Interview with Chris Doolan, supra note 154; Interview with Bertrand Harris, supra note 159.
me.”166 Commissioner Harris explained,

I’ve had victims say, “If anything happens to me now, you are responsible!” . . . You have to be able to empathize with them . . . understand what they’re going through, right? And then realize that they’re not mad at you . . . They don’t like the decision but they don’t know me, right?167

Like Commissioner Harris, each commissioner who talked about the victims’ anger described some version of depersonalization as a strategy to avoid feeling targeted.

Commissioners also discussed their own internal reactions to victims’ pain and grief. Nearly all reported that they not only empathized with the victims, but struggled not to become mired in victims’ sadness. Commissioner Doolan told me, “[a]nyone who says, ‘It doesn’t affect me, that emotional stuff”—no, that’s wrong. It does affect you. Sometimes I have to take breaks, get myself together, so I don’t get caught up in their emotions. Focus, get back on target. Because we’re all humans.”168 Commissioner Glick said, “[t]here is a heavier emotional overlay on the whole hearing and there is certainly a heavier emotional overlay on the decision [when the victims are present]. If somebody told you [the victims’ presence didn’t have this effect], I would question their veracity.”169

Indeed, when we asked commissioners to describe their “most difficult” decisions, purposely neglecting to specify what we meant by “difficult,” several commissioners chose situations where the “difficulty” came not from deciding how to rule, but from the emotions associated with having to announce a grant of parole while victims’ next of kin (VNOKs) were present. This is telling, particularly considering that VNOKs attend a relatively small proportion of hearings.170 For example, Commissioner Glick described his “toughest decision:”

Okay, this was a [nearly 70-year-old] male who had no previous criminal history [and was in prison for killing his wife] . . . he had committed no violations for which he had received discipline since coming to the institution . . . Um, no substance abuse issues before he came to prison. No substance abuse issues in prison . . . And, um, had financial resources to fall back on . . . So, a very unusual inmate in that sense. Not a particularly likeable guy. Um, aside from the fact that he killed his wife, he wasn’t a very likeable guy

166 Interview with Chris Doolan, supra note 154.
167 Interview with Chris Doolan, supra note 154.
168 Interview with Bertrand Harris, supra note 159.
169 Interview with Chris Doolan, supra note 154.
171 WEISBERG ET AL., supra note 40, at 5.
However, the turnover has slowed significantly in recent years, and is no longer notably high. Though historically, this has been true; turnover of Deputy Commissioners was somewhat frequent. Historically, this has been true; turnover of Deputy Commissioners was somewhat frequent. However, the turnover has slowed significantly in recent years, and is no longer notably high.

For Commissioner Glick, Deputy Commissioner Patrick, and others, the immediacy of the victims’ pain made granting parole feel “horrible,” particularly if the victims were clearly struggling in other areas of their lives. “That’s the hardest thing to do. You have to look these people in the eye and say, this guy’s getting a grant, and here’s why,” Commissioner Doolan said.

Though the commissioners’ public persona is necessarily that of an impartial decision maker, their interviews revealed that for many of them, emotional turmoil is a significant aspect of the job—one rarely, if ever, commented upon in media coverage of lifer parole grants. Commissioner Glick said that even though this aspect of the job tended to be “invisible” to outsiders, he and other commissioners sometimes shared amongst themselves the difficulty of handling emotions associated with victims’ experiences. He said, “It’s emotional, it’s gut wrenching. I [actually] think that . . . explains why there’s high turnover on the job.”

171 Interview with Xavier Glick, supra note 169.
173 Interview with Ellen McDonald, supra note 24.
174 Interview with Chris Doolan, supra note 154.
175 Interview with Xavier Glick, supra note 169.
176 Id. Historically, this has been true; turnover of Deputy Commissioners was somewhat frequent. However, the turnover has slowed significantly in recent years, and is no longer notably high.
V. “RHETORICAL RIGHTS:” IMPLEMENTING LONGER DENIAL LENGTHS

Another huge change brought about by Marsy’s Law was the extension of minimum and maximum parole denial terms for lifer inmates. Though it was a central part of this victims’ rights initiative, keeping prisoners incarcerated for longer periods is not an enforceable “right” that can be exercised by individual victims. For this reason, I consider it a “rhetorical right.” I include it here because it was adopted by California citizens, and implemented by state officials, explicitly as part of a victims’ rights measure.

“Denial terms” or “denial lengths” are the amount of time set to elapse between an inmate’s unsuccessful parole hearing and his next parole hearing. Prior to Marsy’s Law, denial lengths were set between one and five years. One year was the default; commissioners had discretion to add one, two, three, or four years to this number. In other words, in 2005, an inmate who commissioners deemed was nearly ready for parole might have his next hearing set for 2006, and an inmate who commissioners deemed entirely unready for parole, or who had made no effort toward rehabilitation, might have his next hearing set for 2010. Marsy’s Law significantly altered the range of possible denial lengths; instead of one to five years, the range became three to fifteen years.

Additionally, Marsy’s Law adjusted the legal standard commissioners used to decide on a denial length. The new starting point for their analysis was not the low end of the range (previously one year), but the high end of the range (now fifteen years). Based on a prisoner’s circumstances, rehabilitative efforts, age, dangerousness, and other factors, the denial length may be reduced from fifteen years to ten, seven, five, or three years. An analysis of more than two hundred lifer hearing transcripts revealed that average denial lengths doubled after Marsy’s Law.

A. The Low End: Imposing Longer Minimum Denials

1. Frustration About the Three-Year Minimum

The substantive aspect of Marsy’s Law that commissioners criticized most was the new lack of flexibility in the minimum denial length. Commissioner Debra Stockwell and others explained that they frequently encountered inmates who were essentially ready for release, but to whom

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177 Russell, supra note 82, at 255.
178 Id.
179 CAL. PENAL CODE § 3041.5(b)(3) (West 2016). Prisoners are technically allowed to petition for an earlier hearing (for example, a prisoner who receives a three-year denial might petition to have another parole hearing after just a year and a half). Id. Preliminary data suggests it is rare for these petitions to be granted.
180 Richardson, supra note 127.
they were unwilling to grant parole for logistical reasons\textsuperscript{181}—for example, an inmate who had not yet secured post-release housing, or whose employment plans were promising but still in the works. This put the commissioners in a quandary. Releasing the inmate meant letting him go before his post-release plans were in place, which could set him up for failure on the outside. But on the other hand, a three-year denial—the minimum they were now permitted to impose under Marsy’s Law—was needlessly long.

Commissioner Cal Welsh described some inmates as being “on the edge”—largely ready for release but with inadequate parole plans or other relatively minor circumstances signaling unreadiness—and said these cases were among the most difficult for commissioners.\textsuperscript{182} Similarly, DC Kirkman said that fairly often, he sees an inmate who is almost ready to be released, but not quite.\textsuperscript{183} He tends to err on the side of conservatism and deny parole, but admitted that doing so makes him uncomfortable because the minimum denial length is three years: “I hate it when I [see] a guy who’s on the cusp.”\textsuperscript{184} DC Horvath echoed this, saying that one-year denials had been perfect for “wobblers—the ones that are really close.”\textsuperscript{185} He expressed discomfort with the increase in the minimum denial length, telling me that if the law had included the possibility of a one-year denial, he “would feel a lot better about the whole drill.”\textsuperscript{186}

A few commissioners also expressed concern about the psychological effects of the change in grant rates on lifer inmates—specifically the move from a one-year to a three-year minimum denial:

I think it has a different psychological impact when you’ve been denied one year for a couple years and all of a sudden with a change in the law you’re denied three years. You feel like you’re even farther from your mark. I think that has a real deleterious effect on the inmate.\textsuperscript{187}

Another commissioner remarked:

You can look at previous denials, when you look at denials,

\textsuperscript{181} E.g., Interview with Debra Stockwell, Comm’r, Cal. Dep’t of Corr. & Rehab. (Feb. 2012).
\textsuperscript{182} Interview with Cal Welsh, Comm’r, Cal. Dep’t of Corr. & Rehab. (Feb. 2012). It is worth noting that the availability of state-sponsored transitional housing for parolees has greatly improved in the past few years, and is generally available to recently released lifers for stays between six months and one year. Interview with Jennifer Shaffer, \textit{supra} note 58.
\textsuperscript{183} Interview with Neil Kirkman, Deputy Comm’r, Cal. Dep’t of Corr. & Rehab. (Feb. 2012).
\textsuperscript{184} \textit{Id}.
\textsuperscript{185} Interview with Tom Horvath, Deputy Comm’r, Cal. Dep’t of Corr. & Rehab. (June 2012).
\textsuperscript{186} Interview with Neil Kirkman, \textit{supra} note 183; \textit{see also} Interview with Tom Horvath, \textit{supra} note 185 (“I don’t like the fact that [now] you don’t have a one-year [denial] because that’s for your wobblers. The ones that are really close and you tell them, I want to hear about your insight, you need to explore this further.”).
\textsuperscript{187} Interview with Tom Horvath, \textit{supra} note 185.
and you look at pre-Prop 9 it was very common for inmates to be riding a series of one-year denials for years. In fact, it was not uncommon for inmates to ride a series of one-year denials punctuated with grants. I’ve had inmates before me who have received multiple prior appointments for suitability. I’m not talking two or three. Multiple. Only to be reversed by the governor. You know these panels were appointed under all kinds of gubernatorial administrations finding them suitable. Post Prop 9, you’ve got very rigid denial lengths, 3, 5, 7, 15, and so, for now it’s changed.188

DC Maria Ruiz said that the availability of a one-year grant had been useful because prior to Marsy’s Law, she had encountered a number of hearings where one of the commissioners on the panel wanted to grant parole and the other wanted to give a three-year denial.189 A one-year denial, she said, had been an easy compromise, and she believed that compromise between commissioners would be impeded by the three-year minimum.190 Ties are referred to the Board en banc, and in recent years, they have become more common, likely due to a new emphasis during commissioners’ training that ties are a normal—even healthy—outcome.191

2. A Makeshift Solution: The Stipulation Workaround

Following the passage of Marsy’s Law, some commissioners tried to approach “borderline” or “edge” cases in creative ways that allowed them to be fair to the inmate without releasing someone who was not quite suitable. In these cases, Commissioner Stockwell explained that she tried to find ways around the three-year minimum.192 For example, sometimes she continued (postponed) the hearing to give the inmate a few more months to get things into place.193 This approach, she explained, was a “pain,” because a new hearing meant getting all the same people—the inmate, inmate’s attorney, the DA, the victims, and both commissioners—into the room again.194 Logistically, this was not always an easy task.195

At the time the commissioners were interviewed for this Article, the “petition to advance” a hearing was a fairly new creation.196 This process

188 Interview with Xavier Glick, supra note 169.
189 Interview with Maria Ruiz, supra note 161.
190 Id.
191 Interview with Jennifer Shaffer, supra note 58.
192 Interview with Debra Stockwell, supra note 181.
193 Id.
194 Id.
195 Id.
196 Interview with Jennifer Shaffer, supra note 58.
allows an inmate to request that his hearing be moved earlier. For example, an inmate who was given a three-year denial in 2014 could petition to have his next hearing in 2015 instead of 2017.

Perhaps because of the petitions’ newness at the time they were interviewed, the commissioners did not view petitions to advance hearings as alleviating the unfairness of the three-year minimum denial length. None were certain how frequently this process was used, nor how many petitions were granted as a result. Some, such as DC Theo Patrick, criticized the new petition process, saying that it should be “more transparent.” DC Horvath expressed concern as well. He said that while it might be relatively simple for an inmate to express concrete changes in his situation, it was less realistic for an inmate to explain psychological changes or realizations:

[H]ow do you explain remorse in a petition to advance? Of course you’re going to write something out . . . . But how does that work out to getting another hearing, when we’re like, “You didn’t have the remorse at your last hearing [and] you can’t just get it in a day.” It’s easy to say, “I got my parole plans, you told me to get my parole plans and here they are, so can you advance me?” Sure. But some of those more softer things that are very important, just hard to flesh out. Especially with a three-year denial and this request to advance.

At the time they were interviewed, commissioners’ concerns about petitions to advance were well-founded; as a general matter, these petitions were summarily denied in the years following Marsy’s Law. From January 2009 to December 2010, 119 petitions were filed by California inmates to advance their hearings; of these, 106 were denied by the Board. The “stipulation workaround” I have described was likely due in large part to the lack of a meaningful petition to advance.

More recently, however, California’s Board of Parole Hearings has systematized petitions to advance. This change was prompted in part by In re Vicks, in which the California Supreme Court wrote that Marsy’s Law
created “a significant risk that there will be a period between parole reviews when the elimination of a hearing that would have been required under the former law creates a significant risk of prolonging incarceration.” While commissioners’ accounts in 2011 and 2012 suggested that petitions to advance hearings were usually denied during that time, by 2014 the BPH’s response to Vicks had transformed these petitions into a more meaningful process. In 2014, the Board received 1,030 petitions to advance a hearing. Over half of those petitions (565) resulted in an advanced hearing. And more than 20% of those advanced hearings (154) resulted in a parole grant.

In July 2013, the Board also implemented an Administrative Review Process, through which it “reviews all three-year denials one year after the hearing,” with the exception of inmates who have received moderate-high or high overall risk assessments and inmates who committed a violent or serious rules violation since their last hearing. Thus, the lowest-risk lifer inmates are now automatically given an additional chance at parole. Of the 856 Administrative Reviews conducted in 2014, 191 inmates were screened out, and 665 Advanced Hearings were conducted. Of these, over one third (232) resulted in a parole grant.

B. The High End: Longer Maximum Denials

1. For the “Poster Boys”

While no commissioners were specifically in favor of the increase in minimum denial length (they either opposed the elimination of the one-year denial possibility or had no firm opinion about it), most saw the increase in the maximum denial length as a positive change. It meant not

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203 Id. at 300.
204 BOARD OF PAROLE HEARINGS, HANDOUT B: “PETITIONS TO ADVANCE AND ADMINISTRATIVE REVIEWS” 2 (2016) (copy on file with the author).
205 Id.
206 Id. at 3.
207 Two commissioners pointed out that prior to Marsy’s Law, some inmates had a long string of one-year denials, and suggested that this pattern, could be unfair to an inmate, since his hope for release was raised anew each year, only to be denied again. Commissioner Villegas mentioned feeling bad for an inmate who received 10 one-year denials in a row. Interview with Daryl Villegas, Comm’r, Cal. Bd. of Parole Hearings (Mar. 2012). DC Allen said, “[t]hese one-year denials year after year was really kinda cruel and unusual punishment. Either the person’s suitable today or he’s not and give him three years. I like that.” Interview with Chad Allen, Deputy Comm’r, Cal. Bd. of Parole Hearings (Aug. 2012).
208 A few commissioners thought that a fifteen-year denial length was too long in any case. DC Patrick was among these, and said that he thought even a ten-year denial was “a little out there.” Interview with Theo Patrick, supra note 172. Some critics have pointed out that the increased denial lengths seem unduly harsh for particular groups, such as incarcerated battered women. See Erin Liotta, Double Victims: Ending the Incarceration of California’s Battered Women, 26 BERKELEY J. GENDER L. & JUST. 253, 290 (2011) (discussing how Proposition 9 has harmed incarcerated battered women).
having to waste resources on the inmates they described as “the poster boys for staying in prison”—for example, serial killers who showed no remorse and refused to participate in rehabilitative programming, or inmates who were deeply involved in prison gangs. DC Hatch recalled one inmate who had come to a hearing with 450 points and 125 115s—meaning that the inmate received an enormous number of disciplinary citations for poor behavior in prison.209 He had done no self-help in prison and repeatedly tried to harm prison staff members.210 At his parole hearings, this inmate was even required to wear a mask because he repeatedly tried to spit on the commissioners.211 Someone like this, DC Hatch explained, was not going to be ready for release in just five years, and it was a waste of time and money to bring him before the board so often.212 DC Horvath agreed with this assessment, saying that a certain group of inmates, most frequently at Level IV prisons, were “coming back and back and back” before Marsy’s Law.213 When the maximum denial was five years,

[w]e [were] going to see them all the time, and they weren’t doing anything. Marsy’s Law saved that, because the ones who were doing horrifically you could just put them on a 15-year list and leave it be. . . . That helps pull out a lot of the guys who are not making any effort.214

2. Reduction of Backlog

The longer denial lengths—at least in theory—also have the potential to reduce a phenomenon commissioners refer to as “backlog”—the BPH’s longtime struggle to keep up with the demand for hearings.215 “[Marsy’s Law has] affected the hearings in that the 3, 5, 7, 10, 15 year denial periods have helped the backlog to diminish,” DC Johnson said.216 Others commented that the backlog was especially frustrating given that so many resources were spent on inmates whose violent in-prison behavior made it wildly unlikely that they would be found suitable for parole.217

In their interviews, commissioners speculated that it would probably be several years before the backlog was eliminated, although they were

209 Interview with Chase Hatch, supra note 155.
210 Id.
211 Id.
212 Id.
213 Interview with Tom Horvath, supra note 185.
214 Id.
215 E.g., id.; Interview with Chase Hatch, supra note 155.
216 Interview with Judith Johnson, Deputy Commissioner, Cal. Board of Parole Hearings (July 2012).
217 Interview with Chase Hatch, supra note 155; Interview with Bertrand Harris, supra note 159.
optimistic that the longer denial lengths were beginning to reduce it.\textsuperscript{218} Between the interviews with commissioners and the publication of this Article, multiple changes within the BPH have led to an almost total elimination of the backlog.\textsuperscript{219} And when the hearings backlog is reduced to single digits, the BPH now uses three-person panels instead of the two-person panels, described supra.\textsuperscript{220}

C. A New Legal Standard

Before Marsy’s Law, commissioners needed a preponderance of the evidence to give a one-year denial; if this standard was met, they moved it to two years; if it was met again, they moved to three years; and so on, up to the five-year maximum.\textsuperscript{221} But starting in 2009, once commissioners decided that an inmate was unsuitable for release, they were required to begin their consideration at the new maximum of fifteen years and work backwards to the other possible denial lengths: ten, seven, five, or three years.\textsuperscript{222} Lowering the denial length to the next “rung” down required evidence of the inmate’s suitability that met the “clear and convincing” standard.\textsuperscript{223} As Commissioner Betances explained it, “[i]t’s clear and convincing evidence to go down every notch. And then you say the reasons why. He’s shown signs of remorse, or he’s got better insight, he’s got whatever you want.”\textsuperscript{224}

How the clear and convincing standard is actually implemented is less clear. Most commissioners did not explicitly mention the standard in discussing how they determined denial lengths.

Of the two commissioners who discussed the standard for reducing a denial down from fifteen years, both held law degrees and practiced as attorneys. One of them mentioned that in practice, the actual standard applied tended to be a preponderance; that is, commissioners tended to talk about whether an inmate “should” or “should not” receive a particular denial length—parlance that more clearly suggests “preponderance of the evidence” reasoning.\textsuperscript{225} The following examples typify the commissioners’ explanation of their reasoning after they had decided that an inmate was not suitable for release:

Marsi’s Law says you always start with 15. You deny, you start at 15. That doesn’t mean you end at 15. That means you

\textsuperscript{218} Interview with Chase Hatch, supra note 155; Interview with Chris Doolan, supra note 154.
\textsuperscript{219} Interview with Jennifer Shaffer, supra note 58.
\textsuperscript{220} Id.
\textsuperscript{221} CAL. PENAL CODE § 3043 (West 2008) (prior to Prop. 9).
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} Interview with Burt Betances, supra note 24.
\textsuperscript{225} Interview with Commissioner Jonathan Duckworth, supra note 58.
start at 15. And what I do is, I look at the positive things that they’ve done. When is the last time they had a disciplinary? Has it been 5 years? Hey, that’s a plus! They been following the rules for the last 5 years. That’s got to be good. Are you involved in self-help programs? That’s pretty good too. I’m glad to see that you are working on your problems. Do you have good parole plans? I’m just going through [the factors listed in § 2402], right?226

[T]he burden is on the candidate and his or her attorney to present information to the Board that would result in that particular inmate getting less than 15 years. So whatever they can bring. Positive programming, educational gains, lack of 115s, it keeps going down, down, down.227

But while some commissioners were aware of the legal guidelines for determining a precise denial length, others did not seem to be. Some talked about the idea that an inmate had to “earn” a long denial. One commissioner said that it was actually a little hard to get a fifteen-year denial; indeed, few are given.228 He described one inmate who had a huge number of disciplinary write-ups, had done no programming, and still did not receive a fifteen-year denial.229 The panel decided to give him ten years instead, because none of his 115s had occurred in the last nine months. 230

Overall, the commissioners’ descriptions made it far from clear that the shift in the legal standard for setting denial lengths had any meaningful effect on their decision making. Commissioner Duckworth believed that even though he personally employed the clear and convincing standard, a preponderance of the evidence standard was more appropriate and “would harmonize the law to what’s actually occurring.”231

VI. ASSESSING THE SUBSTANTIVE IMPACT OF MARSY’S LAW

A. Rights, Rhetoric, and Reality

In understanding how the California Victims’ Bill of Rights Act of 2008 affected individual victims with regard to parole hearings, we are again forced to confront the fact that many parts of it—specifically, the parts I have termed “rhetorical rights”—had at most a rather indirect,
attenuated effect on victims themselves. As the previous Section details, the change in denial lengths and the legal standard shaped commissioners’ experience of parole hearings in a few important ways. Although they were able to view the imposition of longer maximum denial lengths as a means of allocating resources more effectively, they resisted the imposition of longer minimum denial lengths and in some cases found new means of getting around the three-year minimum.

Striking, however, is the complete absence of any mention by commissioners that these provisions of the Victims’ Bill of Rights Act have much to do with actual victims. There is no clear substantive reason why longer denial lengths should have been folded into Marsy’s Law, nor do the releasing authorities responsible for imposing longer denial lengths seem to view the change as having anything whatsoever to do with victims.

Examining the implementation of these rhetorical “victims’ rights” measures leads to the practically inescapable conclusion that even though these measures contain provisions that affect victims, in a more political sense they are for victims largely in the sense that they are against offenders. That is, wedging weighty changes to inmates’ parole denial lengths into something called the “California Victims’ Bill of Rights Act” was a decidedly political move, playing on voters’ genuine sympathy for victims in order to pass an expensive tough-on-crime reform. This is not to suggest that victims’ rights are not a valid cause (they are), nor that victims’ rights advocates are at all disingenuous in their support of measures like Marsy’s Law (they are not), nor that a measure like increased parole denial lengths has no impact on victims. After all, the increased denial lengths Marsy’s Law imposed for lifer inmates also meant fewer hearings for victims and victims’ next of kin. And even if a victim never attends hearings, it can be psychologically traumatic simply to know that the offender’s hearing is taking place. Minimizing this trauma for victims is an important goal. Even so, political co-optation of victims’ rights leads to reforms that have more to do with punishing offenders than with helping victims. Passing tough-on-crime parole reform under the banner of victims’ rights offers an emotionally appealing way to frame controversial, expensive, and punitive criminal justice measures that do little to help individual victims. This strategy illustrates precisely what Robert Elias, Markus Dirk Dubber, and others have pointed out about the co-optation of victims’ rights rhetoric for punitive purposes.232

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232 ROBERT ELIAS, VICTIMS STILL: THE POLITICAL MANIPULATION OF CRIME VICTIMS (1993); DUBBER, supra note 31; see also Roberts, supra note 15, at 381 (“A number of scholars have plausibly argued that this pro-victims movement is more about politics than victims (e.g., Tonry 2004, pp. 25–28).”).
B. Effects of Victim Participation on Parole Hearings

Rhetorical strategy aside, what are the practical implications of expanded rights for victims at parole hearings? In Section IV, I detailed the logistical effects of expanded victim participation on California parole hearings, and also detailed the effects that the on-the-ground implementation of this expanded participation had on the dynamic of the hearing, particularly the emotional impact on parole commissioners.

What effects, however, does expanded participation by victims have on the way commissioners deliberate over parole decisions? What effects do they have on the outcome of parole hearings? In the remainder of this Section, I describe the state of the current research on these questions, then turn back to Marsy’s Law and describe how my data informs the answers to these questions in California.

1. The Empirical Landscape: Victims’ Impact on Decision Making

Prior research that has examined the impact of victims’ testimony at parole hearings has reached mixed results both regarding victims’ influence on parole outcomes and decision makers’ subjective impressions of victims’ influence. Studies conducted in Pennsylvania, Alabama, and California have shown that when victims and victims’ next of kin testify at a parole hearing, releasing authorities are less likely to grant parole.233

However, this influence depends partly on which other factors are considered in the analysis. For example, one California study reported that “when victims attend hearings, the grant rate is less than half the rate when victims do not attend.”234 However, additional work using the same data refined that result and showed that the correlation between victim presence and grant rates was likely due to victims’ tendency to attend initial hearings but not subsequent hearings;235 victims were more likely to attend a hearing the first time an inmate came up for parole, and inmates were less likely to receive parole grants at their initial parole hearing.236 Thus, the relationship between the two factors may not be causal at all. When

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233 See Parsonage et al., supra note 149, at 187 (finding higher rates of parole denial by the Pennsylvania Board of Probation and Parole in 1989 “in the victim testimony group despite comparable parole objective guidelines predictions, offender demographics, and offenses”); Brent L. Smith et al., The Effect of Victim Participation on Parole Decisions: Results from a Southeastern State, 8 CRIM. JUST. POL’Y REV. 57 (1997) (finding that greater victim participation in Alabama parole hearings was associated with lower parole grants); Susan C. Kinney & Joel M. Caplan, Findings from the APAI International Survey of Releasing Authorities, CTR. FOR RESEARCH ON YOUTH & SOC. POLICY 1, 18 (Apr. 2008), http://www.apaintl.org/resources/documents/surveys/2008.pdf [https://perma.cc/G7CM-YZM4] (finding that 40% of releasing authorities indicated victim input was “very influential” in their decision-making process”); see also Roberts, supra note 15, at 396–97 (discussing the effects of victim input on parole outcomes).
234 WEISEBERG ET AL., supra note 40, at 5.
235 Young et al., supra note 62, at 275–76.
236 Id.
other factors were controlled (including the egregiousness of the commitment offense and whether a given hearing was an inmate’s first), the relationship between victim presence and parole hearings’ outcome disappeared.237

Only two previous studies have looked specifically at releasing authorities’ impressions of victim influence on parole hearings, but both offer preliminary support for the idea that commissioners incorporate victims’ testimony into their substantive decisions. In one survey study by Kinnevy and Caplan, 40% of releasing authorities rated victim input as “very influential” to the outcome of their decision about whether to grant an inmate parole.238 And in Polowek’s survey of fifty-two parole decision makers in the United States and Canada, 90% of respondents said that victim information had “some kind of impact on conditional release decision-making.”239

2. The Impact of Victims’ Testimony Under Marsy’s Law

Prior studies of releasing authorities’ incorporation of victims’ testimony in parole decision making concluded that those authorities believed victim participation had a significant substantive effect on their decision. Given California parole commissioners’ discussion of the emotional impact of victims’ testimony on parole hearings, it would seem to follow that California’s releasing authorities would report similar levels of influence. The data, however, points in the opposite direction. The parole commissioners we interviewed were almost unanimous in their belief that victims’ presence had no effect on their decision about whether to grant an inmate parole.

Although a few commissioners believed that a victim’s presence might subconsciously affect their decisions,240 most reported that despite the emotional intensity of hearings attended by victims, a victim’s presence neither affected the outcome of a hearing, nor the difficulty of making a suitability determination. As Deputy Commissioner Gregory Black said, “[O]f course we’re gonna hear what they have to say. But I’m not sure that that really influences our decision. Do you understand? Because it’s really about the inmate; it’s really an evaluation of the inmate, not the people that

237 Id.
238 Kinnevy & Caplan, supra note 233, at 18.
240 E.g., “Q: When there’s testimony from [the victim or VNOK(s)] does that tend to persuade you? A: I’m sure it does. I try not to, but I’m sure it does.” Interview with Burt Betances, supra note 24.
have been hurt by his actions.” Commissioners emphasized that although they listened to victims’ statements, they “rarely put much weight into” them. “I always listen to what the victims have to say,” Commissioner Harris said.

I can always empathize with their pain. I can always understand that the pain that they’re feeling over there and the anger and hostility. But if that’s not a suitability factor [under the California Code of Regulations], then it really has no effect on my judgment.

As these quotes illustrate, many commissioners try to mentally partition victim testimony from suitability determinations. Some said that they found this easy to do. Others reported difficulty ensuring that a victim’s presence did not influence their evaluation, but described exercising sheer will in order to do so, out of a moral obligation to their decision-making duties. Deputy Commissioner DeLand explained,

[y]ou know, I mean, I understand [the victim’s] pain, but I have to make a decision here today to the best of my abilities. And I’m not going to let the fact that [the victim is] upset, you know, prevent me from doing what I think is the right thing.

Other commissioners described different frameworks for thinking about victims’ testimony. Some said that they drew on their occupational backgrounds in corrections or criminal law, which made it fairly second nature to decouple tearful pleas from fact-based decision making. Some described repeatedly reminding themselves that not disregarding victims’ testimony would be unfair to the thousands of victims who chose not to—or could not—come to the hearing. And several commissioners’ explanations represented some combination of these factors.

Commissioners’ efforts not to let victims’ testimony influence their

241 Interview with Gregory Black, supra note 227.
242 Interview with Tom Horvath, supra note 185.
243 Interview with Bertrand Harris, supra note 159.
245 Interview with Cherise DeLand, supra note 158.
246 Interview with Neil Kirkman, supra note 183.
247 Interview with Tom Horvath, supra note 185.
248 While commissioners empathize with victims and VNOKs, it is also important to point out that they did not seem to pity the victims. Nor, as the commissioners perceive it, are victims wholly without political power. A few commissioners mentioned victims’ advocacy groups as a major force behind Marsy’s Law, and one commissioner mentioned that victims sometimes call the Governor about hearings or decisions—calls, the commissioner suggested, that the Governor takes seriously. Interview with Debra Stockwell, supra note 181.
decisions was made more difficult by their awareness that victims reacted strongly to them. For example, commissioners said that victims assessed their facial expressions for signs of sympathy towards an inmate. Commissioners reported managing their external reactions carefully, making it clear that they were listening to victims while trying not to betray the extent of the emotion they felt. This balance was often difficult to achieve. As Commissioner Glick said,

I work hard to ensure [that the victim’s presence] doesn’t skew [my decision or external reaction], but, in turn, that means you end up distressing individuals that you really don’t want to distress because you feel so badly for them already . . . pain and agony is on the menu every hearing.250

3. Influence versus “Usefulness”

If the commissioners were, indeed, correct that victims’ testimony did not affect parole hearing outcomes—as both their own accounts and the empirical data seem to indicate—it would make sense that they would oppose victims’ expanded involvement in parole hearings. After all, Marsy’s Law led to marathon hearings that they disliked, logistical snafus, and emotional difficulty—all without the benefit of any substantive effect. This, however, was not the case. Perhaps surprisingly, commissioners’ assertions that victims’ presence had no influence on the hearing outcomes were coupled with virtually unwavering support for victims’ expanded opportunity to participate in parole hearings under Marsy’s Law.

Asked whether victim testimony was “useful,” commissioners maintained that it was, and gave two main justifications. First, a small subset of commissioners reported that victims sometimes bring substantive information to the hearing that aids in their decision. Second, and more commonly, commissioners believe that victims’ presence is, in one way or another, “good for the process.”251

First, a handful of commissioners recounted rare occasions in which victims provided information that was useful to a suitability determination, but to which commissioners would have otherwise had access. Three commissioners reported specific times a victim or victims’ next of kin provided new facts. On one occasion, a victim said that an inmate had tried to contact the victim directly, which according to the commissioner was evidence of unsuitability:

[One inmate] killed a female [and] wrote to the victim’s father and was saying, you know, I know you thought of me

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250 Interview with Xavier Glick, supra note 169.
251 E.g., Interview with Cindy Patterson, Deputy Comm’r, Cal. Dep’t of Corr. & Rehab. (Feb. 2012).
as a son, I still think of you as a father, and I hope we can be friends when I get out . . . and the victim’s father didn’t want
to hear from him, and he had no right to contact the victim
directly. You’re supposed to do it through the DA’s office,
but he was doing it [directly] and, see, we learned that in the
hearing. That was important to us. That is manipulative. He
was trying to manipulate the dead victim’s father. So again,
this is the kind of stuff we learn by talking to [the victims].

Another commissioner recounted a hearing in which a victim (a family
member of the inmate) substantiated a confidential report that accused the
inmate of trying to sexually assault a younger family member during a
family visit to the prison. This information was especially relevant, the
commissioner explained, because the inmate’s life crime was a similar
sexual assault. As I will discuss infra in the context of policy
recommendations, some uses of this kind of information are highly
problematic. Commissioners are permitted to use any information
relevant to their determination, but information provided by victims is
exempt from questioning or cross-examination under Marsy’s Law;
hinging an inmate’s release on such untested information seems a clear
violation of an inmate’s due process rights.

Useful information sometimes came from victims’ presence less
directly (and less problematically) by providing insight about an inmate’s
readiness for release. In one extreme example, an inmate high-fived his
attorney as soon as parole was granted—in full view of the still-tearful
victim. Although it was too late to change the decision at this point, the
commissioner who witnessed this said that it made him realize he had
made a mistake; the inmate was not ready for release, since someone truly
remorseful would have exercised self-restraint out of respect for the
victim’s pain.

The commissioners’ more common discussions about the utility of
victims’ testimony, however, came not from any information their
testimony produced, but from commissioners’ sense that victim
participation conferred a procedural and/or moral legitimacy on the
proceedings. Commissioners frequently characterized victims’ attendance
as “good for the process.” The precise form of this “goodness” varied.

252 Interview with Chase Hatch, supra note 155.
254 See infra Section VIII.A–C.
255 In the past couple of years, this has become much less of a problem in California. See infra
Section VIII(A)(6).
256 For example, this came up in my interviews with Carmen Garcia, supra note 151, and Chase
Hatch, supra note 155.
257 Interview with Chad Allen, supra note 207.
258 As one commissioner succinctly put it, “[i]s [having victims there] good for the process? Yes .
Some commissioners believed that forcing an inmate to sit across the table from the people his actions had affected could be psychologically beneficial to his rehabilitation. For example, Deputy Commissioner Hatch said, “[i]t forces this [inmate] to have to look, and look, and look, and one day, after coming to the board for 15 years, they’ll finally come out with something and say, ‘okay, I’ve been lying all this time. I do remember [committing the crime].”

Other commissioners believed victims’ presence was good for the victims themselves; speaking at the hearings helped the victims grieve or gave them “closure.” It is worth noting, though, that commissioners were mixed on this point, and some believed that coming to parole hearings prevented victims from “moving on.” For example:

I’ve seen it as many times it being a cathartic thing for the victim’s next of kin as it is a bad thing. Because you’ve got families who don’t ever talk coming together just for this. And they relive it, they get all fired up, they get all animated, and it’s some big to-do and the hate for this person. And they feed on it. It just doesn’t get any better and they’re not healing themselves. So that one works both ways.

Finally, other commissioners believed that victims were beneficial to the hearing process because their presence kept victims’ perspectives foremost in the commissioners’ minds as a more general matter. One Commissioner said, “Prop 9 is . . . intended to provide a mechanism for sensitizing commissioners and keeping us sensitive to victim impact. And I think having the victim’s next of kin there does that.” Another remarked,

It would be easier if the victims weren’t there, but it wouldn’t be right. . . . I was never a victim. I’m just intellectually looking at this, and I have no emotional feelings attached. . . . [V]ictims bring you back to reality. There is a real person, real family, affected.

... Does it improve the process? No.” Interview with Cindy Patterson, supra note 251.

259 Interview with Chase Hatch, supra note 155.
260 Interview with Naomi Franco, supra note 253; Interview with Tom Horvath, supra note 185.
261 Interview with Daryl Villegas, supra note 207.
262 See, e.g., Interview with Ellen McDonald, supra note 24 (finding in the interview that Commissioner McDonald shares a common belief among some commissioners that victims going to parole hearings prevented them from “moving on”).
263 See, e.g., Interview with Xavier Glick, supra note 169 (finding the commissioner to believe that it was beneficial for victims to go to hearings because their presence helped the commissioners to keep the victims’ perspective in mind).
264 Id.
265 Interview with Chris Doolan, supra note 154.
There is a striking juxtaposition between commissioners’ support for victims’ unrestricted participation and commissioners’ insistence that this participation makes no difference to hearing outcomes. The two positions are not necessarily in direct tension, but if we take both seriously, the combination seems to relegate victims’ role in hearings to a mostly ceremonial one that confers procedural integrity. As I will discuss infra, the coexistence of these positions suggests a serious need to clarify victims’ role in parole hearings—both for victims themselves and for the public.

4. Relationship to Previous Research

Although California commissioners greatly value victim testimony, they believe it rarely, if ever, has an impact on their substantive assessment of an inmate’s readiness for release.\textsuperscript{267} This finding appears to contrast sharply with earlier research on releasing authorities’ impressions of victims’ impact on their decision.\textsuperscript{268} However, a closer look at previous research suggests that the findings may not be inconsistent.

Note that California commissioners lauded the important influence of victim testimony in a general sense;\textsuperscript{269} it was only when they were asked more specifically about victims’ impact on their decisions that they explained that a victim’s testimony rarely affected a hearing’s outcome.\textsuperscript{270} Furthermore, even though Polowek’s respondents believed that victims’ testimony had “some kind of impact,”\textsuperscript{271} when asked to rank decision-making factors in order of most to least important, victim testimony came in near the very bottom, at number fourteen out of eighteen.\textsuperscript{272} Indeed, fewer than half of the releasing authorities in Polowek’s study were able to recall a specific case where “victim information represented a particularly significant factor” in the decision.\textsuperscript{273}

Thus, it may be that in California and elsewhere releasing authorities consider victim input “important,” but that this sense of import has no

\textsuperscript{267} See, e.g., Interview with Cherise DeLand, \textit{supra} note 158; Interview with Tom Horvath, \textit{supra} note 185 (arguing that victims’ testimony rarely affected a hearing’s outcome).

\textsuperscript{268} Compare Interview with Tom Horvath, \textit{supra} note 185 (arguing that victims’ testimony rarely affected a hearing’s outcome), with Polowek, \textit{supra} note 239, at 131 (presenting evidence that some respondents to the research believed that victims’ testimony had “some kind of impact” on their decision).

\textsuperscript{269} See, e.g., Interview with Bill Carlan, \textit{supra} note 163; Interview with Burt Betances, \textit{supra} note 24 (supporting the assertion that victims’ presence at the hearings pose an emotional influence).

\textsuperscript{270} See, e.g., Interview with Cherise DeLand, \textit{supra} note 158; Interview with Tom Horvath, \textit{supra} note 185 (arguing that victims’ testimony rarely affected a hearing’s outcome).

\textsuperscript{271} Polowek, \textit{supra} note 239, at 131.

\textsuperscript{272} \textit{Id.} at 135.

\textsuperscript{273} \textit{Id.} at 132.
concrete impact on hearing outcomes.\(^{274}\)

Because previous research did not make that distinction, it is impossible to determine whether the studies are, in fact, inconsistent. At the very least, the instant study illustrates the usefulness of in-depth qualitative responses to fleshing out criminal justice officials’ specific attitudes and beliefs. It suggests a need to interpret the previous research carefully, and to be mindful of the distinction between general “usefulness” and actual influence on hearing outcomes. Simply believing that victim testimony is “important” does not mean that it actually has any substantive influence.

VII. AN AMBIGUOUS PURPOSE

A. The Vagaries of Victims’ Importance

The power of the victims’ rights movement and the increasing public consciousness about victims’ rights have given rise to well-intentioned efforts to encourage victims to participate in parole hearings. Government websites and brochures send victims a clear message that their testimony is valuable and important—that victims are placed at the “heart” of decision making.\(^{275}\)

Yet amid assertions of victims’ centrality, it remains unclear precisely what kind of impact we want victim testimony to have.\(^{276}\)

For example, a website published by the state of Nebraska writes, “[t]he testimony of the victim is an important contribution to the Board of Parole’s decision making process before parole is granted or denied.”\(^{277}\)

The dozens of factors enumerated in the rules that govern the Nebraska Parole Board’s suitability determinations exclude both the crime’s impact

\(^{274}\) It is also worth noting that, “the parole boards that participated in [that] study required that victim information be given ‘consideration’ as a criterion in conditional release decision-making.” Id. at 187. That is, victim input was one of the factors those release authorities were officially supposed to consider; in California, no such mandate exists. Another interesting difference between the two studies is that Polowek did not find unilateral support for having victims testify at parole hearings; in contrast, I found unilateral support among the commissioners. Polowek writes, “[o]verall, this study found that victim participatory rights in a parole context are not fully understood or welcomed by some board members.” Id. at 187. However, only four releasing authorities in the Polowek study were interviewed in depth. Id. at 103.

\(^{275}\) Roberts, supra note 15, at 388.

\(^{276}\) Ian Edwards, An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making, 44 BRIT. J. OF CRIMINOLOGY 967, 978 (2004) (arguing that the stated purpose of including victims’ statements is to give victims a “greater say” in British criminal justice proceedings, but that the “scheme is unclear in its aims and justifications, with the victim left inexorably as an ambiguous participant.”). The word “ambiguous” in the title for Section VII of this paper, “An Ambiguous Purpose”, is borrowed from Edwards’s title.

on the victim, and all other aspects of a victim’s statement.\textsuperscript{278} California’s Guide for Writing Victim Impact Statements, published by the CDCR, states, “[y]our victim impact statement ensures that your voice is heard.”\textsuperscript{279} Yet commissioners are not explicitly directed to consider victim testimony.\textsuperscript{280}

Even in states where victim testimony is explicitly listed as something releasing authorities should consider, it is frequently unclear what they are supposed to do with this information or what parts of this information they are supposed to consider as most important to their decision about an inmate’s suitability for release.\textsuperscript{281} For example, in New Jersey, releasing authorities are directed to consider twenty-three factors. “Statements or testimony of any victim or the nearest relative of a murder/manslaughter victim” are included right alongside the inmate’s “[m]ental and emotional health” and “[d]ocumented changes in [the inmate’s] attitude toward self or others.”\textsuperscript{282} But the “statement of a victim” is not a straightforward “factor” in the same way that an inmate’s psychological diagnosis is. What “information” from victims is important? Should the releasing authorities care whether the victim is still suffering from the physical, emotional, or psychological effects of a crime? Should they find it persuasive if a victim says that he or she has forgiven an inmate? If a victim cries? If a victim shows up but says nothing?

In many jurisdictions it remains unclear what directives to “consider” a victim’s testimony really mean. This implicit contradiction is a common pattern among states: a strong assertion of victims’ rights coupled with a dearth of mechanisms for the substantive integration of victims’ input.

B. The Current Mismatch Between Means and Ends

We might imagine many useful purposes victims’ testimony could theoretically serve at parole hearings, several of which were mentioned by

\textsuperscript{278} See 270 N.J. ADMIN. CODE § 001–007 (1996) (citing the only criterion under which a victim’s testimony would generally fall is the catch-all item of “any other factors” the board determines to be relevant).

\textsuperscript{279} \textit{A Guide for Writing Victim Impact Statements: For Life-Sentenced Adult Inmate Parole Consideration Hearings}, CAL. DEP’T OF CORR. & REHAB. 1, 2 (2012), http://www.cdcruk.ca.gov/victim_services/docs/victim_impact_statement_writing_guide.pdf [https://perma.cc/BW8S-QG44],

\textsuperscript{280} CAL. CODE REGS. tit. 15, § 2402(b) (West 2016).

\textsuperscript{281} It is important to distinguish between information relevant to an inmate’s suitability for release and an inmate’s parole conditions upon release. Many states, California included, stress the importance of the victim’s safety and security upon the inmate’s release. For example, a victim may prefer that an inmate not be paroled to the county where the victim lives, or may ask the panel to direct the inmate not to contact the victim as a condition of parole. \textit{Id.} tit. 15 § 3041.5(b)(3)(A)–(C).

the commissioners whose experiences I have recounted. However, the current system of victim participation seems ill-tailored to these purposes.

First, perhaps we want to remind releasing authorities that while the crime may be “over” in a temporal sense, it is never really “over” for the victim. But if this were the case, we might wonder whether victim testimony at parole hearings is really the best way to remind decision makers. After all, a victim’s choice about whether to testify may or may not tell us anything about a crime’s lasting impact, and some deeply affected victims will find participation too painful. Moreover, since victims only testify at about 10% of parole hearings, some commissioners are bound to end up hearing from more victims than other commissioners do.283

Another possible rationale for allowing victim testimony is that it might be useful to have someone at the parole hearing who knows the intimate details of the crime so that the inmate cannot downplay the worst parts. But this is true only of direct victims, not of victims’ next of kin. And in some cases, testimony by a representative from the District Attorney’s office would be even more useful on this point than victim testimony, since the DA would be familiar not only with the crime itself, but with all of the facts relevant to the commitment offense and its surrounding circumstances. On the other hand, in the majority of cases (which are settled via plea agreements), the DA may possess a much less detailed account of the crime, in which case the victim’s account could be tremendously valuable. Either way, however, using facts that aren’t part of the settled record to help understand whether an inmate is ready for release is problematic.284 And even “settled” records are often spotty, erroneous, or incomplete.

We might also imagine that releasing authorities could glean useful insight from watching an inmate’s response to a victim. For example, inmates who appeared indifferent or contemptuous to a victim or a victim’s family might be particularly unready for release. Yet commissioners receive no special training on interpreting inmates’ behavior, so it is unclear whether they would be able to do it reliably. Additionally, this is not listed as a factor commissioners are supposed to consider in making suitability determinations (and, as the commissioners interviewed for this study detailed, there are superior ways to assess an inmate’s empathy).285

283 Weisberg et al., supra note 40, at 5; Young et al., supra note 62, at 275–76.
284 One source of problems, for example, is the simple fallibility of memory. Ten or fifteen years after a crime occurred, it seems unreasonable to take a victim’s current account of a crime as fact.
285 For example, some commissioners ask inmates, “Who were the victims in this case?” Deputy Commissioner Kirkman said, “[a] lot of inmates will name themselves” alongside the victim and the victim’s family members. Interview with Neil Kirkman, supra note 183. “If you include yourself in that list, you are definitely not ready to get out.” Id. Other inmates cannot recall the name of their victim(s) at all. Deputy Commissioner Judith Johnson said, “[s]ome inmates, you know, you can do a quick
Next, as some of the commissioners we interviewed pointed out, some victims offer useful and unexpected information, such as reporting an inmate’s unauthorized attempts to contact the victim’s family. But if this is the reason to allow victims’ testimony, why wouldn’t we limit the victim’s statement to material issues and then subject them to cross-examination or some other kind of scrutiny to ensure that they are reliable? Better yet, why not actually solicit this information from victims and allow them to submit it in advance so that commissioners can assess it along with the other information they use to prepare for the hearing? And indeed, we might think of many other people—none of whom are typically present at a parole hearing—who could speak to suitability concerns, such as the inmate’s parent or child, a doctor or counselor, or a corrections officer within the institution.286

Another rationale some commissioners offered is that testifying at a parole hearing provides a victim with an opportunity for “catharsis.” As Roberts points, some scholars argue that submitting a victim impact statement “may achieve therapeutic outcomes for both the victim and the offender.”287 But he also points out that “there is no research evidence to support this hypothesis.”288 Not to mention, if we are letting victims testify at parole hearings in order to facilitate their psychological healing or development, it seems that a more effective, wider-reaching strategy would be to offer them free counseling.

Finally, there is a possibility that victims will be more satisfied with the criminal justice system if they are given a voice in it—an idea to which social scientists generally refer as “procedural justice.”289 In multiple studies, victims themselves have reported that various types of

check in the hearing and say, ‘You know, you had three different victims, what were their names?’ [The inmate will respond] ‘I don’t know.’ Well, if you don’t know who you did bad to, how can you be expecting to show very much remorse?” Interview with Judith Johnson, supra note 216. In recounting the crime or talking about their rehabilitation, other inmates try characterize the victim as unsympathetic. For example, they might tell the commissioners that the victim was a drug dealer, or mention that the victim cheated on a lover. Whether these things are true or not, commissioners said, highlighting victim’s negative traits “count[s] heavily” against an inmate’s suitability. Interview with Neil Kirkman, supra note 183. All of these methods seem at least as effective as watching the inmate react to the victim’s presence.

286 Indeed, a few commissioners mentioned that they thought it would also be useful to the process to have the inmate’s family present at the hearings. Interview with Nico Miller, Comm’r, Bd. of Parole Hearings (Mar. 2012).
288 Id.
289 The procedural justice explanation is grounded in a wealth of social psychological research, most notably Tom Tyler’s work. Tyler and others find that people are more satisfied with a legal outcome if they believe it was reached through a fair process. E.g., Jason Sunshine & Tom R. Tyler, The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing, 37 LAW & SOC’Y REV. 513 (2003). For example, it is well-established that if people feel police are acting fairly, they will be more likely to trust the police. Id. at 514.
“expressive” intent—for example, the desire to share their stories or to communicate the extent of their suffering to the offender—are their primary motivations for giving a victim impact statement at sentencing.290 To be sure, some victims end up glad that they participated, and indicate afterward that if they were ever in a similar situation, they would give a victim impact statement again.291 But the empirical evidence on this point is mixed.292 Specifically, studies about the question of whether participation “increases victim satisfaction and feelings of ‘inclusiveness’ in the justice process are not encouraging.”293 Moreover, even if catharsis and/or procedural justice were valid explanations, they still would not bear on the substance of a suitability determination.

In sum, none of these six justifications for victim inclusion I have listed are particularly compelling. There is a simpler or more effective means than victim testimony of reaching every one of these ends.294 Perhaps the most obvious explanation is that victims do not do a great deal to inform suitability determinations. After all, the damage caused by the crime should have already been reflected in the verdict and sentencing phases. At the parole hearing, where the crucial determination is an inmate’s suitability, it is often unclear what substance a victim can contribute. A crime’s continuing or attenuated repercussions are not suitability factors, nor do they change the mental state the inmate had at the time of the crime.

C. Why Allow Victim Testimony?

In the absence of a compelling substantive reason to include victim testimony at parole hearings, we might wonder whether it makes sense to allow victims to speak at parole hearings at all. In addition to the lack of an
instrumental function, recall that victims’ statements can cause scheduling complications, extend the length of parole hearings, and bring emotional turmoil to the hearings for decision makers.

Yet recall, too, that the California Commissioners and Deputy Commissioners unwaveringly supported allowing victim testimony. This apparent paradox belies a crucial point: even if we do not think the testimony is going to affect a hearing’s outcome, there is something fundamentally discomfiting about not allowing a victim or a victim’s next of kin to speak there. Perhaps this feeling comes from the primacy of victims’ rights in modern criminal justice sensibilities or from the feeling that victims ought to have primacy. Absent expenditures beyond most criminal justice budgets (e.g., trauma and grief counseling; monetary compensation), the criminal justice system is not equipped to “do” much for victims as individuals that can counterbalance the long-lasting effects of a terrible crime. Or perhaps we can imagine all too easily how we, ourselves, would feel in the victim’s position—how cruel it would seem if we were deprived of the chance to explain how a terrible crime affected our own life when the person who committed it was being considered for release.

If this is so, then the true justification for allowing victims’ testimony has more to do with expression than utility. But the real “expresser” is the criminal justice system, not the victim. And the real goal is not to allow victim testimony to have a substantive impact, but rather to endorse its inclusion. Allowing victims to speak at parole hearings is the criminal justice system’s way of saying, “we know that for you, the harm this crime caused may never really be ‘over.’” Perhaps, too, we want to avoid endorsing the implicit message that excluding victims might carry: “Thanks, but this isn’t really about you anymore.”

The tension between the overarching “importance” of victims’ inclusion and the virtually nonexistent substantive impact we intend victim testimony to have may be the reason why so many states allow and even encourage victim testimony at parole hearings without specifying why they include it. Perhaps they do not really know. But as well-intended as this omission is, it may do a disservice to victims by inflating their perception of their testimony’s utility, which may ultimately undermine their faith in the criminal justice system. Indeed, it may even act as a safety valve for victims’ dissatisfaction with a larger governmental or social structure that lacks the ability to make them whole following their victimization.

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295 See Edwards, supra note 276, at 979 (citing Hoyle et al. 1998 and Morgan & Sanders 1999). Victims’ satisfaction with the process decreased after the adjudication was complete, which Edwards attributes to victims’ having gotten the impression that they were being “consulted” about the decision, whereas releasing authorities thought that the point of victims’ testimony was chiefly cathartic or expressive. Id.
Clarifying victims’ roles in parole hearings may not be entirely comfortable, but as I will argue in the following Section, effective victims’ rights policy in the parole hearings context should strive for greater transparency in its design and implementation.

VIII. POLICY RECOMMENDATIONS

The current moment in criminal justice is characterized by unprecedented bipartisan agreement regarding multiple aspects of crime and incarceration, which has opened a unique window for reform. It is an ideal time to align the purpose of victims’ rights legislation with the needs of victims themselves, to think critically about what we mean by “victims’ rights,” and to develop bipartisan strategies for implementing reforms that will make parole decisions more transparent while being responsive to the needs of multiple actors within the criminal justice system.

The reforms I suggest here vary in scope. Some are small “tweaks” designed to more closely align purpose with procedure. Others are larger—more general principle than specific policy—and would require significant coordination among the system’s actors to implement. Some of them build on insights gleaned from firsthand experiences of the releasing authorities described in this Article. Others build on the victims’ rights and parole hearings literature I have discussed. Their overall thrust is threefold.

First, I argue that it is important to think critically about the intended purposes of victims’ rights measures at parole hearings and to closely tailor hearings procedures to those purposes. Second, I argue in favor of policies that increase both the amount of clarity and the amount of support that victims, decision makers, and inmates currently receive. Finally, and most broadly, I argue that parole hearings need to be a more “open” process, which has implications for politics, procedure, and research.

A. Tailor Procedures to the Purpose of Victim Participation

Figuring out why we want victims to testify, then designing procedures to fit those ends may seem like a fairly straightforward proposition. But experience suggests otherwise: “Most of the controversies surrounding victim involvement in criminal justice stem from a lack of clarity in determining which role victims do and should perform.”

In California and elsewhere, victims are included in the parole hearings


297 Edwards, supra note 276, at 977.
process under the umbrella of “victims’ rights,” yet what their participation is actually supposed to do remains vague to both the victims and decision makers. Although in a substantive sense this is mostly untrue, the victims are assured that their input “matters,” while commissioners are tasked with listening to victim testimony, but given no means of incorporating it into their decisions and are sometimes instructed not to let it affect parole outcomes. Allowing these tensions to pervade parole hearings may be convenient, but not confronting these tensions disrespects the integrity of the process. We need to be more straightforward and more consistent about the role victims play.

1. Consider Whether Victims Should Have a Role at Parole Hearings

In modern criminal justice rhetoric, “victims’ rights” are actually treated as a given—but this casual ubiquitousness can actually undermine them. After all, victims’ rights are not enshrined in the U.S. Constitution, and as some scholars have argued, most notably Professor Paul Cassell, we have a long way to go in ensuring that victims are adequately heard in all jurisdictions. This means we need to think critically about the purposes of victim participation. A first step in discerning this purpose is questioning whether victims should have a voice at parole hearings at all.

Several scholars have suggested that victims should not be permitted to speak at parole hearings. The extent of the crime’s impact on the victim, this argument goes, has already been assessed at the sentencing stage. At the parole hearing, the relevant question has nothing to do with the victim, only with the offender. Considering this, as Professor Julian V. Roberts has written, “it is unclear why—under current releasing criteria—the protracted suffering of the crime victim should be a consideration for the authority charged with evaluating risk of reoffending and offender rehabilitation,” particularly since in a strict legal sense, they “seldom possess information relevant to the parole decision.”

Ultimately, this hardline view may be politically unattainable. Perhaps it gives short shrift to the potential merits of victim inclusion. It is worth seriously considering Roberts’s position, which challenges “victims’ rights” advocates to think concretely about what would be lost in the hearings process if victims had no role. My next few recommendations attempt to address this issue. I have disaggregated various types of victim participation, and various purposes of victim participation. Any given parole hearings regime might incorporate some, all, or none of these purposes. My overarching point is not that victims should or should not participate in parole hearings, but rather that we can only begin to conceive

298 Roberts, supra note 12, at 116.
299 Roberts, supra note 15, at 347.
an effective participatory role for victims once we have clearly identified what we want to accomplish by their inclusion.300

2. Consider Victims’ Degree of Control Over the Releasing Decision

One possible role for victims in parole hearings is some measure of control over the releasing decision. This is typically discussed in terms of “direct control” and “indirect control.” I will discuss each in turn.

First, just as it is worth considering one pole of victim participation—barring victims from parole hearings entirely—it is worth considering the antipode. Theoretically, parole decisions could involve not just an assessment of the inmate’s dangerousness, but a kind of “resentencing,” which could take into account the long-term harm caused by the crime. In this formulation, one purpose of victim participation would be to have direct control over the sentencing recalibration. For example, Professor Erin Ann O’Hara has proposed that “governments experiment with decisions regarding release from prison by giving victims control over the imposition of the last 10% of the convict’s sentence of imprisonment.”301 Giving victims a quasi-judicial role and essentially allowing them to resentence an offender raises some obvious problems, placing a crucial governmental function into the hands of the person perhaps least equipped to make an impartial decision. O’Hara, in contrast, maintains that parole decisions should not necessarily be entirely impartial.

Indirect control, on the other hand, can be defined as a victim having some “say” over the choice about whether and when an inmate is released, but control is moderated through the discretion of parole commissioners or other releasing authorities. Although this category is broad, it can be characterized by some incorporation of the victims’ testimony or opinion into official release guidelines. Regardless, it is insufficient simply to place “victim input” on a list of factors that should be considered. As I will elaborate further, guidelines regarding victim input need to be ruthlessly specific about what kinds of contributions this indirect control should entail, and what effects these contributions should have. For example, if victims talk about the continuing effect of the crime on their lives, should this continuing harm place any actual weight on the “do not release” side of the scale? And if the victims believe they have overcome the effects of the crime, moved on with their lives, or offered the offender their forgiveness, should commissioners weigh this factor in favor of release? Alternatively, perhaps even if the victim is permitted to discuss the crime’s

300 See Edwards, supra note 276, at 973–75 (discussing Sherry Arnstein’s eight-steps “ladder of participation,” describing a compelling typology of victim participation divided between a “dispositive” and “non-dispositive” role in decision making).
continuing impact, this impact should have no effect on the hearing outcome. Either way, everyone involved should know exactly how the information that the victim provides is supposed to enter into the decisional calculus.

Another type of information victims sometimes provide bears directly on the inmate’s suitability. For example, perhaps the inmate has sent a threatening letter to the victim, or perhaps the victim points out that the inmate is minimizing the heinousness of the offense. This information may be especially useful to the board when the inmate and the victim are members of the same family, and the victim is familiar with the inmate’s rehabilitative needs. We might imagine that some jurisdictions would want to treat this information separately from information about the continuing effects of the crime on the victim. If so, this distinction should be incorporated into the suitability guidelines, and steps should be taken to insure the information’s reliability.

Massachusetts offers one example of parole release guidelines that give victims indirect control. “Statements of victims or family members of victims” are listed as “information considered by the Board,” right alongside “psychological examinations” and “[i]nformation provided by the inmate.”\footnote{Mass. Parole Bd., Parole Decision Making: The Policy of the Massachusetts Parole Board 11 (2012), http://www.mass.gov/eopss/docs/pb/paroledecision.pdf [https://perma.cc/BH4V-XJ3J] (last visited Nov. 7, 2016).} Massachusetts Code clearly states what kinds of information the victim is expected to provide: “[S]tatements . . . about the financial, social, psychological, and emotional harm done to or loss suffered by such victim[.].”\footnote{120 Mass. Code Regs. § 300.05(1)(f) (2016).} While it is not exactly clear how the Board is supposed to incorporate these factors, presumably (1) the victim is only permitted to give the kinds of information listed, and (2) the Board is supposed to consider this information in its substantive calculus, such that greater harm to the victim weighs against release.

3. \textit{Allow Victims Substantive Input About Release Conditions}

As Roberts points out, “[a]n important distinction exists between [victim input arrangements] that permit victims to oppose the offender’s release and those that restrict the victim’s input to submissions about the conditions that might be imposed if parole is granted.”\footnote{Roberts, supra note 12, at 114.} Too often, jurisdictions do not distinguish between victim input regarding conditions of release and victim input regarding release itself.

Whether a jurisdiction gives victims any direct or indirect control over release decisions, there are many good reasons for releasing authorities to consider victims’ input in setting parole conditions. If a victim would
prefer an offender not to contact him or her, or would like to request that the inmate live in a different town, there seems little reason that a parole board should not consider this information. Some victims may also have specific knowledge about the offender’s history of compliance or noncompliance with bail, probation, or other state-imposed conditions. Of course, the board needs to weigh these requests against the parolee’s freedom (e.g., if a victim would prefer that an offender live in a different state versus a different town) and ensure the information’s reliability. But setting parole conditions is a very different process from deciding whether an inmate should be released, and it offers an opportunity to enact respect for victims’ individual needs and experiences. Even scholars who generally oppose allowing victims to have any input in releasing decisions have acknowledged that victims’ wishes should be incorporated into parole conditions.

Particularly in jurisdictions where a victim’s voice in the parole process is limited to input in setting parole conditions, we might imagine a new kind of procedure tailored specifically to this end—for example, one that takes place only in the event that release is granted. We might imagine, too, that instead of requiring victims to trek across the state to the prison where an inmate is housed, the victim could meet with the board at a time and place more convenient to him or her. This approach would be logistically simpler for victims and might result in more widespread participation. Giving victims this option would also allow them to discuss their feelings about their own safety in private, rather than in front of the inmate, which some victims would likely prefer.


Regardless of the substantive influence that victim participation might have, it should influence hearings in ways that are consistent from hearing to hearing. As one Deputy Commissioner pointed out, there are many reasons a victim may choose to attend (or not attend) a hearing. In two identical cases, one victim may show up and the other may not; allowing the victim’s presence or absence to affect a releasing decision introduces complications. For one, allowing the victim to meet with the board privately might make it more difficult to ensure reliability of the information. Nonetheless, alternative approaches like this merit consideration and further research.

DC Horvath said, “I mean, I feel for [the victims]. You tear up at some of the stuff they say, but I’m not gonna beat somebody down longer simply because he was unfortunate that [his victim] showed up. While somebody who did the same crime, [his victims] have elected not to attend for their own reasons, not for the inmate’s reasons. So I don’t get too excited about it.” Interview with Tom Horvath, supra note 185.
an arbitrariness into the decision-making process that may unfairly disadvantage certain inmates. A victim’s failure to show up at a parole hearing could mean many things—inability to get time off work or secure childcare, inability to get transportation, a lack of interest in the proceeding, a belief that seeing the offender in person would be too psychologically painful, and so on. Just because a victim does not attend a hearing does not mean that he or she is not suffering greatly from the continuing effects of the crime. Decision-making guidelines need to take these possibilities into account.

5. *Keep Releasing Authorities Cognizant of Victims’ Experiences.*

Even though the commissioners I interviewed tended not to find victims’ testimony helpful in deciding whether to give a specific grant, several mentioned that victims’ attendance made them cognizant of victims’ experience as a general matter. 309 They believed it was helpful, in the course of their jobs, to be kept sensitive to the continuing effects of serious crime on the lives of victims and their families. 310 If this is a main purpose of victims’ testimony, there are probably more efficient and effective ways to accomplish it.

For example, we might imagine a victims’ forum that commissioners are required to attend once or twice a year, followed by discussion about how victims’ experience should be incorporated into release decisions. Note that an approach like this could supplant or complement victim testimony at parole hearings, depending on the goals of the process in a particular jurisdiction. Allowing commissioners to hear from many victims, rather than sporadically from those who happen to show up at hearings, could make sure that a broad range of victims’ voices are heard by all commissioners.


As I have described above, victims’ testimony occasionally contains information that commissioners use to help weigh an inmate’s suitability. Where this is the case, the inmate needs to have a chance to challenge material facts used to find him unsuitable for release. California provides a mechanism for this kind of challenge, which has recently been incorporated into commissioners’ training. If a victim says something at a hearing that might affect the Board’s decision and which conflicts with the inmate’s account, commissioners can continue the hearing to a later day

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309 Interview with Chad Allen, *supra* note 207; Interview with Xavier Glick, *supra* note 169; Interview with Theo Patrick, *supra* note 172; Interview with Cindy Patterson, *supra* note 251.

310 Interview with Cherise DeLand, *supra* note 158; Interview with Chris Doolan, *supra* note 154; Interview with Xavier Glick, *supra* note 169.
and request an investigation into the veracity of the victim’s statement.\textsuperscript{311} In 2015, more investigations were requested by commissioners than in previous years,\textsuperscript{312} which may be a result of recent improvements to commissioners’ training.

While it is important to ensure that victims are not intimidated, harassed, or subject to nonessential or invasive questioning, it is also important to ensure that any information actually used to find an inmate unsuitable for release is reliable. Prohibiting an inmate from questioning or rebutting information that keeps him in prison, which is still done in a number of states, seriously undermines procedural fairness.\textsuperscript{313}

B. Improve Parole Hearings for Victims

1. Make Sure Victims Understand How Their Testimony Will Be Used.

While government assurances that victims are at the “heart” of decisions are well intentioned and rhetorically compelling, they are also “likely to give victims the impression that they will have a more significant participatory role than they actually are being given.”\textsuperscript{314} Victims’ expectations about their ability to affect a hearing outcome should match the amount of influence that they actually have. Purporting to seriously consider victims’ input or put victims at the “center of decision making” is unfair if the function of their testimony at hearings is primarily an expressive one.

Roberts and others have suggested that the real danger in victims’ dissatisfaction is “unfulfilled expectations;” if a victim believes that his statement is going to have more of a role than it actually does, the criminal justice system’s legitimacy is likely to be undermined in the victim’s eyes.\textsuperscript{315} On the other hand, if a victim’s role is spelled out clearly, even if the role is smaller than he would prefer, he is less likely to feel that his expectations were unfulfilled. Though it may be uncomfortable to tell victims that they have no substantive influence, honesty and legitimacy go hand in hand.

Even a purely expressive role can be important, and should be treated with care and respect. For example, a government brochure explaining this role to victims might: outline the personal benefits of testifying; explain that even though the testimony will not affect the releasing decision, victim input may affect the conditions of release if it is granted; discuss the

\textsuperscript{311} Interview with Jennifer Shaffer, supra note 58.
\textsuperscript{312} Id.
\textsuperscript{313} See Roberts, supra note 12, at 117.
\textsuperscript{314} Edwards, supra note 276, at 979.
\textsuperscript{315} See generally Roberts, supra note 12.
impact testimony can have on an offender’s understanding of the extent of the harm he caused.

More research needs to be done about whether victims’ participation in parole hearings actually benefits victims psychologically, providing the kind of “catharsis” to which some commissioners alluded.316 Victims should then be informed about the likely psychological benefits or drawbacks to testifying, which will help them make a more informed decision about whether to participate.

2. Continue Reducing Barriers to Victims’ Receipt of Information.

Regardless of the extent to which victims participate in parole hearings, it is crucial that they are able to receive information about their offender’s case. Nor should this receipt of information hinge on whether they decide to participate in the parole hearing process. As is the case in most states now, victims should be able to receive information about the offender’s parole hearing dates, release date, parole conditions, and so on without ever having to actively “participate” in a hearing. States sometimes require victims to “opt-in” to receive this information, which can be problematic if the process is administratively burdensome to initiate or maintain. Increasingly, these processes are done electronically, which (ideally) streamlines them and allows victims to update their own contact information. The easier it is for victims to receive information, the better. For example, allowing a victim to automatically receive an email or letter when the inmate’s hearing is scheduled is better than requiring a victim to keep logging into a particular website to check for updates.

3. Take Practical Measures to Help More Victims Attend Hearings.

If we truly believe that victims’ attendance at parole hearings is important for the process, important for the victims, or both, we should make every effort to help victims attend hearings when they so desire. Since hearings are held at prisons, getting to them can require extensive travel and time off of work. Some kind of minimal reimbursement for travel expenses, as well as legal protection if they need to miss work to attend a hearing, might significantly reduce barriers to victims’ attendance. We might imagine that at the very least, victims attending a parole hearing should receive the same minimal compensation and employment assurances that jurors receive. Additional research should be done in order to determine whether this kind of support would be feasible, and whether it would make a meaningful difference to victims’ ability to attend hearings. We might also imagine that on-site counseling services could be made available to victims who were distraught following their testimony.

316 Interview with Tom Horvath, supra note 185.
Recently in California, some of these very reforms have begun to take shape. For example, victims are now able to receive some financial and logistical assistance to attend hearings—a change that will appear in the state’s official hearing notices by 2017.317

4. Offer Mental Health Support to Victims Following Their Testimony.

Speaking at a parole hearing may bring up thoughts and feelings that victims have suppressed or avoided for a long time. Additionally, actually seeing the person who harmed him or his loved ones may be an incredibly harrowing experience for a victim. Simply sending him on his way after the hearing without making any mental health resources available to him, such as an on-site counselor, is unfair to the victim. If we ask victims to contribute their testimony, we need to ensure that they have proper support available afterward.


It is worth thinking, too, about the reasons that underlie victim-versus-inmate rhetoric. One, of course, is resource scarcity. Money is limited, and because inmates are incarcerated, they consume a relatively large amount of it, necessarily remaining closely connected to the criminal justice system. Victims, on the other hand, do not always remain connected in any official capacity. By and large, they return to their lives, and often these lives have been severely disrupted by their victimization. The feeling that the criminal justice system “abandons” victims can seem incredibly unfair against the backdrop of the government’s continued housing and feeding of offenders. One way to address this is to think creatively about more tangible ways that the system can make victims whole, including compensation programs318 and community-based responses to crime.319

C. Improve Parole Hearings for Releasing Authorities


The guidelines parole commissioners are directed to consider should clearly delineate the role victims’ testimony is supposed to serve in the

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317 Interview with Jennifer Shaffer, supra note 58.


319 See generally Martin Wright, The Court as Last Resort: Victim-Centered, Community-Based Responses to Crime, 42 BRT. J. OF CRIMINOLOGY 654 (2002).
hearing. If it is not supposed to affect the releasing decision, the guidelines
should say so. If commissioners should ignore emotional appeals but
consider information pertaining to suitability, then the guidelines should
specify this. Leaving the role of victims’ testimony vague is unfair to
commissioners, who are then left to decide how different types of
information from victims should be incorporated, if at all, into their
suitability decisions. It also opens the door to inconsistencies from one
commissioner to another.


Following Marsy’s Law, the rules for setting denial length became
somewhat confusing in California. BPH commissioners are supposed to
default to a finding of suitability—but if they do not find suitability, they
are supposed to switch their default to the maximum denial length of
fifteen years. This mandate is counterintuitive—they are asked to begin
from an assumption that someone presents minimal danger to society, but
if they decide that he presents any danger, they are asked to suddenly
assume that he presents the highest level of danger possible. “[C]lear and
convincing evidence”—which as Friedman and Robinson point out is not
“defined for the sake of the commissioners”—is then required to move
from fifteen years to ten years, and from ten years to seven. However, as
the law is written, it is unclear whether the same standard is used to reduce
the denial to five years or three. “The suitability decision and the
deferral decision involve different considerations[,]” which forces
commissioners to perform mental gymnastics.


Of all the policy reforms I suggest here, this one is probably the
lowest-hanging fruit. Several commissioners I interviewed suggested that
the scheduling problem victims presented was not only significant, but was
so significant that it was actually one of the most difficult parts of their
jobs. Requiring victims to give an extra few weeks’ notice if they think
they might attend a hearing would not introduce much of a burden to
victims. This early indication of possible attendance could be non-binding,
with no penalty for a last-minute change of heart, but it would give hearing
schedulers enough time to take victims’ attendance into account. Hearings
where victims indicated that they planned to attend could be booked for

320 Roberts has argued this as well: “If parole boards are to consider the ongoing suffering of the
victim or the victim’s likely reaction to the prisoner’s release, their mandates should reflect this
consideration.” Roberts, supra note 15, at 402.
321 Friedman & Robinson, supra note 43, at 185.
322 Id. at 208.
323 Id.
324 Id.
two slots instead of one (or at least, not booked back to back). This simple measure would largely avoid the problem of hearings lasting long into the evening, and would allow commissioners to perform their jobs better, ensuring that they have plenty of time to prepare for hearings the following day.

Relatedly, one study has suggested that commissioners’ willingness to vote in favor of a parole grant may be associated with the time of day, or with whether the commissioner had gotten a chance to eat anything between hearings. In my observations, commissioners often did not get a chance to take more than a quick bathroom break between hearings. To ensure that they approach each hearing with a clear mind, it would be a good idea to mandate twenty- or thirty-minute breaks for commissioners between hearings. Ample research from other occupations also echoes this recommendation.


The commissioners I interviewed struggled to separate their obligation to listen to victims’ testimony from their obligation not to let the victims’ experiences have undue influence over their decision making. This dual role puts a heavy burden on commissioners, forcing them to become emotional receptacles for victims’ pain and anguish. This particular challenge is one of the more invisible aspects of commissioners’ jobs, but several of them shared the belief that it contributed to burnout and fatigue.

Even if it is inevitable that commissioners act as an emotional buffer, this burdensome aspect of their job needs to be incorporated into their official training. While commissioners eventually appear to develop on-the-job coping strategies—and while empirical evidence suggests that they successfully partition the emotional impact of the victims’ testimony from their decision about whether an inmate is ready to be released

325 See generally Young et al., supra note 62.

D. Increase Transparency


Marsy’s Law is one of many examples nationwide in which “victims’ rights” have been coupled with controversial “tough-on-crime” punitive reforms. Marsy’s Law did expand the number of rights that individual victims could exercise at lifer parole hearings. And increasing the years
that lifers had to wait between hearings did mean fewer hearings for victims to go through. But tripling the minimum and maximum parole denial lengths for California’s lifers is not an automatic “win” for victims simply because it is more punitive for offenders. Victims’ rights measures should directly and clearly serve the needs of victims themselves. As Robert Elias has persuasively written:

We need victims’ services that really serve victims’ needs . . .
and that stress victimization’s psychological effects. . . .
Feminist and other services that challenge the social
conditions that generate victimization must be elevated over
official services that are designed to enlist victims into status
quo crime-control strategies and political campaigns.326

2. Stop Political Rhetoric Pitting Victims’ Rights Against Offenders’

Closely related to the previous point, one of the least useful ways to look at victims’ rights is through the false dichotomy of victims’ rights versus inmates’ rights or offenders’ rights. The idea that these two things should somehow be “balanced” suggests that they are a zero-sum game: any “win” for victims is a “loss” for offenders, and vice versa. At best, this construction is inaccurate. At worst, it is an invidious rhetorical move calculated to swell prisons (and corrections budgets). “To speak of ‘balance’ assumes a duality of positions in diametric opposition. It is inappropriate to consider the position of victims this way.”327 This is true in the sentencing context, and even more so in the parole hearings context, where punishment has already been assessed.

Co-opting victims’ rights into other political projects can also be unfair to victims, robbing them of potential political allies who might support extensive pro-victim reforms, were they not ushered in under the umbrella of “tough-on-crime” policies or positioned as a way to “counterbalance” legal entitlements for criminal defendants that are perceived as excessive. Instead of pitting victims rhetorically against offenders, victims’ rights innovations should center on the improvement of victims’ everyday lives in the wake of the crime, including means of remedying the financial328 and psychological trauma that crime can cause.

3. Allow More People to Attend Parole Hearings.

Part of the reason that parole hearing processes are such a “black box” is that most of the time few people attend. While victims in California and many other jurisdictions are permitted to bring people with them for

326 Elias, supra note 232, at 120.
327 Edwards, supra note 276, at 972.
328 T.R. Miller et al., Victim Costs of Violent Crime and Resulting Injuries, 12 Health Affairs 186 (1993), http://content.healthaffairs.org/content/12/4/186.short [https://perma.cc/8NF4-MTSB].
“support,” few inmates ever have anyone present to support them except for their attorneys. Many inmates keep close connections to a parent, spouse, sibling, friend, or other family member while they are in prison, even over the course of numerous years. These individuals are sometimes in a better position than the inmate’s attorney to facilitate the rehabilitative process, because not only are they personally invested in his rehabilitation, but they have more contact with him. If these same people attend his parole hearing, they can support him in the years to come, following up on whether he has signed up for a substance abuse program or is working toward his GED. If we expect the inmate to eventually return to his community, it makes sense that the closest members of this community would have as much information as possible about the rehabilitative process. Of course, at the same time, this change has potential downsides. An inmate whose mother is present at a hearing, for example, may be less willing to admit the unflattering details of his commitment offense and accept full responsibility for his actions. And an inmate’s family members sometimes have problematic or even abusive relationships with inmates. We might imagine some circumstances in which an inmate would benefit from the presence of an inmate’s support person and other circumstances where such a person’s presence could be counterproductive for the inmate or for the hearing.329

This idea of opening the hearing process to attendance by a wider range of individuals was also supported by the commissioners with whom I spoke. Asked if there was anything that they wished was different about the hearing process, one commissioner suggested allowing inmates’ family members to attend the hearing. Another commissioner wished hearings could be easily accessible to the public, instead of being held on prison grounds. Overall, the commissioners we interviewed did not want less public involvement, but more. They believed that the general public held misconceptions about the parole process, and that opening the process would benefit everyone who was a part of it, including themselves. Indeed, in recent years, BPH has been receiving and approving more requests for outside observers to attend hearings.

E. Additional Research

Parole hearings are a strange creature of criminal justice. Though technically public, they are largely invisible. Though they are not judicial proceedings, they can result in an inmate’s release from prison or set a lengthier term of incarceration. And though they affect the lives of hundreds of thousands of incarcerated Americans, relatively little research

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329 Some inmates might actually prefer the presence of a close friend or mentor in prison who has been personally helpful in their rehabilitation.
exists on hearings’ conduct or on the conditions that determine parole release. Given their importance to criminal justice, parole hearings would benefit not only from the kinds of innovations I suggest above, but also from more knowledge about the process.

1. Conduct Parole Research Across Multiple States.

As in many areas of criminal justice, parole hearing procedures vary greatly from state to state. All states permit some form of victim involvement, but the shape and scope of this involvement differs. In some states, the victims and inmates never see each other. In others, the victim meets with releasing authorities but inmates do not. In some states, victims have the option to testify telephonically. In others, victims are allowed to give a written statement, but not to appear in person. Elsewhere, it is the reverse. Sometimes victims can choose either option.

The sheer range of victims’ participation arrangements offers a rich opportunity to understand the phenomenon of victims’ participation in parole hearings, as well as victims’ rights more broadly, across a wide range of conditions. For example, we might look at the connection between victim participation and release rates under different setups. We might talk to victims who have participated in hearings via various procedural arrangements, and try to learn if these arrangements affect any subjective benefits victims receive from testifying. We might talk to the victims who choose not to participate in each state, in order to figure out what factors deter participation. Even a state-by-state review of parole guidelines regarding victim participation (ideally paired with a state-by-state review of the information given out to victims themselves) would be useful. This kind of comparative work would help establish a set of “best practices” with regard to victim involvement, and would avoid some of the tensions I have described regarding victim testimony in California lifer hearings.

2. Conduct Research on Psychological Effects of Victims’ Testimony.

Whether or not detailed, state-by-state analysis is feasible, the literature would also benefit from smaller-scale psychological research regarding the benefits and drawbacks of victims’ testimony for everyone involved in parole hearings, particularly victims themselves—a point on which the literature is currently both sparse and divided.

For example, restorative justice research in other contexts has suggested that one benefit of victims’ testimony is that it can spur additional reflection or remorse on the part of the inmate. If so, it would be an excellent justification for victims’ participation in parole hearings, and one that should be communicated to victims and decision makers. Or if inmates were permitted to have “support people” present, such as a parent or sibling, we might imagine that victim testimony could be useful in helping the inmate and “support person” think more critically about what
rehabilitation might entail. Understanding more about how the victim’s presence affects the psychological and interpersonal dynamics of parole hearings will allow a more comprehensive assessment of its costs and benefits.

CONCLUSION

Despite the increasing recognition of victims’ importance as crucial actors in the criminal justice process, and despite the huge significance parole hearings play in the criminal justice system, academic discussions of the intersection between these two issues has been curiously sparse. In this Article, I have used first-hand accounts from releasing authorities to discuss the on-the-ground implementation of a victims’ rights initiative in California that has had significant implications for lifer parole hearings: for commissioners’ roles, for our understanding of victims’ involvement, and for the inmates whose freedom is at stake in these hearings. Nor is the relevance of the findings limited to California. Many states are currently considering implementing their own versions of Marsy’s Law, and California’s experience offers a multitude of lessons, both cautionary and encouraging.

The current widespread agreement about the need for criminal justice reform presents an ideal time to try to reach greater consensus about victims’ rights issues. Despite the increasingly partisan dividedness of many political issues, criminal justice seems to be enjoying a cooler-headed respite, in part because many issues—such as over-incarceration, prison overcrowding, and police brutality—have reached something of a crescendo. Though parole hearings and victims’ rights are not usually in the forefront of the conversation, the time has never been better to think critically about how these issues have evolved, how they intersect, and how they will shape criminal justice in the future.


331 For a lengthier discussion of the criminal justice reforms that may be possible at present, particularly with regard to policing and conditions of parole and probation, see Kathryn M. Young & Joan Petersilia, Keeping Track: Surveillance, Control, and the Expansion of the Carceral State, 129 HARV. L. REV. 1318, 1344–51, 1354–55 (2016).