

Impact of Marsy’s Law on Parole in California: An Empirical Study

Laura L. Richardson*

Marsy’s Law (Proposition 9) purported to increase Victims’ Rights by making significant changes to parole in California. Supporters of Marsy’s Law intended to decrease lifer inmate’s “chances” to obtain parole by statutorily lengthening the amount of time between parole hearings, and to increase victim presence at parole hearings by creating greater opportunities for victim participation.

I conducted an analysis of 211 randomly selected parole hearing transcripts in California both before and after Marsy’s Law was implemented. I found that the passage of Marsy’s Law nearly doubled the amount of time set by the parole board between parole hearings. Additionally, Marsy’s Law may have increased victim participation at parole hearings. However, it is not yet clear whether Marsy’s Law has impacted the quality of victim participation at parole hearings or has indirectly impacted parole hearing decisions.

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* Student, UCLA School of Law. Prepared for presentation at MPSA’s 2012 Annual Meeting, Chicago, Illinois, April 14, 2012. Special thanks to Joseph Doherty and Sharon Dolovich.

I. INTRODUCTION

In 2008, California voters passed Proposition 9 (“Marsy’s Law”), a Victim’s Rights bill intended to give the victims of crimes and their families a more meaningful role in the criminal justice system.¹ Marsy’s Law altered many aspects of the California criminal justice system from redefining victim² to dramatically amending parole procedure.³

This Comment explains the impact of Marsy’s Law on both parole hearing decisions and victim participation. An empirical analysis of 211 parole hearings from 2007 to 2010 reveals that the average amount of time set between parole hearings has almost doubled since the passage of Marsy’s Law. Additionally, Marsy’s Law has increased victim participation by as much as 7 percent. This study shows how Victims’ Rights bills can have a profound impact on parole hearings and thus on inmates serving indeterminate sentences.⁴

Part I describes the history of parole and Victims’ Rights in California and describes the changes that Marsy’s Law made to parole procedure. Part II reviews past empirical research carried out on parole board decision-making generally, and specifically when victim participation is allowed.⁵ Part II goes on to theorize what impact Marsy’s Law may have had on parole and victim participation and sets out my hypotheses. Part III describes the data set and how it was coded, and Part IV discusses the results of the analyses. Part V discusses the

¹ Text of Proposed Laws, Proposition 9, Victims’ Bill of Rights Act of 2008: Marsy’s Law, Section 3 (listing the purposes of Marsy’s Law) (available at <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop9>). Marsy’s Law went into effect January 1, 2009. All parole hearings scheduled after January 1, 2009 were conducted under the changed rules with the exception of parole hearings scheduled for 2008 that had to be postponed until after the new year.

² Under the post-Marsy’s Law California Constitution, a victim is defined as (1) a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act; (2) the person’s spouse, parents, children, siblings, or guardian; and (3) a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated. CAL. CONST., art. I, § 28 (e).

³ See CAL. PENAL CODE 3041.5 (b); CAL. PENAL CODE § 3043.

⁴ Inmates serving indeterminate life sentences are commonly referred to as “lifers.”

⁵ For the purposes of this study victim refers not only to the direct victim of the crime (“crime victim”) but also the victim’s family and victim’s representative. CAL. PENAL CODE § 3043 (b).

implications of my findings and I conclude with some final thoughts and by proposing avenues for future research.

I. BACKGROUND

a. PAROLE IN CALIFORNIA

During most of the 19th century California imposed determinate sentences (i.e., sentences for which a specific time for release is given) on convicted criminals. Sentencing was left up to the discretion of judges which resulted in arbitrary sentencing decisions and excessive sentences.⁶ Mitigation of these excessive sentences could only be carried out by executive clemency, which posed additional problems due to the sheer number of sentences that had to be reviewed and the political consequences of releasing a prisoner early if the prisoner went on to commit another crime.⁷

To address the arbitrariness of sentencing and the deficiency of executive clemency as a fail-safe, California became an early adopter of an indeterminate sentencing regime of parole in 1883.⁸ The primary purpose of parole was to allow the early release of prisoners where public safety didn't require a longer period of incarceration.⁹ The indeterminate sentencing regime "emphasized tailoring the sentence to the characteristics of the specific offender" and gave the administrative authority to determine whether a prisoner had been rehabilitated to the Board of

⁶ See Sheldon L. Messinger et al., *The Foundations of Parole in California*, 19 LAW & SOC'Y REV. 69, 71-72 (1985) (describing sentences as severe and inconsistent)

⁷ *Id.* at 73-74.

⁸ *Id.* at 84. However, there is some doubt as to whether the change to a determinate sentencing regime has actually decreased arbitrariness. See e.g., Kathleen Noone, *Keeping the Commitment: Why California Should Maintain Consideration of the Commitment Offense in Determining Parole for Life Inmates*, 37 HASTINGS CONST. L.Q. 789, 799-800 (2010) (discussing the back and forth between the parole board and governor over Ms. Lawrence's suitability for parole as reflected in *In re Lawrence*, 190 P.3d 535, 553 (Cal. 2008)); Jack Dolan, *Schwarzenegger was Inconsistent on Clemency*, L.A. TIMES, Jan. 16, 2011, available at <http://www.latimes.com/news/local/la-me-nunez-20110116,0,2463672.story> (reporting that former Gov. Schwarzenegger reduced the prison sentence of his political ally, former state Assembly Speaker Fabian Nunez's son Esteban, but reversed the Parole Board's decisions for 29 inmates who had committed similar crimes).

⁹ California's parole statute reflects this public safety standard by requiring parole to be granted if the State couldn't show that the person up for parole remained a threat to public safety. CAL. PENAL CODE § 3041(b).

Parole Hearings.¹⁰ However, in the 1970s, indeterminate sentencing regimes faced opposition from both sides of the political-ideological spectrum.¹¹ In response to the call for reform of indeterminate-sentencing regimes, California passed the Determinate Sentencing Act of 1977 which created a mixed regime of both determinate and indeterminate sentences. Determinate sentences were, and continue to be, set by the California legislature composed primarily of base terms.¹² Indeterminate sentences are still imposed for serious crimes including murder.¹³

California's current parole procedure is divided between three bodies: the Board of Parole Hearings, the governor, and the courts. California's Board of Parole Hearings is comprised of commissioners and deputy commissioners appointed by the governor.¹⁴ For each parole hearing, a parole panel ("Panel") is formed comprised of one commissioner and one deputy commissioner. The Board of Parole Hearings conducts anywhere from about 1,500 to 6,000 parole hearings a year.¹⁵ Parole is either granted, denied, stipulated, waived, or continued.

¹⁰ Criticism of indeterminate sentencing came from both the left and the right. Conservatives argued that rehabilitation had failed. Liberals responded by pointing out inequalities in sentencing and race. See CANDACE MCCOY, *POLITICS AND PLEA BARGAINING: VICTIMS' RIGHTS IN CALIFORNIA* 9 (1993).

¹¹ A surprising alliance of conservative pro-law groups and inmate groups embraced the switch from indeterminate sentencing to a determinate sentencing regime. *The Law: Fixed Sentences Gain Favor*, TIME, Dec. 12, 1977, <http://www.time.com/time/magazine/article/0,9171,915844-1,00.html> (noting that inmates in particular recognized the arbitrariness of parole); see also MCCOY, *supra* note 10 at 9.

Common criticisms of the indeterminate sentencing model are that the parole system failed to reduce crime rates and produced "correctional practices that are unjust and contrary to our traditional notions of jurisprudence." GRAY CAVENDER, *PAROLE: A CRITICAL ANALYSIS* 3, (1982); see also MCCOY, *supra* note 10 at 56-60, 68-80.

¹² See Steve Disharoon, *California's Broken Parole System: Flawed Standards and Insufficient Oversight Threaten the Rights of Prisoners*, 44 U.S.F. L. REV. 177, (2009); MCCOY, *supra* note 10 at 9.

¹³ In re Dannenberg, 104 P.3d 783, 791 (Cal. 2005). Some other crimes for which indeterminate sentences can be given include conspiracy to commit first degree murder, CAL. PENAL CODE § 182; attempted first degree murder, Id. § 664; and kidnap for robbery or rape, Id. § 209.

¹⁴ There are only 12 commissioners, appointed by the governor, and confirmed by the senate for terms of three years. *Board of Parole Hearings*, CA. DEPT. OF CORRECTIONS & REHABILITATION, <http://www.cdcr.ca.gov/BOPH/index.html> (last visited April 28, 2011). Deputy Commissioners are civil service appointments made by the Governor and not subject to Senate Confirmation. *Board of Parole Hearings*, CA. DEPT. OF CORRECTIONS & REHABILITATION, http://www.cdcr.ca.gov/BOPH/deputy_Commissioners.html (last visited April 28, 2011).

¹⁵ In 2008 around 5,900 inmates received parole hearings. That number was around 1,500 in 2009 and 2,000 in 2010.

In a full parole hearing,¹⁶ the Panel discusses the inmate's preconviction factors,¹⁷ the commitment crime,¹⁸ and postconviction factors.¹⁹ After this, the Panel takes note of the opposition letters and letters of support that they have received since the last parole hearing. Then, if the district attorney is present,²⁰ she is given an opportunity to question the inmate about any of the previously addressed factors and the commitment offense before either recommending or opposing parole. Next, if the inmate has an attorney, the attorney is allowed to give her closing statement, followed by a statement from the inmate if she so chooses. Finally, before deliberations, the victim or victim's next of kin are invited to speak before the board or have their statements read into the record.

The Panel then determines the inmate's suitability for parole. Deliberations by the Panel are made off the record. If the inmate is found suitable based on a combination of the suitability and unsuitability factors, the Panel "shall normally set a parole release date."²¹ Public safety is the main consideration of the parole hearings for determining suitability. In determining suitability the Panel is bound by the authorizing statute.²² There are six unsuitability factors and

¹⁶ By full parole hearings I mean hearings in which parole is either granted or denied, not parole hearings that result in postponement, waiver or stipulation.

¹⁷ This includes the inmate's previous record of criminality including juvenile arrests and convictions, upbringing, history of substance abuse, gang affiliation, history of mental health issues, history of abuse, and other considerations relevant to the unsuitability and suitability factors found in Title 15 of the California Code of Regulations, section 2402.

¹⁸ This includes the type of crime, how the crime was carried out, the number of victims, whether the offense was carried out in a way that put others at risk, whether the motivations for the crime were trivial, whether the inmate was intoxicated at the time of the crime, and other considerations relevant to the unsuitability and suitability factors found in Title 15 of the California Code of Regulations, section 2402.

¹⁹ This includes the inmate's institutional involvement in programmatic self help, attendance at Alcoholics Anonymous or Narcotics Anonymous, educational upgrading, participation in vocational training, positive counseling chronos, disciplinary 115s, 128a counseling chronos, psychiatric reports, support letters, firm parole plans, demonstrated remorse or insight about the crime, and other considerations relevant to the unsuitability and suitability factors found in Title 15 of the California Code of Regulations, section 2402. While the inmate is not statutorily required to discuss the commitment offense or answer questions, the board tends to look unfavorably upon the inmate's choice not to discuss the commitment offense.

²⁰ At the parole hearing under California Penal Code Section 3041.7 the prosecutor from the county of commitment is permitted to be present to "represent the interests of the people at the hearing."

²¹ CAL. CODE REGS. tit. 15 § 2402.

²² CAL. CODE REGS. Tit. 15 § 2402.

nine suitability factors that are considered in parole determinations.²³ While none of these factors are determinative in whether or not parole is granted, there is some confusion as to how exactly the factors should be applied, and weighed.²⁴ When an inmate is determined to be unsuitable for parole release, the Panel determines the date of the next parole hearing.²⁵ Before the passage of Marsy's Law parole hearings were set at a minimum of one year and a maximum of five years.²⁶ The default amount of years between hearings was one with the Panel being able to grant 2-5 years only if it was "unreasonable to expect that parole would be granted at a hearing during the following year and states the bases for the finding."²⁷

If the Panel determines that the inmate is suitable for parole the governor has thirty days in which to review the Panel's determination.²⁸ The governor can affirm, modify, or reverse the Panel's determination of suitability.²⁹ However, in reviewing the Panel's determination, the Governor's determination is bound by the same suitability and unsuitability factors that bind the Panel. Recently fewer than 5% of inmates eligible for parole are found suitable by both the

²³ The unsuitability factors include:

(1) whether the offense was committed in an "especially heinous, atrocious or cruel manner"; (2) whether the individual had a previous record of violence; (3) whether the individual has an unstable social history; (4) whether the individual has committed sadistic sexual offenses; (5) whether the individual has a "lengthy history of severe mental problems related to the offense"; and (6) whether the individual has demonstrated institutional misbehavior. CAL. CODE REGS. Tit. 15 § 2402 (c) (1) (A)-(E); CAL. CODE REGS. § 2402 (c).

The suitability factors include:

(1) demonstrated remorse; (2) no juvenile record of violent crime; (3) stable social history and relationships; (4) crime was the result of significant stress; (5) crime was the result of battered woman syndrome; (6) age; (7) realistic future plans; (8) lacks history of violent crimes; and (9) positive institutional behavior. CAL. CODE REGS. § 2402 (d).

²⁴ For example, it is unclear whether the absence of suitability factors can be construed by the parole board or governor as unsuitability factors and to what degree should the heinousness of the initial crime be weighed given that the inmate cannot rehabilitate that particular unsuitability factor. *See e.g.*, *In re Lawrence*, 190 P.3d 535 (Cal. 2008); *see also* Blaire Russell, *In re Lawrence and Hayward v. Marshall: Reexamining the Due Process Protections of California Lifers Seeking Parole*, 14 BERKELEY J. CRIM. L. 251 (2009).

²⁵ CAL. PENAL CODE § 3041.5 (b).

²⁶ CAL. PENAL CODE § 3041.5 (b) (2) (2008).

²⁷ *Id.* The bases for any finding of unsuitability must be that the inmate poses a current threat to public safety. *See In re Lawrence*, 190 P.3d. at 539.

²⁸ CAL. CONST. Art. 5, § 8 (b). The constitution was amended to include this provision in 1988. WEST'S ANN. CAL. CONST. Art. 5, § 8, Credits.

²⁹ *Id.*

Panels and the Governor in any given year.³⁰ Until recently, the governor normally reversed at least half the grants of parole by the Panels.³¹

Finally, California courts may review the denial of parole by either the Panel or governor through State *habeas corpus* review. In 2002, the California Supreme Court, recognizing a liberty interest in parole, imposed a “some evidence” standard on parole determinations.³² In 2008, the California Supreme Court held that the nature of the commitment crime alone could not be used to demonstrate current dangerousness many years after the commission of the commitment crime.³³ As of 2005, courts had reversed 28 of Governor Schwarzenegger’s parole denials finding that the reversals were not supported by the required standard of “some evidence,”³⁴ and the courts are active in continuing to overturn Panel and governor denials of parole.

³⁰ See Gary Klein, *Buddha Behind Bars Granted Rare Release, But Fight From DA Promised*, MARIN INDEP. J., July 21, 2008. http://www.marinij.com/marinnews/ci_9944775.

³¹ In 2009 Governor Schwarzenegger received 454 recommendations for parole from the parole board. He reversed 285 and referred 49 to be re-reviewed by the parole board en banc. GOV. ARNOLD SCHWARZENEGGER, EXECUTIVE REPORT ON PAROLE REVIEW DECISIONS FOR THE STATE OF CALIFORNIA 2 (2009). In 2006 the Governor received 206 recommendations for parole, reversed 143 and referred 38 to be reviewed by the parole board en banc. GOV. ARNOLD SCHWARZENEGGER, EXECUTIVE REPORT ON PAROLE REVIEW DECISIONS FOR THE STATE OF CALIFORNIA 2 (2006). During his tenure, Governor Gray Davis reviewed 371 recommendations for parole and allowed only 9, a mere 2.4 percent of those deemed suitable for release by the parole board. Michael Rothfeld, *Is this Paroled Killer Still a Threat?*, L.A. TIMES, July 13, 2008, <http://www.articles.latimes.com/2008/jul/13/local/me-killer13/5>.

³² In re Rosenkrantz, 59 P.3d 174, 658 (Cal. 2002). The Court in Rosenkrantz went on to say that “[b]ecause prisoners possess a protected liberty interest in connection with parole decision rendered by the Board, it would be anomalous to conclude that they possess no comparable interest when such decisions are reviewed by the Governor, where such review must be based upon the same factors considered by the Board. Under California law, this liberty interest underlying a Governor’s parole review decisions is protected by due process of law.” *Id.* at 661.

³³ In re Lawrence, 190 P.3d 535, 560 (Cal. 2008).

³⁴ See Rothfeld, *supra* note 31; see e.g. In re Rodriguez, 122 Cal. Rptr. 3d 691 (Cal. Ct. App. 2011) (overturning the Governor’s reversal of parole and holding that there was no evidence of current dangerousness); In re Gomez, 118 Cal. Rptr. 3d 900 (Cal. Ct. App. 2010) (holding that the record did not support the Governor’s decision to reverse the Board’s grant of parole); In re Twinn, 118 Cal. Rptr. 3d 399 (Cal. Ct. App. 2010) (holding that no evidence supported the Governor’s reversal of parole); In re McDonald, 118 Cal. Rptr. 3d 145 (Cal. Ct. App. 2010) (reinstating grant of parole after the Governor reversed the Board’s determination of suitability); In re Moses, 106 Cal. Rptr. 3d 608 (Cal. Ct. App. 2010) (reinstating grant of parole after the Governor reversed the Board’s determination of suitability); In re Burdan, 86 Cal. Rptr. 3d 549 (Cal. Ct. App. 2008) (holding that inmate’s due process rights were violated by the Governor’s reversal of parole).

b. VICTIM'S RIGHTS IN CALIFORNIA

The Victims' Rights movement in the United States evolved as a response to the perceived shortcoming of the legal system in addressing the needs of crime victims and the families of crime victims.³⁵ While the exclusion of the victim from criminal justice procedure can be considered both a virtue³⁶ and a vice,³⁷ the marginalization of the crime victim in the criminal justice system resulted in the perception that victims' rights were not being vindicated through the criminal justice system. Nationally, the politicization of so called Victims' Rights emerged during the 1970s with President Ford bringing the issue of Victims' Rights front and center during the summer of 1975 in an address on his anticrime program.³⁸ President Reagan continued to keep the issue of Victims' Rights at the forefront of the public's consciousness by creating a Presidential task force on Victims' Rights in 1982.³⁹ The taskforce recommended that laws be passed protecting Victims' Rights on both the state and federal level.⁴⁰ As the Victims' Rights movement evolved, victims and victims' families were not only entitled to compensation

³⁵ There is vigorous debate over what the role of the victim should be in the criminal justice system. *See e.g.*, Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839 (1997) (noting that victims' have been marginalized in our criminal justice system and suggesting systematic reform to include greater victim input in criminal proceedings); Lynne Henderson, *The Wrongs of Victim's Rights*, 37 STANFORD L. REV. 937, 945-46 (1985) (arguing that so called Victims' Rights are aimed less at including victims in the criminal justice system and more at vindicating conservative crime control goals) [hereinafter *Wrongs of Victim's Rights*]; Lynne Henderson, *Victims' Rights Revisited*, UTAH L. REV. no. 2 (1999) available at <http://ssrn.com/abstract=173215> (questioning the constitutional rights of victims', and survivors of homicide victims', to participate in criminal proceedings) [hereinafter *Victims' Rights Revisited*].

³⁶ "The American legal system intentionally and properly distances families from prosecutions; the goal is evenhanded justice. The level of punishment a criminal receives should not depend on how persistent a particular family is in pleading for punishment or blocking parole. Civilized Justice rejects vendetta and instead place retribution in the hands of the entire society. It may seem depersonalizing, but that's a goal, not a defect, of our system." Editorial, *No on Proposition 9*, LA. TIMES, Sept. 26, 2008, at 28.

³⁷ *See e.g.* Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1 (1984).

³⁸ For an interesting "chicken or the egg" examination of the politicization of Victims' Rights see MCCOY, *supra* note 10 at 10-16.

³⁹ President Regan had previously engaged the national attention on Victims' Rights by declaring the week of April 19th in 1981 as "Victims' Rights Week." Carrington & Nicholson, *supra* note 37 at 7 (noting that Regan made similar Presidential Proclamations in 1982, 1983 and 1984).

⁴⁰ PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME FINAL REPORT 16-18 (1982), available at <http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf>.

but were given limited involvement in sentencing and in parole hearings. By 1987 victims could submit impact statements for parole in 38 states.⁴¹ Currently all 50 states have some form of statutory Victims' Rights.⁴² Many states have amended their constitutions to include these rights.

California was one of the first states to embrace the Victims' Rights movement. Modern Victims' Rights legislation began in California during the 1960s. In 1965, the California legislature passed a bill creating a compensation program for crime victims.⁴³ It began allowing victim impact statements in 1976 as part of a pre-sentencing report in criminal proceedings. In 1981 the California Department of Justice published the Crime Victims Handbook, a guide to navigating the criminal justice system and the rights of victims.⁴⁴

In 1982, California voters passed Proposition 8, California's first Victims' Bill of Rights. However, the bill did not address Victims' Rights directly, instead making broad changes to California criminal procedure: It abolished California's independent exclusionary rule and vicarious exclusionary rule;⁴⁵ allowed for victims' to refuse an interview, deposition, or discovery request by the defendant and the defendant's representative;⁴⁶ gave victims the right to be heard at any criminal proceeding in which the right of a victim is at issue,⁴⁷ the right to a

⁴¹ [FIND CITE]

⁴² "In some form or other, a victim has a right to speak at sentencing in all fifty states." Douglas E. Beloo, *Constitutional Implication of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 286 (2003). Additionally, "the constitutions or statutes of forty states either explicitly or implicitly grant victims the right to give recommendations at sentencing." *Id.*

⁴³ "In 1965, California's legislature passed the nation's first law to create a crime victim compensation program. Christine Edmunds and Anne Seymour, *Victims' Rights Laws in the United States*, in MARCH 2010 NATIONAL VICTIM ASSISTANCE ACADEMY TRACK 1: FOUNDATION-LEVEL TRAINING 3-1 (2010). Victims' Rights has "become a term laden with ideological and rhetorical import, although its legal meaning is problematic." MCCOY, *supra* note 10 at 26.

⁴⁴ See Carrington & Nicholson, *supra* note 37 at 6.

⁴⁵ CAL. CONST. art. I, § 28 (c) (2) (also called the Right to Truth-in Evidence); See also J. Clark Kelso & Brigitte A. Bass, *The Victims' Bill of Rights: Where Did It Come From and How Much Did It Do?*, 23 PAC. L. J. 843, 868 (1992).

⁴⁶ CAL. CONST. art. I, § 28 (b) (5).

⁴⁷ CAL. CONST. art. I, § 28 (b) (8).

speedy trial and prompt and final conclusion;⁴⁸ the right to participate in the parole process;⁴⁹ and many other changes.⁵⁰ The impact of Proposition 8 was immense. By 1992, Kelso & Bass found over one thousand appellate cases that were affected by Proposition 8.⁵¹

In 1990, partially in response to the perceived shortcomings of Proposition 8 in addressing the needs and rights of victims, Californians passed Proposition 115, The Crime Victims Justice Reform Act. Proposition 115 made substantial changes to existing California criminal procedure. Among other things, Proposition 115 forbade courts from interpreting the California Constitution as granting greater protections than those afforded by the U.S. Constitution,⁵² allowed for hearsay evidence to be admitted at preliminary hearings,⁵³ disallowed cross-examination of hearsay evidence offered at preliminary examinations,⁵⁴ and indicated that courts should not interpret the California Constitution to prohibit the joining of criminal cases.⁵⁵

c. MARSY'S LAW

On November 4, 2008 California voted in favor of Proposition 9, a Victims' Bill of Rights entitled *Marsy's Law for All* ("Marsy's Law"). The bill was named after Marsy Nicholas who was murdered by her ex-boyfriend. Her killer made bail and Marsy's mother, who had no notice of his release, ran into him at a grocery store.⁵⁶ Her brother Henry Nicholas was the driving force of the bill.⁵⁷ Proposition 9 passed with nearly 54% of the vote,⁵⁸ despite facing

⁴⁸ CAL. CONST. art. I, § 28 (b) (9).

⁴⁹ CAL. CONST. art. I, § 28 (b) (15).

⁵⁰ For a full description of the impact of Proposition 8 see J. Brown, *Proposition 8: Origins and Impact- A Public Defender's Perspective*, 23 PAC. L.J. 891 (1992).

⁵¹ Kelso & Bass, *supra* note 45 at 866.

⁵² CAL. CONST. art. 1, § 24.

⁵³ CAL. CONST. art. I, § 30 (b).

⁵⁴ CAL. EVID. CODE § 1203.1.

⁵⁵ CAL. CONST. art. 1, § 14.1.

⁵⁶ See MARSY'S LAW FOR ALL, <http://marsyslawforall.org/about/> (last visited May 1, 2011) [hereinafter MARSY'S LAW FOR ALL].

⁵⁷ *Id.*

⁵⁸ STATEMENT OF VOTE, NOVEMBER 4, 2008, GENERAL ELECTION, CALIFORNIA SECRETARY OF STATE DEBRA BOWEN 7 (2008).

widespread opposition by California’s editorial boards.⁵⁹ The stated purpose of Marsy’s Law was to:

(1) Provide victims with rights to justice and due process. (2) Eliminate parole hearings in which there is no likelihood a murderer will be paroled, and to provide that a convicted murderer can receive a parole hearing no more frequently than every three years, and can be denied a follow-up parole hearing for as long as 15 years.⁶⁰

Similar to Proposition 8 and Proposition 115, Marsy’s Law sought to enhance Victims’ Rights through both direct and indirect measures. While Proposition 8 and Proposition 115 both allowed the victim to participate in the parole hearing, Marsy’s Law amended the California Constitution and the California Penal Code allowing for qualitative and quantitative improvements to victim participation. The Constitutional definition of victim was expanded to include: (1) a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act; (2) the person’s spouse, parents, children, siblings, or guardian; and (3) a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated.⁶¹ Additionally, section 3043 of the California Penal Code was significantly altered allowing for victims, victims’ families, and up to two representatives to have greater input during the parole hearing. Victims are now entitled to have their “entire and uninterrupted statements” heard during the parole hearing.⁶² Additionally the inmate does not have the right to cross-examine the victim, victim’s family, or victim’s representative at the parole hearing.⁶³

⁵⁹ See *Marsy’s Law*, WIKIPEDIA.ORG, available at http://en.wikipedia.org/wiki/Marsy%27s_Law (last visited May 12, 2011).

⁶⁰ *Statement of Purpose and Intent*, STATE OF CALIFORNIA DEPT. OF JUST., <http://ag.ca.gov/victimservices/content/statement.php> Law (last visited May 1, 2011).

⁶¹ “Victim” does not include: (1) a person in custody for an offense; (2) the accused; or (3) a person whom the court finds would not act in the best interests of a minor victim. CAL. CONST., ART. I, § 28(e).

⁶² CAL. PENAL CODE ANN. § 3043.

⁶³ CAL. PENAL CODE § 3043 (b).

Marsy's Law also purported to indirectly address Victims' Rights by changing the length of time that Panels could set between parole hearings. Marsy's Law changed the default time for the date of the next parole hearing from a single year to fifteen years.⁶⁴ It changed the amount of time that could be set between parole hearings from 1-5 years to 3-15 years.⁶⁵ It altered the standard for deciding when to set the next hearing, shifting the burden from the state on justifying why the inmate continued to be a threat to public safety necessitating a longer time before the next hearing, to the inmate in showing the non-existence of reasons why he or she continues to be a threat to public safety.⁶⁶ It also gave the board less discretion in setting parole hearings only allowing parole hearings to be initially set at either 3, 7, 10 or 15 years.⁶⁷

II. LITERATURE REVIEW

a. PAST EMPIRICAL WORK

Prior studies on parole decisions have focused primarily on what factors impact the decisions of parole hearings. Empirical research on parole hearings, while attempting to create “objective, actuarial models and guidelines for determining releases from prison” instead has exposed how little predictability can be found in parole decisions.⁶⁸ Empirical studies on parole have found many different factors to exert control over whether parole was granted or not. An experimental study conducted by Carolyn Turpin-Petrosino in 1999 examined what factors most affected parole decisions by having parole board officers from New Jersey hear experimental cases and decide whether to grant parole and then rank which factors they considered important

⁶⁴ CAL. PENAL CODE 3041.5 (b)(3)(A).

⁶⁵ CAL. PENAL CODE 3041.5 (b)(3).

⁶⁶ CAL. PENAL CODE 3041.5 (b).

⁶⁷ *Id.*

⁶⁸ Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROBATION 16 (2007); see also Mary West-Smith et al., *Denial of Parole: An Inmate Perspective*, 64 FED. PROBATION 3, 9 (“Release decisions by the Parole Board appear to be largely subjective and to follow latent norms that emerge over time.”) (2000); *c.f.* Robert M. Garber & Christina Maslach, *The Parole Hearing: Decision or Justification*, 1 L & HUM. BEHAV. 261 (1977).

in their decision-making.⁶⁹ She found that the type of crime was the most important factor in parole decisions.⁷⁰ A 1974 study by Robert M. Garber and Christina Maslach looked at whether what was discussed at the parole hearing had an impact on whether or not parole was granted.⁷¹ This study involved 100 randomly selected California parole hearings from September and October of 1974.⁷² The authors found that when parole was granted there was a “significantly greater proportion of discussion about post-release activities, ... post-release support, ... and prior parole hearings.”⁷³ When parole was denied there was a “significantly greater proportion of discussion about prison rehabilitation ... and prison custody.”⁷⁴ Additionally the study noted that the parole hearing placed a “heavy emphasis on psychological assessment.”⁷⁵ Other studies have shown that race,⁷⁶ gender,⁷⁷ and the institutional behavior of the inmate⁷⁸ impact parole board decision-making at parole hearings.

More recent research into parole hearing decision-making has shown that victim participation can exert a significant effect on parole hearing decisions.⁷⁹ In a 1997 study conducted by Brent L. Smith, Erin Watkins and Kathryn Morgan, the authors found that

⁶⁹ Carolyn Turpin-Petrosino, *Are Limiting Enactments Effective? An Experimental Test of Decision Making in a Presumptive Parole State*, 24 J. CRIM. JUST. 321, 324-25 (1999).

⁷⁰ *Id.* at 329.

⁷¹ Garber & Maslach, *supra* note 68 at 261.

⁷² *Id.* at 266.

⁷³ *Id.* at 271.

⁷⁴ *Id.*

⁷⁵ *Id.* at 274.

⁷⁶ Leo Carroll & Margaret E. Mondrick, *Racial Bias in the Decision to Grant Parole*, 11 LAW & SOC’Y REV. 93, 104 (1976) (finding that black prisoners were required to meet an “additional requirement not imposed upon white prisoners” in order to be found eligible for parole).

⁷⁷ Martin Silverstein, *Justice in Genderland: Through a Parole Looking Glass*, 29 SYMBOLIC INTERACTION 393, 407-08 (2006) (finding that gender played a role in how Parole Boards viewed the inmate’s commitment crime which in turn impacted parole decisions).

⁷⁸ John S. Carroll et al., *Evaluation, Diagnosis, and Prediction in Parole Decision Making*, 17 LAW & SOC’Y REV. 199, 211-12 (1982) (finding that the “single strongest factor associated with the parole decision” in Pennsylvania is institutional discipline).

⁷⁹ For an overview see Caplan, *supra* note 68 at 18.

increased victim participation in parole hearings resulted in fewer grants of parole.⁸⁰ Smith et al. looked at parole hearings in Alabama for violent offenders from June 1993 through May 1994.⁸¹ Parole decisions in Alabama are conducted by three member parole board panels.⁸² Out of the 763 parole hearings that Smith et al. collected, they focused on 316 hearings in which "victims were notified of the parole hearing."⁸³ Out of the 316 hearings, parole was granted about 43 percent of the time.⁸⁴ Smith et al. found that when victim participation was high⁸⁵ parole was granted in only 18 percent of hearings.⁸⁶ When victim participation was minimal⁸⁷ parole was granted in around 46 percent of hearings.⁸⁸

Other studies have similarly explored the impact of victim participation on parole board decisions. William H. Parsonage, Frances P. Bernat, and Jacqueline Helfgott examined the impact of victim testimony, implemented by Pennsylvania in 1986, on parole decision making.⁸⁹ The data set contains 200 randomly selected parole cases decided in 1989 by the Pennsylvania Board of Probation and Parole in which the inmate was appearing before the board for the first time.⁹⁰ 100 of these cases had victim impact testimony.⁹¹ Controlling for the offense, offender, and parole eligibility related variables the study found that when victim impact testimony was

⁸⁰ 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).

⁸¹ *Id.* at 62.

⁸² *Id.*

⁸³ *Id.* at 65.

⁸⁴ This is a quite large percentage in comparison to California where parole is granted in about 2-5% of hearings. See Klein, *supra* note 30; Rothfeld, *supra* note 31 ("The State Parole Board under Gov. Arnold Schwarzenegger has been granting releases to about 5% of eligible inmates serving life sentences.")

⁸⁵ High participation means that more than ten letters or appearances from victims (or victim's families) occurred at the parole hearing. Smith et al., *supra* note 80 at 65.

⁸⁶ *Id.*

⁸⁷ Minimal participation means that two or fewer letters or appearances from victims occurred at the parole hearing. *Id.*

⁸⁸ *Id.*

⁸⁹ William H. Parsonage et al., *Victim Impact Testimony and Pennsylvania's Parole Decision Making Process: A Pilot Study*, 6 CRIM. JUST. POL'Y REV. 187 (1992).

⁹⁰ *Id.* at 193.

⁹¹ *Id.*

present parole was refused in 43 percent of parole hearings in comparison to 7 percent in the cases in which victim testimony was not present.⁹² Using discriminant analysis the authors found that out of the four highly significant variables in explaining the parole board's decision to refuse parole, victim testimony exerted the greatest impact on the parole decisions.⁹³ Other variables that significantly impacted parole decision making were the institutional performance of the inmate, the presence of victim injury, and the number of the inmate's prior convictions.⁹⁴ The study also found that even in cases where the victim suffered no injury victim testimony resulted in denial 27.8 percent of the time in comparison to 0 percent of the time when there was no victim testimony.⁹⁵ The study concluded that victim testimony, which at the time was new in Pennsylvania, posed certain dangers because the parole board's understanding of the policy reasons underlying victim testimony may not have been understood.⁹⁶

b. THEORIES OF IMPACT

Marsy's Law is unique in the way that it integrates Victim's Right into parole procedure in order to achieve its stated goals.⁹⁷ While previous empirical studies have addressed the direct impact of victim participation on parole decisions, no study has yet addressed the direct and indirect impact of Victims' Rights legislation on parole hearings.

If Marsy's Law directly serves the Victims' Rights movement's goals, it should impact parole hearings by increasing the amount of victim participation. Because Marsy's Law has made the constitutional definition of victim more expansive and now allows two representatives to attend the parole hearings on behalf of the victim, victim participation should increase.

⁹² *Id.* at 194.

⁹³ *Id.* at 195.

⁹⁴ *Id.*

⁹⁵ *Id.* at 197.

⁹⁶ *Id.* at 201.

⁹⁷ *Statement of Purpose and Intent*, STATE OF CALIFORNIA DEPT. OF JUST., <http://ag.ca.gov/victimservices/content/statement.php> Law (last visited May 1, 2011).

Additionally, because Marsy's Law has given victims (defined broadly) more opportunities for participation during the parole hearing, victim participation should increase because the participation will be perceived to be more meaningful. Additionally, if Marsy's Law directly serves the Victims' Rights movement's goals, it should indirectly impact parole hearings because increased victim participation has been shown to impact parole board decisions. Because Marsy's Law has qualitatively and quantitatively increased the opportunity for victim participation, the impact of victim participation on parole hearings should significantly impact the time set between parole hearings and whether or not parole is granted.

If Marsy's Law indirectly serves the Victims' Rights movement's goals, the amount of time set between parole hearings should remain relatively stable with the exception of larger amounts of time set between the parole hearings for murderers. While Marsy's Law increased the available range of time that a Panel could set between parole hearings from 1 – 5 years to 3 – 15 years, since most inmates were not given the statutory maximum of five years between parole hearings before the passage of Marsy's Law, the passage of the law should not significantly increase the median amount of time set between parole hearings.

It is possible that Marsy's Law does not directly or indirectly serve the Victim's Rights movement's goals. If Marsy's Law does not directly serve the Victims' Rights movement's goals, it will neither directly increase victim participation nor indirectly impact parole hearing decisions. Additionally, if Marsy's Law merely impacts the time set between parole hearings and doesn't impact victim participation it may still not be meeting the Victims' Rights movement's goals. Disproportionate effects might show that one of the purposes of Marsy's Law is over-served, while the other purpose is underserved by the law. In that case, the parole board will significantly increase the time set between parole hearings without being influenced

by increased victim participation.

Marsy's Law has the potential to increase the threat of arbitrariness of parole procedures, whether or not Marsy's Law actually meets the Victims' Rights movement's goals. While it was questionable whether parole procedure before the passage of Marsy's Law was reasonably predictable,⁹⁸ the changes that Marsy's Law has made to parole procedure increases the opportunity for arbitrariness by: (1) allowing for more people to call themselves victims thus potentially creating victim testimony from those only tangentially related to the direct victim of the crime; (2) allowing for Victims' Rights organizations to target parole hearings by volunteering to act as a victim representative for murder victims specifically; (3) allowing victims (defined broadly) false or misleading testimony that cannot be countered or corrected by the inmate or inmate's counsel; (4) causing those who are nearly eligible for parole to have to wait three years instead of one until their next parole hearing; and (5) increasing the amount of time set between parole hearings in order to create fewer parole hearings in the short term to combat the large amount of parole hearings given the small amount of commissioners.

c. HYPOTHESES

While earlier studies have shown how victim input can exert a significant impact on parole hearing decisions, no study has dealt directly with the impact of a law that has made as many changes to parole as Marsy's Law. Building off the work of Smith et al. and Parsonage et al., I intend to show the variety of ways in which this Victims' Rights bills has already and may continue to impact parole hearings and the decision-making of the parole board.

Hypothesis 1

The passage of Marsy's Law will significantly increase the amount of time set by the Panels between parole hearings. One of the purposes of the changes made to the penal code by

⁹⁸ See *supra* note 8 and accompanying text.

the passage of Marsy's Law was to allow the board to set longer periods of time between parole hearings, thus creating less stress on a victim's family having to relive the crime every time the inmate has a parole hearing.⁹⁹ Additionally by increasing the minimum amount of time that can be set between parole hearings from 1 to 3 years and by increasing the default amount of time set between parole hearings from the minimum (1 year) to the maximum (15 years) it is very likely that the length set between parole hearings has increased significantly since the passage of Marsy's Law.

Hypothesis 2

The passage of Marsy's Law will increase victim's participation at parole hearings. One of the other purposes of Marsy's Law was to increase the opportunity for meaningful victim participation. Marsy's Law, in increasing the opportunity for victim participation and by making such participation free from certain procedural restraints, should result in increased victim input at parole hearings.

Hypothesis 3

The passage of Marsy's Law will indirectly impact parole decisions by increasing victim participation. Since increased victim participation has been previously shown to impact the decision-making of parole boards, the passage of Marsy's Law, which made significant changes to the qualitative and quantitative aspects of victim participation should indirectly impact parole decisions.

⁹⁹ The stated purpose of Marsy's Law was to: (1) Provide victims with rights to justice and due process. (2) Eliminate parole hearings in which there is no likelihood a murderer will be paroled, and to provide that a convicted murderer can receive a parole hearing no more frequently than every three years, and can be denied a follow-up parole hearing for as long as 15 years. *Statement of Purpose and Intent*, STATE OF CALIFORNIA DEPT. OF JUST., <http://ag.ca.gov/victimservices/content/statement.php> Law (last visited May 1, 2011).

III. DATA + METHODOLOGY

a. DATA COLLECTION

The data set used in my analysis was collected through a multi-step process. In order to explore the impact of Marsy's Law on parole hearings, I chose to limit my sample to parole hearings to a four year range including the two years before (2007-08) and after (2009-10) Marsy's Law was implemented. Listings of parole hearings conducted from September 2007 to December 2010 were available online¹⁰⁰ and I aggregated the parole hearings from that range of time into a single Excel spreadsheet ("Master List"). There were 10,908 scheduled parole hearings from September 2007 to December 2010 contained in my Master List. Each parole hearing is labeled with the name of the inmate and a California Department of Corrections number ("CDC Number") that includes a letter followed by five numbers. The first letter of the CDC Number is significant. There is a strong correlation between the length of incarceration and the number of the alphabet. Thus, earlier letters (i.e., A and B) are associated with lengthier incarceration.¹⁰¹ An exception to this scheme is that CDC Numbers that start with W are assigned only to female inmates.

After filing California Public Records Act requests for 350 parole hearing transcripts,¹⁰² I was able to code 211 parole hearing transcripts in order to create my final data set.¹⁰³ In order to test whether the final sample of 211 was representative of the Master List, I compared the frequencies of the first letter of the CDC Number of the Master List to the frequencies of the first letter of the CDC Number of the final data set. Using the Pearson Chi2 list, I found that the final

¹⁰⁰ http://www.cdcr.ca.gov/BOPH/hearing_schedule.html.

¹⁰¹ Length of incarceration is measured as the time between the year of the parole hearing and the year of sentencing. However, this length does not measure the potential time the inmate spent in prison before sentencing.

¹⁰² See Appendix B.

¹⁰³ A detailed explanation of how I ended up with my final data set of 211 is contained in Appendix A.

data set was highly correlated ($r = 0.00$) to the Master List based on the frequencies of the first letter of the CDC Number.

Parole hearing transcripts range in length from 5 pages to over 150 pages with the shorter parole hearing transcripts normally being the result of parole being stipulated, waived, postponed or continued. Parole hearings are conducted at all State penal institutions that house lifers and are conducted by one Commissioner and one Deputy Commissioner.¹⁰⁴

In order to code each parole hearing transcript I created a matrix of the different information relevant to this study (Table 1). Each transcript was read thoroughly and information was recorded on a paper copy of the matrix and later recorded on an Excel spreadsheet (Table 2). Missing data was initially coded as a 99 for all binary and categorical variables. Coding errors were corrected once in the Excel spreadsheet itself and again once the Excel spreadsheet was imported to Stata. Each variable was checked against the initial recorded matrix a total of three times.

[Insert Tables 1 + 2 Here]

b. DEPENDENT VARIABLES

Next Hearing

The key dependent variable for the first hypothesis is the time in years set by the two-commissioner panels until the next parole hearing. If parole was granted the variable was coded as “0”. When parole was stipulated, waived, postponed, or continued the year the next hearing was set for was coded unless not stated in which case it was left blank. Out of 211 cases, 48 cases did not have a year set for the next hearing.

¹⁰⁴ Deputy Commissioners are civil service appointments made by the Governor and not subject to Senate Confirmation. *Board of Parole Hearings*, CA. DEPT. OF CORRECTIONS & REHABILITATION, http://www.cdcr.ca.gov/BOPH/deputy_commissioners.html (last visited April 28, 2011). The Commissioners meet en banc to decide cases that are determined by the Governor to require full panel consideration. No en banc parole hearings are included in my data.

Victim Participation

This is a key dependent variable for my second hypothesis. *Victim Participation* is a matrix variable representing the level of participation by the victim in the parole hearing proceedings.¹⁰⁵ Victim participation is measured by combining two binary variables relating to participation by the victim or victim's family – *Next of Kin Present* and *Opposition Letters*.¹⁰⁶ If neither the victim (or victim's next of kin) was present at the parole hearing and no opposition letters were sent the variable was coded as "0". If the victim (or victim's next of kin) was present or opposition letters were sent, the variable was coded as "1". If the victim (or victim's next of kin) was present at the parole hearing and opposition letters were sent, the variable was coded as "2". In 169 of the 211 cases, the victim or next of kin was not present at the parole hearing and opposition letters were not sent. *Victim participation* is also a key independent variable for the purposes of this study.

c. INDEPENDENT VARIABLES

Marsy's Law Applied

The key independent variable for both hypotheses is whether the parole hearing took place before Marsy's Law was applied or after Marsy's Law was applied. This binary variable was coded as "0" if the year was before 2009 (the year Marsy's Law went into effect) or if the Panel utilized the pre-Marsy's Law scheme in determining the amount of time until the next parole hearing, and as "1" if the year was 2009 or later (after Marsy's Law went into effect). Marsy's Law applied in nearly half the cases (109).

¹⁰⁵ "Victim" in this context means victim, victim's next of kin, and/or victim's representative.

¹⁰⁶ These variables are described in detail below.

Suitability Score

This independent variable is a score created out of the nine suitability factors that must be considered by the Panel in their deliberations.¹⁰⁷ This score was created through a multi-step process. First, I added up all of the suitability factors that were deemed present by the Panel. From that number I subtracted the amount of suitability factors that the Panel discussed as being absent.¹⁰⁸ I then divided that number by the total number of potential suitability factors (i.e., divided the total by nine). The suitability score for each inmate – where those factors were discussed in the parole hearing transcript – fell somewhere along the spectrum from -1 (which would represent the Panel discussing every suitability factor as being absent) to 1 (which would represent the Panel discussing every suitability factor as being present).

Unsuitability Score

This independent variable is a score created out of the six unsuitability factors that must be considered by the Panel in their deliberations.¹⁰⁹ This score was also created through a multi-step process. First, I added up all of the unsuitability factors that were deemed present by the Panel with the exception of heinous initial crime which the Panel found in every case. From that number I subtracted the amount of unsuitability factors that the Panel discussed as being absent. I then divided that number by the total number of potential unsuitability factors, with the

¹⁰⁷ The nine suitability factors are: no juvenile record, under stress when crime committed, stable social history, crime was the result of battered women syndrome, age, realistic future plans, lacks history of violent crime, and good institutional behavior. CAL. CODE REGS. § 2402 (d).

According to Commissioner Susan Melanson, the factors are fairly malleable, meaning that the absence of a suitability factor can be considered an unsuitability factor and the absence of an unsuitability factor can be considered a suitability factor. Personal Communication with Susan Melanson, Commissioner, Board of Parole Hearings (April 26, 2011).

¹⁰⁸ The noted absence of suitability factors is normally considered an unsuitability factor by the board and the noted absence of an unsuitability factor is normally considered a suitability factor. One noted exception I saw to this was in the parole hearing for inmate P-14259 the Commissioners seemed to cite the lack of an unstable social history as an unsuitability factor. Transcript of Parole Hearing for CDC # P-14259, Sept. 30, 2010 (on file with California Department of Corrections and Rehabilitation).

¹⁰⁹ The six unsuitability factors are: heinous initial crime, previous record of violence, institutional misbehavior, sexually sadistic offense, severe mental problems, and unstable social history. CAL. CODE REGS. § 2402 (c).

exception of heinous initial crime (i.e., divided the total by 5). The unsuitability score for each inmate – where those factors were discussed in the parole hearing transcript – fell somewhere along the spectrum from -1 (which would represent the Panel discussing every unsuitability factor as being absent) to 1 (which would represent the Panel discussing every unsuitability factor as being present).

Next of Kin Present

This is a binary variable representing whether the victim, or victim’s next of kin, was present at the parole hearing. The presence of the victim, or victim’s next of kin, is coded as “1” and the absence of the victim, or victim’s next of kin, is coded as “0”.

Opposition Letters

This is a binary variable representing whether letters were sent by the victim, or victim’s next of kin, opposing parole. The presence of opposition letters is coded as “1” and the absence of opposition letters is coded as “0”.

d. CONTROL VARIABLES

To determine whether the differences that I found at parole hearings before and after the passage of Marsy’s Law indicated that the passage of Marsy’s Law was the primary difference maker, I included in the regressions control variables for other factors that others have found to have an impact on the decision making of parole boards. These included offender characteristics, offense characteristics,¹¹⁰ procedural characteristics of the parole hearing, and general parole factors.¹¹¹ Some of these variables were combined to create matrix variables that

¹¹⁰ Unfortunately, the age and race of the victim were not present in most of the hearing transcripts, so were not utilized in my regressions.

¹¹¹ These categories are similar to the ones that Kathryn Morgan and Brent L. Smith used in their study of the impact of victim participation of parole. *Victims, Punishment, and Parole: The Effect of Victim Participation on Parole Hearings*, 4 CRIMINOLOGY & PUB. POL’Y 333, 343-44 (2005) (characterizing their variables as falling into the following categories: offender characteristics, offense characteristics, general parole factors, and offender and victim related responses).

represent features of the parole hearing, the crime, and the offender. Additionally, many of these variables were also used in determining whether Marsy's Law had had an impact on victim participation.

Subsequent Hearing

This is a key control variable for both hypotheses. In only one initial hearing in the data set did the Panel grant parole to an inmate. Additionally, victims may be more likely to show up to the initial parole hearing and less likely to show up in subsequent hearings due to the time commitment and potential frustration with repeated interactions with the inmate. *Subsequent Hearing* is a binary variable with initial hearings coded as "0" and subsequent hearings coded as "1".

Length of Incarceration

This control variable is the time in years between the year the inmate was sentenced and the year of the parole hearing. The length of incarceration is significantly correlated with the first letter of the CDC Number and is also correlated with the commitment crime which impacts the length of the sentence.

Inmate Attorney Present

This is a binary variable representing whether the inmate was represented at the parole hearing by a lawyer. The presence of counsel for an inmate at the parole hearing is coded as "1" and the absence of counsel is coded as "0". Many times when the inmate wasn't present, counsel wasn't present as well. The result of many of those parole hearings is that the hearing was waived, unsuitability stipulated, or the hearing was postponed. Additionally, there were few cases in which the inmate represented herself or himself at the parole hearings.

Marsy's Law Objection

This is binary variable representing whether the attorney made a Marsy's Law objection at the parole hearing.¹¹² The variable is coded as "1" when the lawyer made a Marsy's Law objection and "0" when the lawyer didn't make a Marsy's Law objection. Marsy's Law objections were fairly boilerplate, preserving for review whether Marsy's Law violates the Ex Post Facto clause of the United States and California constitutions and whether Marsy's Law violates the Due Process clauses of the United States and California constitutions.

State Opposition

This is a matrix variable representing the level of state opposition expressed during the parole hearing. *State Opposition* is measured by combining two binary variables related to state opposition: (1) *District Attorney Opposed Parole* - coded as "1" if the district attorney was present and opposed parole and "0" if the district attorney was either not present or didn't oppose parole; and (2) *Police Department Opposed Parole* - coded as "1" if the police department opposed parole and "0" if the police department didn't oppose parole. If both the district attorney and police department opposed parole, *State Opposition* was coded as "2." If either the district attorney or police department opposed parole, *State Opposition* was coded as "1." If neither the district attorney nor police department opposed parole, *State Opposition* was coded as "0."

Programmatic Self-Help

Inmates are encouraged to participate in various activities by the panels while incarcerated to demonstrate a commitment to rehabilitation and to increase their likelihood of having a successful transition to free society. These activities are often referred to as

¹¹² Whether or not an attorney made a Marsy's Law objection could have some implications for the competency of the inmate's attorney. While there are many competent attorneys representing inmates at parole hearings, more than half the attorneys (62.32%) failed to preserve the record by making a Marsy's Law objection at the parole hearing and may have waived future Marsy's Law claims for *habeas corpus* appeals.

programmatically self help. *Programmatic Self-Help* is a matrix variable measured by three binary variables relating to inmate activities: (1) *Vocation* - coded as “1” if the inmate completed a vocational program during incarceration and “0” if the inmate had not completed a vocational program during incarceration; (2) *Self-Help Programs* - coded as “1” if the inmate had participated in institutional self-help programs during incarceration and “0” if the inmate had not participated in institutional self-help programs during incarceration; and (3) *NA/AA* - coded as “1” if the inmate had participated in Narcotics Anonymous (“NA”) or Alcoholics Anonymous (“AA”) during incarceration and “0” if inmate had not participated in NA or AA during incarceration. If the inmate participated/completed all three of these activities while incarcerated, *Programmatic Self-Help* was coded as “3.” If the inmate participated/completed two of the three of these activities while incarcerated, *Programmatic Self-Help* was coded as “2.” If the inmate participated/completed only one of these activities while incarcerated, *Programmatic Self-Help* was coded as “1.” Finally, if the inmate did not participate or complete any of these activities while incarcerated, *Programmatic Self-Help* was coded as “0.”

Psychological Evaluation Score

The board seems to rely to some extent on the psychological evaluations that the inmate normally has before a parole hearing to inform them as to the current dangerousness of the inmate and whether the inmate has shown insight into her or his life-crime. I utilized a multi-step process to create a variable representing the inmate’s overall *psychological evaluation score*. The following three variables were utilized to create the variable *psychological evaluation score*: the inmate’s PCLR Psychopathy Score¹¹³ in their most recent psychological evaluation (ordinal variable on a scale from “0” being very low to “8” being very high); the

¹¹³ The PCLR Psychopathy Score measures the inmates level of psychopathy. Scores for all psychological evaluation tests were coded as follows: 0 very low; 1 very low/low; 2 low; 3 low/moderate; 4 moderate; 5 moderate/high; 6 high; 7 high/very high; and 8 very high.

inmate's HCR20 Score¹¹⁴ in their most recent psychological evaluation (ordinal variable on a scale from "0" being very low to "8" being very high); and the inmate's LS/CMI Score¹¹⁵ in their most recent psychological evaluation (ordinal variable on a scale from "0" being very low to "8" being very high). I averaged the inmate's three scores to come up with their overall psychological evaluation score.

Crime Type

The type of commitment crime that resulted in the indeterminate life sentence is a categorical variable coded as follows: murder first "1"; murder second "2"; kidnapping for robbery "3"; attempted murder "4"; conspiracy to commit murder "5"; kidnap for ransom "6"; torture "7"; kidnap for rape "8"; and rape by force "9". These are the only crimes for which indeterminate sentences are still given in California. From this variable I created nine binary variables; one for each type of crime where "1" means that the inmate committed that particular crime and "0" means the inmate did not commit that particular crime. Each binary variable corresponds to one of the categories above. For example *Crime 1* is the binary variable that represents whether the inmate committed first degree murder.

[Insert Table 3 Here]

IV. ANALYSIS

a. DESCRIPTIVE STATISTICS

Out of the 211 parole hearing transcripts coded, the Panel denied parole 117 times, granted parole 12 times, and postponed, waived, stipulated, or continued the parole hearing 82 times.

Out of the 12 grants of parole only one was given at an initial parole hearing. Roughly half of

¹¹⁴ The HCR-20 Score measures the inmate's risk of future violence.

¹¹⁵ The LS/CMI (Level of Service/Case Management Inventory) Score measures the inmate's recidivism risk. See Karina Kendrick, *The Tipping Point: Prison Overcrowding Nationally, in West Virginia, and Recommendation for Reform*, 113 W. VIR. L. REV. 585, 612 (2011).

the hearings (109) occurred after the implementation of Marsy's Law. Additionally, out of the 211 parole hearings, victims were present at 35 of the hearings (17%). In 32 of those hearings the victim(s) spoke. For the following analyses, I limited my data set to the parole hearings transcripts ($N=121$) where parole was either denied or granted after a full hearing.

b. DIRECT EFFECTS OF MARSY'S LAW ON PAROLE HEARINGS

1. Length Set Between Parole Hearings

Marsy's Law nearly doubled the time set between parole hearings. Prior to the passage of Marsy's Law, 50% of parole hearings resulted in a time set between parole hearings of two years or less. In 50% of the post Marsy's Law parole hearings the time set between the parole hearings was at least five years. Additionally, the board appears to be fully utilizing Marsy's Law only two years after its passage. Prior to the passage of Marsy's Law the panels set the time between parole hearings at three years or less over half of the time (70%) despite being able to set the amount of time until the next parole hearing for five years. After the passage of Marsy's Law, despite still being able to set parole hearings for three years, the panels have set the amount of time until the next hearing at more than three years over half the time (75%).

[Insert Table 4 Here]

Compare these results to the impact of the presence of the victim or victim's next of kin at the parole hearing. The presence of the victim or victim's next of kin resulted in an increase of about only one year whereas the application of Marsy's Law resulted in an increase of nearly 2.5 years.

[Insert Table 5 Here]

Similarly, the suitability and unsuitability scores of the inmate did not increase or decrease the amount of times set between parole hearing as much as the application of Marsy's

Law. Where the suitability score was less than zero, meaning that the absence of suitability factors discussed by the board was greater than the presence of suitability factors discussed by the board, the length of time set between parole hearings either increased by less than a year (using the mean) or didn't increase at all (using the median). This was also true where the unsuitability score was greater than zero, meaning that the presence of unsuitability factors discussed by the board was greater than the absence of unsuitability factors discussed by the board.

[Insert Table 6 Here]

[Insert Table 7 Here]

These results indicate that Marsy's Law has had a significant impact on the time set by the parole board panels between parole hearings. This is no surprise given the amount of time that Marsy's Law now allows panels to set between hearings (3-15 years) in comparison to the amount of years the board was allowed to set between hearings prior to the passage of Marsy's Law (1-5 years).

Using least squares regression to test the validity of the results above, and controlling for other variables, I found that amount of years set by the panels until the next parole hearing were increased significantly by the passage of Marsy's Law, supporting *hypothesis 1*.¹¹⁶

[Insert Table 8 Here]

Using only the independent variables described in Part II.c., the coefficient for Marsy's Law in the regression shows an increase in the amount of time set by the panels until the next hearing by 2.20 years (+/-0.39) for full parole hearings (Table 8, Column II). Only the

¹¹⁶ In this regression I controlled for the type of crime using the binary crime type variables. However, crime type as a group was not significant ($p = 0.33$) so I didn't report them in Table 8, Column III. Additionally, since I was missing 16 cases from *Psychological Evaluation Score*, 2 cases from *Programmatic Self-Help*, and 1 case from *Length of Incarceration*, I used multiple imputation in stat to predicted the missing cases.

unsuitability score shows a greater increase in the amount of time set between parole hearings by the panels; the coefficient for the unsuitability score showing an increase in the amount of time set between parole hearings by 2.95 years (+/- 0.87). Additionally, the suitability score exerted a significant negative impact on the time set between parole hearings with the coefficient for the suitability score showing a decrease in the amount of time set between parole hearings by 2.35 years (+/- 0.82).

Controlling for the additional variables described in Part II.d., Marsy's Law continued to exert a significant impact on the time set between parole hearings. The coefficient for Marsy's Law shows an increase in the amount of time set by the panels until the next hearing by 2.03 years (+/-0.38) for full parole hearings (Table 8, Column III).

To test the robustness of the regression, I used matching in order to account for imbalanced factors that may have impacted the results. In the matched samples, the difference in the time set between parole hearings before and after Marsy's Law decreased from 2.47 to 1.66. However, the impact remained significant at the $p < 0.01$ level.

[Insert Table 9 Here]

2. Impact on Victim Participation

In order to determine the impact of the passage of Marsy's Law on victim participation, I used an ordered probit regression and controlled for the variables I considered most likely to impact victim participation.¹¹⁷ I included variables representing some offender characteristics, offense characteristics, and procedural characteristics of the parole hearing. I found that victim participation increased after the passage of Marsy's Law, supporting *hypothesis 2*. However, using matching, it is unclear whether Marsy's Law has actually increased victim participation.

¹¹⁷ In this regression I also controlled for the type of crime using the binary crime type variables. However, crime type as a group was not significant ($p = 0.80$) so I didn't report them in Table 9.

[Insert Table 10 Here]

Before the implementation of Marsy's Law, victims (or victims' next of kin) either attended the parole hearing or sent opposition letters about in about 13 percent of full parole hearings (+/- 3 percent). After the passage of Marsy's Law, either attendance or opposition letters occurred in about 20 percent of full parole hearings (+/- 4 percent).¹¹⁸ Additionally, before the implementation of Marsy's Law, victims (or victims' next of kin) both attended the parole hearing and sent opposition letters in about 5 percent of full parole hearings (+/- 2 percent). After the implementation of Marsy's Law, both attendance and opposition letters occurred in a little less than 13 percent of full parole hearings (+/- 4 percent).¹¹⁹

To test the robustness of the regression, I used matching in order to account for imbalanced factors that may have impacted the results. In the unmatched samples, the difference in the presence of victim's next of kin (before and after Marsy's Law was implemented) was approximately 10 percent, while in the matched samples the difference was approximately 4 percent (Table 9). Additionally, the p-value rose from .22 in the unmatched sample to .66 in the matched sample. However, the opposite effect occurred for opposition letters. In the unmatched samples, the difference in whether opposition letters were sent (before and after Marsy's Law was implemented) was approximately 11 percent, while in the matched samples the difference was approximately 16 percent. Additionally, the p-value dropped from .16 in the unmatched sample to .03 in the matched sample.

c. INDIRECT EFFECT OF MARSY'S LAW ON PAROLE HEARINGS

In order to determine the indirect impact of Marsy's Law on parole hearings, I employed path analysis to determine whether the impact of Marsy's Law on victim participation in turn

¹¹⁸ These results were significant at the $p < 0.01$ level.

¹¹⁹ These results were significant at the $p < 0.05$ level.

affected the amount of time set between parole hearings. I found that Marsy's Law did not have a significant indirect impact on the time set between parole hearings.

[Insert Figure 1 Here]

[Insert Table 11 Here]

The model of the determinants of the time set until the next hearing is depicted graphically in Figure 1 and uses the measured variables *Marsy's Law Applied*, *Victim Participation*, *Subsequent Hearing*, *Length of Incarceration* and the latent variable *Institutional Behavior* created from the *Suitability Score* and *Unsuitability Score* (Table 12). Additionally, both *Marsy's Law Applied* and *Subsequent Hearing* could impact *Victim Participation* but would not impact the other variables. The model shows that *Institutional Behavior* and *Marsy's Law Applied* have the largest positive impact on Next Hearing and that *Subsequent Hearing* has the largest negative impact on Next Hearing (Figure 1, Table 11). All of these are highly significant at the $p < 0.01$ level. However, in this model, *Victim Participation* does not have a significant impact on *Next Hearing* but is highly correlated with *Subsequent Hearing*. Additionally, *Marsy's Law Applied* did not have a significant impact on *Victim Participation*.

[Insert Table 12 Here]

[Insert Table 13 Here]

V. DISCUSSION

a. DIRECT EFFECTS

1. Marsy's Law has a Significant Impact on the Time Set Between Parole Hearings

The passage of Marsy's Law has already had a significant impact on parole hearings at least with regards to the amount of time set by the parole board panels between parole hearings.

This is likely due to a number of different factors that influence the panels during the parole hearing process.

Will of the People

Although the parole board itself is not politically vulnerable to the popular will like the governor,¹²⁰ its commissioners and deputy commissioners are not insulated from what the public wants. Marsy's Law was passed by Californians in large part because of the changes that it would make to the criminal justice system.¹²¹ In order to carry forth the will of the electorate, Panel decisions regarding length set between parole hearings would increase since that was an explicitly stated component of the bill.¹²² Additionally, Marsy's Law has to some extent highlighted the very popular Victims' Right movement. The parole board may be feeling pressure to use Marsy's Law as a sword or face the ire of powerful Victims' Rights organizations.

More Flexibility.

While in some ways the parole board has less discretion after the passage of Marsy's Law due to the strict guidelines added to California Penal Code Section 3041.5 (b) (3), it is possible that the parole board feels less constrained now that they have more flexibility in being able to set longer periods between parole hearings.¹²³ There may be legitimate circumstances that would make setting a yearly hearing – even a hearing every five years – redundant if the inmate has

¹²⁰ The power of the electorate was demonstrated in California when voters recalled Governor Gray Davis from office in 2003. See Katharine Q. Seelye, *For Gray Davis, Great Fall From the Highest Height*, N.Y. TIMES, Oct. 8, 2003, <http://www.nytimes.com/2003/10/08/us/california-recall-governor-for-gray-davis-great-fall-highest-height.html>.

¹²¹ Text of Proposed Laws, Proposition 9, Victims' Bill of Rights Act of 2008: Marsy's Law, Section 3 (listing the purposes of Marsy's Law) (available at <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop9>).

¹²² See *supra* note X and accompanying text.

¹²³ Personal Communication with Susan Melanson, Commissioner, Board of Parole Hearings (April 26, 2011). *C.f.* Transcript of Parole Hearing for CDC # J-55438, Feb. 25, 2009 (on file with California Department of Corrections and Rehabilitation). (noting that they would have set the next parole hearing date for one year if not for Marsy's Law requiring them to set a period of three years).

severe persistent mental problems that are not likely to be quickly resolved or has shown no motivation towards programmatic or behavioral rehabilitation. However, prior to Marsy's Law the board had the discretion to set the next parole hearing at the statutory maximum of five years yet only did so in about 18 percent of full parole hearings. After the passage of Marsy's Law approximately 32 percent of full parole hearings are set at five years and 57 percent of parole hearings are set at five years or more.

Economy + Efficiency.

With only twelve Commissioners and with depleted economic funds, there is a compelling economic reason why lengthy parole denials might be preferable. One result of the passage of Marsy's Law is that there are fewer parole hearings per year, at least in the short term. California, with the largest lifer population in the United States of 30,000¹²⁴ has been overwhelmed with parole hearings, with nearly 4,000 lifers receiving a parole hearing per year.¹²⁵ However, Marsy's Law would serve as only a temporary fix with new lifers becoming eligible for parole each year and with eventual waves of parole hearings coming in 3, 5, 7, 10 or 15 years out. Additionally, Marsy's Law has prompted a wave of lawsuits in both state and federal courts.¹²⁶ These lawsuits are costly and may clog up already overburdened judicial systems.

2. Marsy's Law May Have an Impact on Victim Participation

At this juncture it appears that the passage of Marsy's Law may have a small but significant impact on victim participation although the matched model seems to suggest that it has only increased opposition letters and not the actual presence of the victim's next of kin.

¹²⁴ See *supra* note X and accompanying text.

¹²⁵ *Id.* Additionally, in 2008 nearly 6,000 inmates were scheduled for parole hearings.

¹²⁶ See *In re Vicks*, 195 Cal.App.4th 475 (Cal. Ct. App. 2011), *cert. granted*, 255 P.3d 952 (Cal. July 20, 2011) (No. D056998); see also *Gilman v. Schwarzenegger*, 638 F.3d 1101 (9th Cir. 2011).

Opposition letters may have experienced a slight significant increase after the passage of Marsy's Law due to the publicity that Marsy's Law generated. The increased publicity could have served as a reminder to victim's families that they are allowed to participate in the parole hearings. While actual presence requires some planning and travel, opposition letters are an inexpensive alternative, providing a convenient way for families of victims to let their feelings regarding the parole of the inmate be known. It is possible that this effect will remain or grow stronger if victims' rights groups remain active in policy making, but it is possible that the more removed from the passage of Marsy's Law we become, the smaller this impact will be.

It is possible that over time Marsy's Law will increase the presence of the victim's next of kin at parole hearings although it appears that it has not done so thus far. First, the law is fairly new so it may be that victims remain unaware of their increased statutory and constitutional rights. Victims' Rights organizations could become more active in reaching out to crime victims in order to encourage them to utilize their statutory parole rights. Additionally, since Marsy's Law now allows the victim to send a representative to speak on his or her behalf,¹²⁷ Victims' Rights organizations may reach out to victims to speak on their behalf at parole hearings. Finally, victims who feel that their Marsy's Law rights have been violated have begun to be more present in the news and in the courts.¹²⁸ This broader exposure of both the victim and their rights may encourage other victims to become more involved in the parole process. Thus, the impact of Marsy's Law on the presence of the victim's next of kin could continue to increase with time.

¹²⁷ CAL. PENAL CODE § 3043 (b)(2).

¹²⁸ See e.g. John Langelier, *Suit Claims Schwarzenegger Violated Marsy's Law*, FOX40.COM, May 11, 2011, <http://www.fox40.com/news/headlines/kswb-nunez-sentence-commutation-lawsuit,0,5091757.story> (discussing the pending suit accusing former Governor Schwarzenegger of commuting the sentence of a friend's son in violation of Marsy's Law); Don Thompson, *Schwarzenegger says Commutation was to Help Friend*, FORBES, Apr. 19, 2011, http://www.forbes.com/feeds/ap/2011/04/19/general-us-schwarzenegger-commutation_8425502.html.

a. INDIRECT EFFECTS

It appears that Marsy's Law does not have an indirect effect on the time set between parole hearings. However, as noted above, this might change over time. Currently, in the path analysis model, victim participation is motivated primarily by whether or not the hearing is a subsequent hearing, with participation dropping significantly if it is. This would make sense given the fact that parole hearings may not be conveniently located for the family of the victim and the fact that once read into the record, the victim's next of kin's statements are contained in the inmate's file forever. Thus, subsequent hearings might not provide the same motivation to victim's families to attend. However, if victim's rights organizations reach out to families and offer to send volunteers as victims' representatives, it is possible that presence at subsequent parole hearings will increase.

CONCLUSIONS

Marsy's Law has already had a significant impact on the time set by the parole board between parole hearings (*hypothesis 1*). The passage of Marsy's Law has nearly doubled the amount of time set between parole hearings (from about 2.5 year to about 5 years), and is a highly significant determinate of the length set between parole hearings.¹²⁹ Future work should continue to track the length set between parole hearings by the parole board as the time between the passage of Marsy's Law and the present increases. This length of time may impact how the parole board panels decide to use the law in setting the next parole hearing date.

While it appears that we are starting to see an increase in victim participation after the passage of Marsy's Law (*hypothesis 2*), it is possible that victim participation will continue to increase with time or may decrease with more distance from the passage of Marsy's Law. Future work should continue to try to measure any increases in victim participation and should focus on

¹²⁹ This significant change may implicate *ex post facto* concerns.

collecting more information on what motivates a victim to participate in a hearing or to be absent from a hearing apart from the legal rights given to victims by Marsy's Law. The following theoretical model could be used to consider other variables that might impact victim participation: $VP = ML + (MF - AMF) + X$.

In this simple model *Victim Participation* (VP) is a function of whether Marsy's Law was in effect (ML), the impact of motivational and anti-motivational factors (MF-AMF), and anything else (X) that exerts influence on the model that we are unable to measure. Variables that could "motivate" or "anti-motivate" victim participation include the relationship of the victim to the crime victim, whether the crime victim was a gang member, the distance the victim's family lives from the prison where the parole hearing is taking place, the number of parole hearings that have already taken place, whether a representative has been sent in the place of a family member, and the economic situation of the victim's next of kin.

Additionally, future research should continue to see whether Marsy's Law has an indirect effect on the time set between parole hearings. It is possible that over time, Marsy's Law will increase victim participation and, if it does, such participation may convince parole board panels to set longer lengths of time between parole hearings as would be consistent with other studies. However, future research should attempt to advance a more sophisticated model that looks at the factors that motivate victim participation broadly and whether those factors may have changed due to Marsy's Law as well.

APPENDIX A.

Data Collection Narrative

In order to obtain copies of the transcripts associated with the parole hearings I filed a California Public Records Act (“CPRA”) request¹³⁰ with the Department of Corrections and Rehabilitation (“DCR”). I asked for either all 10,908 parole hearing transcripts if they were already collected, or a sample of 600 parole hearing transcripts¹³¹ (“First Sample”) if they were stored separately.¹³² My request for 10,908 parole hearing transcripts was denied, and the price of obtaining 600 parole hearing transcripts was cost and time prohibitive. In order to accomplish my goal I sent a second CPRA request asking to inspect the records in person.¹³³ I was granted permission to inspect the records in person from February 24 to February 25.

Because I only had two days to collect parole hearing transcripts and had never seen a parole hearing transcript before, I used Stata to create a smaller sample of hearing transcripts to begin with. This sample consisted of 100 parole hearing transcripts (“Second Sample”).

When I arrived in the Board of Parole Hearings office in Sacramento I began reading through the parole hearing transcripts to see what information they contained and how long they were.¹³⁴ I started by reading the transcripts that were at the “top” of my sample (i.e., the CDC Number began with A). As I read each transcript I took notes, putting down any information that I thought might be pertinent to my analysis. After reading a few transcripts I created a matrix (Table 1) in order to have consistency in recording information from the transcripts. This matrix

¹³⁰ CAL. GOV'T CODE § 6250 et seq.

¹³¹ See Part IIa. above.

¹³² Letter from Laura Richardson, UCLA Law Student, to Daniel Davis, Board of Parole Hearings (Jan. 13, 2011) (on file with author)

¹³³ CAL. GOV'T CODE § 6253 allows public records to be inspected in person. The parole hearing transcripts are held in Sacramento at the Board of Parole Hearings.

¹³⁴ Parole hearing transcripts ranged from 5 to over 150 pages. They did not all contain the same information. For example, some would describe the race of the inmate or victim while others wouldn't mention race at all.

contained boxes where I could fill in pertinent information about the inmate, crime, procedural elements of the parole hearing, and the victim. During the first two days I was only able to read through and collect information from 40 parole hearing transcripts. I then coded each matrix and input the data into an Excel spreadsheet.

I drew another sample of 250 transcripts (“Third Sample”) from the 600 parole hearing transcripts in my First Sample. I did not include the transcripts not coded from the Second Sample. I sent a third CPRA request to the DCR and asked to return to Sacramento to inspect the transcripts in the Third Sample from March 21 to March 25. My request was granted and I traveled to Sacramento to read and record parole hearing transcripts using the matrix to collect the pertinent information (Table 2). This time I began at the “bottom” of my sample and worked my way from the CDC Numbers that started with the letter W. I was able to read and record 171 parole hearing transcripts to create a total sample of 211 parole hearing transcripts (“Final Sample”). In order to test whether the Final Sample was representative of the Master List, I compared the frequencies of the first letter of the CDC Number of the Master List to the frequencies of the first letter of the CDC Number of the final data set. Using the Pearson Chi2 list, I found that the final data set was highly correlated ($p = 0.00$) to the Master List based on the frequencies of the first letter of the CDC Number.

After reading the parole hearing transcripts and recording the data into the matrix, I coded the rest of the data and input it into the Excel spreadsheet. Missing data was assigned a 99 for all binary and categorical variables although some of those missing cases were later assigned predicted values or were coded as “.”. Coding errors were corrected in Stata once I uploaded the spreadsheet by going through each variable individually and looking for possible coding errors. Each variable was checked three times.

APPENDIX B.

California Public Record Act (“CPRA”) Correspondence

CPRA Request Jan. 13, 2011

Dear Mr. Davis,

I am a student at UCLA School of Law conducting a study supervised by Professor Joseph Doherty and Professor Sharon Dolovich.

Pursuant to my rights under the California Public Records Act, Government Code Section 6250 et seq., I ask to obtain a copy of the following which I understand to be held by your agency.

I would like to obtain Board of Parole Hearings transcripts from the period 2007-2010. Parole hearing transcripts are transcribed approximately 30 days after the completion of the hearing. Therefore I would like to limit my request to those parole hearings conducted before Jan. 1, 2011. I understand that the parole hearing transcripts may be available in electronic form according to the CDCR website. If that is the case I would much prefer to receive these transcripts electronically.

I am aware that a similar request has been granted for the Lifers Project, run by the Stanford Criminal Justice Center at Stanford Law School. They submitted their request with the California Department of Corrections and Rehabilitation in order to obtain a random sample of 750 Board of Parole Hearing transcripts from 2007-2010.

I ask for a determination of this request within 10 days of your receipt of it, and an even prompter reply if you can make that determination without having to review the records in question.

If you determine that any or all of the information qualifies for an exemption for disclosure, I ask you to not whether, as is normally the case under the Act, the exemption is discretionary, and if so whether it is necessary in this case to exercise your discretion to withhold the information.

If you determine that some but not all of the information is exempt from disclosure and that you intend to withhold it, I ask that you redact it for the time being and make the rest available as requested.

In any event, please provide a signed notification citing the legal authorities on which you rely if you determine that any or all of the information is exempt and will not be disclosed.

Cost: It is my understanding that all of the records I have requested (parole hearing transcripts) are available electronically. Please provide me with an estimate of the direct cost of producing copies of these records in electronic format. (*See* California Public Records Act, Government Code Section 6253.9 “the cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.”) For a point of reference, the California Parks Department charges \$1 per CD to copy electronically available public records. I am aware that

your regulations specify a cost of 12 cent per page for copying (C.C.R. Title 15, Section 3260.1). As this regulation is in conflict with the plain language of the statute with regard to electronically available records, I do not believe it applies to this records request.

I am prepared to select a subset of 600 transcripts from the time period I identified above, if obtaining all parole hearing transcripts from January 1, 2007 to December 10, 2010 would be too expensive.

If I can provide any clarification that will help expedite your attention to my request, please contact me at 503-502-0859 or by email at richardson2012@lawnet.ucla.edu.

Thank you in advance for your cooperation and prompt assistance.

CPRA Request Feb. 17, 2011

Dear Mr. McDaniel,

I would like to come up to the building in which the parole hearing transcripts are held next Thursday and Friday (Feb. 24- Feb. 25) to inspect a smaller selection of the transcripts in person (Government Code Section 6250 et seq.). Attached to this email is an Excel spreadsheet with the 100 parole hearing transcripts that I would like to inspect over the two days. Please let me know if you can accommodate my request.

I was also wondering if you could tell me where and how the parole hearing transcripts are stored.

Thank you so much for your time and assistance.

CPRA Request Mar. 3, 2011

Dear Mr. McDaniel,

I would like return to Sacramento from Monday March 21 to Friday March 25 to inspect another selection of the transcripts in person (Government Code Section 6250 et seq.). Attached to this email are the 250 parole hearing transcripts that I would like to inspect over the five days. Please let me know if you can accommodate my request.

APPENDIX C.

Table 1. Matrix for Parole Data Collection

NAME:	CDC#:	DATE:	RACE:
HEINOUS INIT. CRIME:	INMATE PRES?:	MARSY APPL.?:	AGE:
PREVIOUS RECORD VIOLENCE:	INMATE ATTRNY?:	MEP:	GANG:
UNSTABLE SOCIAL HISTORY:	MARSY'S LAW OBJ?:	SENTENCE:	# VIC:
SADISTIC SEXUAL OFFENSE:	DA PRES?:	SENTENCE COMM:	VIC 1 SEX:
SERIOUS MENTAL PROBLEMS:	DA OBJ?:	CRIME:	VIC 1 RACE:
INSTITUTIONAL MISBEHAVIOR:	POLICE OBJ?:	WEAPON:	VIC 1 AGE:
NO JUVIE RECORD:	SUB HEAR?:	SEXUAL COMP?:	VIC 2 SEX:
STABLE SOCIAL HISTORY:	PAROLE:	CLAIMS INNOC?:	VIC 2 RACE:
UNDER STRESS WHEN CRIME COMM:	NEXT HEAR?:	AGE AT CRIME?:	VIC 2 AGE:
BATTERED WIVES SYNDROME:	ILLEGAL ALIEN?:	#115:	VIC NK:?
AGE:	EDUCATION:	#128A:	# NK?
FUTURE PLANS:	VOCATION:	GAF:	NK SPOKE?:
NO HISTORY VIOLENT CRIME:	SELF HELP:	PCLRPSYCH:	# OPP LETTERS:
GOOD INSTITUTIONAL BEHAVIOR:	SUPPORT LETTERS:	HCR20:	VIC REP?
DEMONSTRATED REMORSE/INSIGHT:	NA/AA:	RISK FV:	VR SPOKE?:
	CUST LEVEL:	CLASS SCORE:	

Table 2. Filled in Matrix for Parole Data Collection

NAME: [REDACTED]	CDC#: [REDACTED]	DATE: 4/22/09	RACE:
HEINOUS INIT. CRIME: ✓	INMATE PRES?: ✓	MARSY APPL.?:	AGE:
PREVIOUS RECORD VIOLENCE:	INMATE ATTRNY?: ✓	MEP: 4/7/10	GANG: X
UNSTABLE SOCIAL HISTORY: ✓	MARSY'S LAW OBJ?:	SENTENCE: 15+	# VIC: 1
SADISTIC SEXUAL OFFENSE:	DA PRES?: ✓	SENTENCE COMM: 99	VIC 1 SEX: F
SERIOUS MENTAL PROBLEMS:	DA OBJ?: ✓	CRIME: Murder 2	VIC 1 RACE:
INSTITUTIONAL MISBEHAVIOR:	POLICE OBJ?:	WEAPON:	VIC 1 AGE:
NO JUVIE RECORD:	SUB HEAR?: Initial	SEXUAL COMP?:	VIC 2 SEX:
STABLE SOCIAL HISTORY:	PAROLE: Not Granted	CLAIMS INNOC?:	VIC 2 RACE:
UNDER STRESS WHEN CRIME COMM:	NEXT HEAR?: 7	AGE AT CRIME?:	VIC 2 AGE:
BATTERED WIVES SYNDROME:	ILLEGAL ALIEN?:	#115: 0	VIC NK: ? ✓
AGE:	EDUCATION: Assoc.	#128A: 0	# NK? 14
FUTURE PLANS:	VOCATION: ✓	GAF:	NK SPOKE?: ✓
NO HISTORY VIOLENT CRIME:	SELF HELP: ✓	PCLRPSYCH: low	# OPP LETTERS:
GOOD INSTITUTIONAL BEHAVIOR: ✓	SUPPORT LETTERS: ✓	HCR20: low	VIC REP?
DEMONSTRATED REMORSE/INSIGHT: X	NA/AA: X	RISK FV: med/high	VR SPOKE?:
	CUST LEVEL:	CLASS SCORE:	

NOTES:

Table 3: Variables Relating to the Features of the Parole Hearing

Descriptive Name	Variable Name	Short Description
Next Hearing	nexthearing	Dependent Variable- Years set by the Parole Board Until the Next Hearing
Victim Participation	nkpresletter	Dependent + Independent Variable- Categorical variable representing victim participation based on presence of victim (or victim's next of kin) and opposition letters
Marsy's Law Applied	marsyslawapp	Independent Variable- Binary variable representing whether Marsy's Law was applied to the parole hearing
Suitability Score	suitpercent	Independent Variable- Cardinal variable representing the <i>suitability score</i> of the inmate
Unsuitability Score	unsuitpercent	Independent Variable- Cardinal variable representing the <i>unsuitability score</i> of the inmate
Next of Kin Present	nkpresent	Independent Variable- Binary variable representing whether the victim, or victim's next of kin, was present at the parole hearing
Opposition Letters	oppleters	Independent Variable- Binary variable representing whether opposition letters were sent
Subsequent Hearing	subhear	Control Variable- Dummy variable whether the parole hearing was a subsequent hearing
Length of Incarceration	timebetween	Control Variable- Time between sentencing and the parole hearing
Inmate Attorney Present	inmateatt	Control Variable-Dummy variable whether the inmate had a lawyer present
Marsy's Law Objection	attobjml	Control Variable- Binary variable whether the inmate's attorney objected to Marsy's Law at the parole hearing
State Opposition	opposition	Control Variable- Matrix variable representing the level of state opposition to parole
Programmatic Self-Help	progselphelp	Control Variable- matrix variable representing the level of programmatic rehabilitation the inmate underwent while incarcerated
Psychological Evaluation Score	psychscore	Control Variable- Average of scores from three psychological exams
Crime Type	crimetype	Control Variable- Categorical variable expressing what the type of crime that resulted in the life sentence

Table 4. Years Set Until Next Parole Hearing Before and After Marsy's Law

	<i>Mean</i>	<i>Median</i>	<i>Std. Err.</i>	<i>Largest</i>	<i>Smallest</i>	<i>N</i>
Years Set Until Next Parole Hearing	3.88	3	.23	15	0	121
Pre-Marsy's Law	2.55	2	.21	5	0	56
Post-Marsy's Law	5.03	5	.34	15	0	65
Difference	-2.48	3	.41			
p =	.00					
t =	-5.97					

Table 5. Years Set Until Next Parole Hearing More by Whether Victim's Next of Kin Present

	<i>Mean</i>	<i>Median</i>	<i>Std. Err.</i>	<i>Largest</i>	<i>Smallest</i>	<i>N</i>
Years Set Until Next Parole Hearing	3.88	3	.23	15	0	121
Victim/Next of Kin Absent	3.64	3	.25	10	0	94
Victim/Next of Kin Present	4.74	4	.58	15	1	27
Difference	-1.10	1	.56			
p =	.05					
t =	-1.98					

Table 6. Years Set Until Next Parole Hearing More by Suitability Score

	<i>Mean</i>	<i>Median</i>	<i>Std. Err.</i>	<i>Largest</i>	<i>Smallest</i>	<i>N</i>
Years Set Until Next Parole Hearing	3.88	3	.23	15	0	121
Suitability Score > 0	3.06	3	.42	10	0	33
Suitability Score < or 0	4.19	3	.28	15	1	88
Difference	1.13	0	.52			
p =	.03					
t =	2.18					

Table 7. Years Set Until Next Parole Hearing More by Unsuitability Score

	<i>Mean</i>	<i>Median</i>	<i>Std. Err.</i>	<i>Largest</i>	<i>Smallest</i>	<i>N</i>
Years Set Until Next Parole Hearing	3.88	3	.23	15	0	121
Unsuitability Score > 0	4.47	3	.32	15	0	77
Unsuitability Score < or 0	2.86	3	.28	7	0	44
Difference	-1.60	0	.47			
p =	.00					
t =	-3.43					

Table 8. Marsy's Law's Impact on Parole Board Decisions

	I	II	III
Marsy's Law Applied		2.20*** (0.39)	2.03*** (0.38)
Suitability Score	-2.35** (0.92)	-2.35*** (0.82)	-1.55* (0.82)
Unsuitability Score	3.65*** (0.97)	2.95*** (0.87)	1.88** (0.84)
Next of Kin Present	1.11** (0.56)	0.95* (0.49)	0.42 (0.46)
Opposition Letters	0.39 (0.65)	-0.04 (0.58)	-0.04 (0.53)
Length of Incarceration			-0.04 (0.04)
Subsequent Hearing			-2.01*** (0.45)
Inmate Attorney Present			-0.69 (0.64)
Marsy's Law Objection			0.51 (0.53)
State Opposition			-0.04 (0.31)
Programmatic Self-Help			-0.35 (0.22)
Psychological Evaluation Score			0.07 (0.16)
Constant	2.81*** (0.30)	1.85*** (0.32)	5.78*** (1.46)
<i>N</i>	121	121	121
Adjusted R ²	0.18	0.35	0.52

Standard errors in parentheses
 *** p<0.01, ** p<0.05, * p<0.1

Next Hearing – the dependent variable in this regression – represents the amount of time set between parole hearings by the Parole Board. I used ordinary least squares regression in columns I and II and multiple imputation in column III to compensate for 16 missing cases from *Psychological Evaluation Score*, 2 missing cases from *Programmatic Self-Help*, and 1 missing case from *Length of Incarceration*. *Crime Type* was included in the multiple imputation as a fixed effect but is not reported as it was not significant.

Table 9. Pre- and post-Marsy’s Law Estimates of Time to Next Hearing and Victim Participation using Matched Samples (Propensity Score Matching)

		Pre-Marsy’s Law	Post-Marsy’s Law	Difference	S.E.	T-stat
Time to Next Hearing	Unmatched	2.46	5.02	2.47	.47	5.30
	ATT	3.05	4.71	1.66	.46	3.56
Next of Kin Present	Unmatched	.18	.29	.11	.09	1.24
	ATT	.27	.31	.04	.11	.39
Opposition Letters	Unmatched	.11	.22	.11	.08	1.41
	ATT	.06	.21	.15	.08	1.81

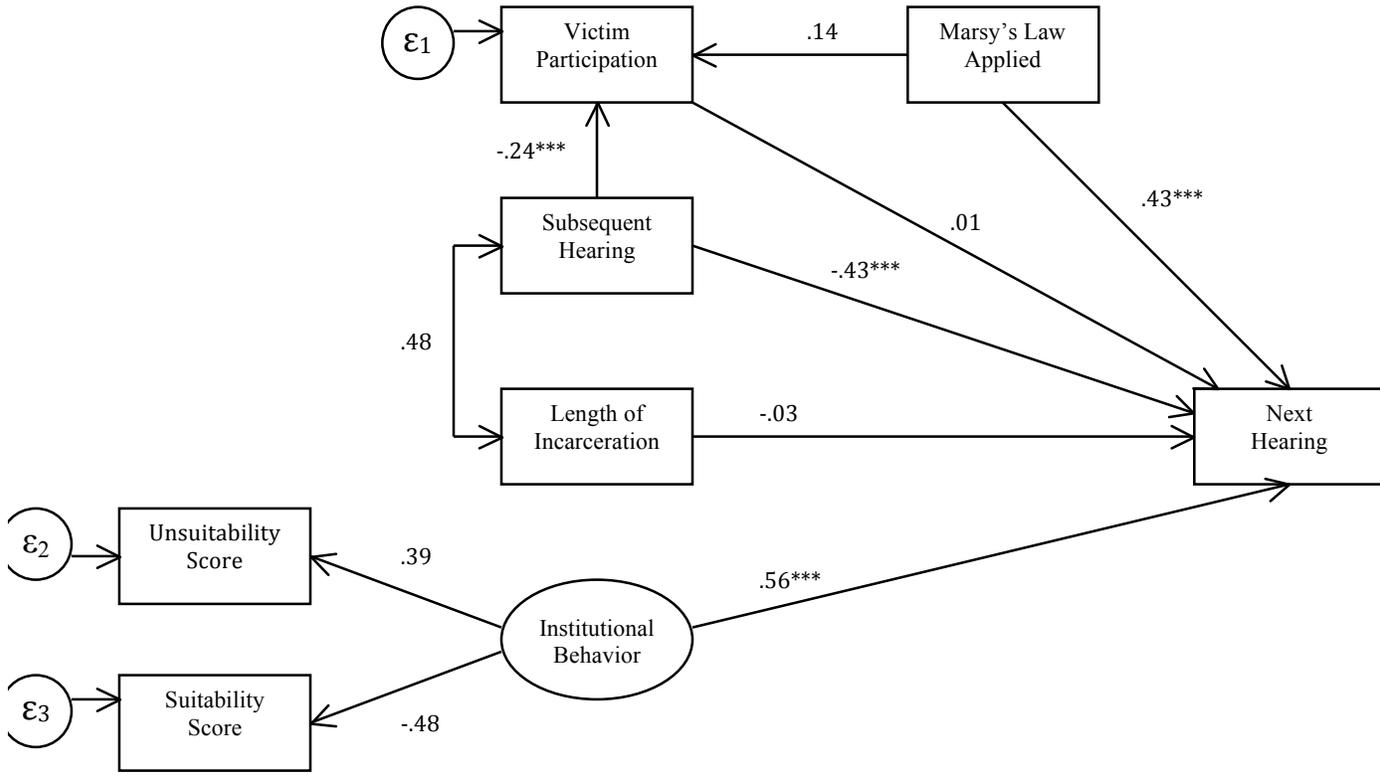
Table 10. Marsy’s Law’s Impact on Victim Participation

	I
Marsy’s Law Applied	0.51** (0.25)
Suitability Score	-0.05 (0.50)
Unsuitability Score	-0.91 (0.57)
Subsequent Hearing	-0.64** (0.32)
Length of Incarceration	-0.02 (0.03)
State Opposition	0.27 (0.23)
Cut1	-0.32 (0.69)
Cut2	0.46 (0.70)
<i>N</i>	127
Pseudo R ²	.09

Standard errors in parentheses
 *** p<0.01, ** p<0.05, * p<0.1

Victim Participation – the dependent variable in this regression – represents the level of victim participation by the victim or victim’s family. This variable was coded as “0” if there was no victim participation, “1” if the victim (or victim’s next of kin) were present or opposition letters were sent, and “2” if both the victim (or victim’s next of kin) were present and opposition letters were sent. I used an ordered probit regression.

Figure 1. Path Analysis Showing Direct and Indirect Effects



*** p<0.01, ** p<0.05, * p<0.1

Table 11. Path Analysis Results

	Victim Participation	Next Hearing
Victim Participation		.01 (.07)
Subsequent Hearing	-.24*** (.09)	-.43*** (.07)
Length of Incarceration		-.03 (.06)
Marsy's Law Applied	.14 (.09)	.42*** (.14)
Institutional Behavior		.56*** (.24)

LR test of model vs. saturated: $\chi^2(9) = 9.37$, Prob > $\chi^2 = 0.4037$
 Standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1

Table 12. Institutional Behavior Variable

Observed Variable	Latent Construct	β	B	SE
Unsuitability Score	Institutional Behavior	.39***	.06**	.03
Suitability Score	Institutional Behavior	-.48***	-.08**	.04

*** p<0.01, ** p<0.05, * p<0.1

Table 13. Path Analysis: Standardized and Unstandardized Effects

	Unstandardized Effects			Standardized Effects
	Direct	Indirect	Total	Total
Victim Participation	.04		.04	.01
Subsequent Hearing	-2.28***	-.01	-2.30***	-.43***
Length of Incarceration	-.01		-.01	-.03
Marsy's Law Applied	2.16	.01	2.17***	.43***
Institutional Behavior	1		1	.56***

*** p<0.01, ** p<0.05, * p<0.1