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## An Uncertain Participant: Victim Input and the Black Box of Discretionary Parole Release

Noah Epstein  
*Fordham University School of Law*

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## NOTES

### AN UNCERTAIN PARTICIPANT: VICTIM INPUT AND THE BLACK BOX OF DISCRETIONARY PAROLE RELEASE

*Noah Epstein\**

*Little is understood about the parole release process, as state parole boards predominately operate with incredible discretion and keep their deliberations and rationales hidden from public view. Even less is understood about the intersection of the inscrutable parole release decision-making process and victim rights. As the victim rights movement mobilized in the 1970s, victims, instead of remaining passive witnesses, came to wield significant influence over the release decision process. Today, victim participation in parole proceedings is increasing as most parole boards proclaim how important victims' voices are and, in turn, actively incorporate victim input into their release calculus.*

*Yet, it is not entirely clear what role, if any, victims should have in the release process because it is not entirely clear what purposes parole release should serve more generally. Rather than resolving these pressing questions that are at the heart of the release decision, the current system gives individual parole board members a great degree of discretion when it comes to how they approach victim input and the role it should serve. This approach has resulted in a release process that treats victim input in a troubling and inconsistent manner, which is unfair to inmates, victims, and parole board members alike.*

*To make sense of this situation, this Note identifies four analytical frameworks for understanding discretionary parole release, which reveal board members' options for approaching victim input. Ultimately, this Note proposes that parole boards should approach the release decision as an evaluation of both the inmate's rehabilitation and the extent to which sentencing's retributive and deterrent goals have been met. In this vein, victim input should only influence the release decision if it provides information, not emotion, that the inmate is not rehabilitated or that the*

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\* J.D. Candidate, 2022, Fordham University School of Law; B.A., 2018, Colgate University. I extend my sincere gratitude to Professor Bruce A. Green not only for his superb guidance and insight but also for his unwavering support during such a turbulent time. I also thank Eric Lim for his excellent editorial work and the editors and staff of the *Fordham Law Review* for their invaluable assistance. Finally, I thank my family and friends for, well, everything.

*judge's minimum sentence did not accurately reflect the impact of the crime and that retribution or deterrence has not been met. In recognition of the implications of such an approach, this Note proposes procedural changes to the release decision and structural changes to parole boards. These recommended reforms are animated by principles of equity, transparency, and procedural justice. Applying this Note's approach to victim input in the parole process and implementing the corresponding procedural changes can hopefully create a system that is fairer for inmates, minimizes risks of secondary harms to victims, and protects board members from improper external pressures.*

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## INTRODUCTION

What role should victims play in the parole release process? To what degree is their input relevant to the purposes of discretionary parole release as varied as those purposes may be?

These pressing questions came to the fore on March 13, 2018, when the New York State Board of Parole (“the Board”) controversially granted parole for Herman Bell, reopening old and deep wounds for some victims and finally achieving closure for others.<sup>1</sup> In 1979, Bell, a member of the Black Liberation Army at the time of the crime,<sup>2</sup> was sentenced to twenty-five years to life imprisonment for the murder of two police officers, Joseph A. Piagentini and Waverly M. Jones, in Harlem, New York, on May 21, 1971.<sup>3</sup> In 2018, in preparation for Bell’s eighth and final parole hearing, Diane Piagentini, the widow of Officer Piagentini, submitted her final written victim impact statement,<sup>4</sup> which the Board was required to consider under New York law.<sup>5</sup> Arguing against Bell’s release, Diane Piagentini detailed the devastating emotional toll that the crime inflicted on her and her two daughters, as well as the resulting post-traumatic stress disorder she suffered.<sup>6</sup>

Conversely, the children of Officer Jones—Waverly Jones Jr. and Wanda Jones—had advocated for Bell’s release.<sup>7</sup> Their position was made clear in a separate victim impact statement submitted in 2018, likely penned by Waverly Jones Jr.<sup>8</sup> The letter, as cited by the Board in the release decision, stated, “The simple answer is [Bell’s release] would bring joy and peace as we have already forgiven [him] publicly . . . . [T]o deny him parole again

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1. See Al Baker, *Man Who Killed 2 Officers in ‘71 Is Released From Prison*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/nyregion/herman-bell-parole.html> [<https://perma.cc/59EJ-ZNU6>].

2. The Black Liberation Army was an underground offshoot of the Black Panther Party and was known for using radical and violent methods to achieve its political goals. For further reading on the Black Liberation Army, see William Rosenau, “*Our Backs Are Against the Wall*”: *The Black Liberation Army and Domestic Terrorism in 1970s America*, 36 STUD. CONFLICT & TERRORISM 176 (2013).

3. See Baker, *supra* note 1.

4. See *Piagentini v. N.Y. Bd. of Parole*, 176 A.D.3d 138, 139–40 (N.Y. App. Div. 2019).

5. See N.Y. EXEC. LAW § 259-i(2)(c)(A)(v) (McKinney 2021).

6. See *Piagentini*, 176 A.D.3d at 139–40 (discussing details articulated in Diane Piagentini’s statement to the parole board), *appeal denied*, 35 N.Y.3d 906 (2020).

7. See Austin Fenner & Brian Harmon, *Slain Cop’s Kin Urge Release of One Killer*, N.Y. DAILY NEWS (Feb. 4, 2004), <https://www.nydailynews.com/archives/news/slain-kin-urge-release-killer-article-1.657766> [<https://perma.cc/SPA7-J6FV>]. However, not all of Officer Jones’s family members advocated for the release of those involved in his death. See Daniel A. Gross, *The Eleventh Parole Hearing of Jalil Abdul Muntaqim*, NEW YORKER (Jan. 25, 2019), <https://www.newyorker.com/news/dispatch/the-eleventh-parole-hearing-of-jalil-abdul-muntaqim> [<https://perma.cc/C8NG-KCSQ>].

8. Although the victim impact statement was anonymous, every indication suggests that it was submitted by Waverly Jones Jr. See Al Baker, *Nearly 5 Decades Later, Man Who Killed New York Officers Wins Parole*, N.Y. TIMES (Mar. 14, 2018), <https://www.nytimes.com/2018/03/14/nyregion/herman-bell-nypd-parole.html> [<https://perma.cc/5QRP-8HWQ>]; *Piagentini*, 176 A.D.3d at 148 (Egan, J., dissenting).

would cause us pain as we are reminded of the painful episode each time he appears before the board.”<sup>9</sup>

Ultimately, the Board voted two-to-one to release Bell over Diane Piagentini’s objections,<sup>10</sup> a deviation from the common trend.<sup>11</sup> The Board cited Bell’s remorse, strong support network, and exemplary disciplinary record while incarcerated in support of its decision.<sup>12</sup> The Board also directly cited the victim letter and described it as a noteworthy factor in its release decision but did not directly address Diane Piagentini’s victim impact statement.<sup>13</sup>

The blowback to the Board’s decision was swift, as opponents decried the decision as both disgraceful to victims<sup>14</sup> and illegal because it did not adequately assess Diane Piagentini’s victim statement.<sup>15</sup> Some called for the removal of the Board members who voted to release Bell.<sup>16</sup> New York City Mayor Bill de Blasio, in a letter to the Board, urged the Board to rescind its decision arguing Bell’s release would cause too much anguish for the victims’ families and questioned whether those who murder officers should ever be released on parole.<sup>17</sup> As recently as September 2020, in response to Bell’s release and other controversial Board decisions,<sup>18</sup> some New York State lawmakers have proposed legislation that would permit the removal of Board members upon a majority vote of the legislature, arguing such political

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9. See Baker, *supra* note 8.

10. See *id.*

11. See *infra* Part I.D.2 (describing multiple studies, which reveal that victim participation is highly correlated with release denials).

12. See Baker, *supra* note 1; see also Jen Marlowe, *After Nearly 45 Years of Incarceration, Herman Bell Wins Parole*, COLORLINES (Mar. 22, 2018), <https://www.colorlines.com/articles/after-nearly-45-years-incarceration-herman-bell-wins-parole> [<https://perma.cc/4V33-A4UV>].

13. See *Piagentini*, 176 A.D.3d at 148 (Egan, J., dissenting); see also Baker, *supra* note 8.

14. See Tina Moore et al., *Law Enforcement Rages over Cop Killer’s Parole*, N.Y. POST (Mar. 14, 2018, 2:09 PM), <https://nypost.com/2018/03/14/law-enforcement-rages-over-cop-killers-parole/> [<https://perma.cc/5WFV-6ZCH>]; see also Press Release, New York City Police Dep’t, *The Truth About Herman Bell* (Apr. 20, 2018), <https://www1.nyc.gov/site/nypd/news/f0420/the-truth-herman-bell#0> [<https://perma.cc/5XPP-VH92>] (“The Parole Board has indeed sent a message in releasing him, though the families of Joseph Piagentini [and] Waverly Jones . . . may not agree that it is positive or hopeful.”).

15. See *Piagentini*, 176 A.D.3d at 148 (Egan, J., dissenting).

16. See *Families, PBA Outraged over Parole for Cop Killer Herman Bell*, ABC7 N.Y. (Mar. 15, 2018), <https://abc7ny.com/parole-board-herman-bell-killing-nypd-pba-patrolmen-benevolent-association/3220591/> [<https://perma.cc/NMG6-Z7YS>].

17. Letter from Bill de Blasio, Mayor of the City of New York, to Tina M. Stanford, Chairwoman of the New York State Bd. of Parole (Mar. 23, 2018), [https://www1.nyc.gov/assets/nypd/downloads/pdf/public\\_information/parole-board-letter-bell.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/parole-board-letter-bell.pdf) [<https://perma.cc/P479-86S4>].

18. See, e.g., Dorian Geiger, *Killer and Rapist Who Admitted Brutal Double Murder Was Motivated by Hatred of Women Controversially Paroled in NY*, OXYGEN (Sept. 3, 2020, 2:45 PM), <https://www.oxygen.com/crime-news/sam-ayala-convicted-of-double-murder-and-rape-of-2-women-in-1977-paroled> [<https://perma.cc/C8UV-UBS4>] (noting that one of the victim’s children described the release as a mockery and argued that the release victimized them again).

accountability is necessary to ensure the Board adequately considers victims' wishes in its deliberations.<sup>19</sup>

While victim input is only one of many factors that the typical parole board<sup>20</sup> considers,<sup>21</sup> the case of Herman Bell highlights just how central a role victims occupy in the parole process both in the public imagination and in practice.<sup>22</sup> More fundamentally, given the Board's apparent reliance on one victim's statement over another, and the intense public blowback as a result, Bell's case reveals that it is not clear how release decisions should be made and what the proper role for victims should be in that process. Further, Bell's case is not an outlier, as recent similar cases have occurred that prompt the same questions. On August 27, 2021, a two-member panel of California parole board members recommended that Sirhan B. Sirhan be released on parole after appearing before board members sixteen times and spending over fifty years in jail for the assassination of Senator Robert F. Kennedy.<sup>23</sup> As in Herman Bell's case, there were victims who advocated for<sup>24</sup> and against release.<sup>25</sup> While the panel recommendation could still be reviewed by the full Board as well as reversed by California Governor Gavin Newsom,<sup>26</sup> it again showcases the centrality of victims in the process, at least from the public's perspective, and begs the question of how victims ought to fit into that process. Rather than resolving these important questions, the current system across many states gives parole boards great discretion when it comes

19. Bernadette Hogan, *GOP State Lawmakers Introduce Bill to Strengthen Parole Board Oversight*, N.Y. POST (Sept. 29, 2020, 6:01 AM), <https://nypost.com/2020/09/29/state-gop-introduces-bill-to-strengthen-parole-board-oversight/> [<https://perma.cc/XT2Q-BS6F>].

20. For the sake of uniformity, this Note refers to the institution in charge of discretionary parole release as "boards" throughout, even though some states refer to their boards by different names.

21. See EBONY L. RUHLAND ET AL., ROBYN INST. OF CRIM. L. & CRIM. JUST., *THE CONTINUING LEVERAGE OF RELEASING AUTHORITIES: FINDINGS FROM A NATIONAL SURVEY 26* (2017), [https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/final\\_national\\_parole\\_survey\\_2017.pdf](https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/final_national_parole_survey_2017.pdf) [<https://perma.cc/UP5X-M76E>] (reporting that states considered victim input but also consider up to eighteen other factors).

22. For further discussion on just how central a role victims can play in the parole process, see *infra* Part I.D.2.

23. See Nicholas Bogel-Burroughs, *Parole Board Recommends Release of Sirhan Sirhan, Robert F. Kennedy's Assassin*, N.Y. TIMES (Sept. 1, 2021), <https://www.nytimes.com/2021/08/27/us/sirhan-sirhan-parole-rfk.html> [<https://perma.cc/BA6H-EVBU>].

24. See *id.* (detailing that one of Mr. Kennedy's sons, Douglas Kennedy, attended the hearing, pushed for release, and stated "I do have some love for you" while, another son, Robert F. Kennedy Jr., sent the board a letter arguing for Mr. Sirhan's release).

25. See Rory Kennedy, Opinion, *Robert Kennedy Was My Dad. His Assassin Doesn't Deserve Parole.*, N.Y. TIMES (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/opinion/sirhan-sirhan-parole-kennedy.html> [<https://perma.cc/UNX7-A7HD>]; see also Ray Sanchez & Cheri Mossburg, *Board Recommends Parole For RFK Assassin Sirhan Sirhan on 16th Attempt*, CNN (Aug. 28, 2021, 1:24 AM), <https://www.cnn.com/2021/08/27/us/sirhan-sirhan-parole-rfk-assassination/index.html> [<https://perma.cc/8BJV-URKS>]. Six of Kennedy's children issued a statement, which read, in part: "Our father's death is a very difficult matter for us to discuss publicly and for the past many decades we have declined to engage directly in the parole process . . . . We adamantly oppose the parole and release of Sirhan Sirhan and are shocked by a ruling that we believe ignores the standards for parole of a confessed, first-degree murderer in the state of California." *Id.*

26. See Bogel-Burroughs, *supra* note 23.

to how they approach victim input and consider the purposes it should serve.<sup>27</sup> This has created a system that produces inconsistent and troubling results, which is unfair to inmates, victims, and parole board members alike.<sup>28</sup>

This Note offers a proposal for the way victim input should be evaluated in the parole release context. It argues that the release decision should be approached as a quasi-judicial act concerned only with the rehabilitation of the inmate and whether the retributive and deterrent principles of sentencing have been met.<sup>29</sup> It then concludes that victim input should only influence the release decision if it provides information, other than emotion, that demonstrates either that the inmate is not rehabilitated, or that the sentencing judge's minimum sentence did not accurately reflect the impact of the crime, and thus the needs of retribution and deterrence have not been met.<sup>30</sup>

To compensate for the implications of this proposal, this Note: (1) proposes that states clarify and codify the proper role of victim input in parole release decisions and (2) urges state legislatures to implement institutional changes to their parole boards and procedural changes to release. Such reforms are necessary to both prevent parole boards from being overly retributive- or deterrence-focused, which can lead to a crush of denials, and to better protect victims from secondary harms.

Part I of this Note examines the function and history of discretionary parole release in the United States and the way it has intersected with victim rights to demonstrate the current influence of victim participation on parole release. Part II explores the ambiguous purpose that victim input serves in parole release decision-making and the way it results in inconsistent treatment of victim input. Drawing on theory and practice, it describes four analytical frameworks for understanding how parole boards make release decisions and how each approach treats victim input differently. Part III posits that release decisions should be approached as a form of resentencing that is concerned only with the inmate's rehabilitation and the goals of sentencing. Thus, this Note concludes that victim input should only be relevant to the release decision if it speaks to these two elements. Furthermore, Part III proposes procedural and institutional reforms necessary to implement this approach.

#### I. VICTIMS IN THE PAROLE HEARING ROOM

This part provides a brief history of discretionary parole release in the United States, how it functions today, and how it has intersected with the victim rights movement. In addition, it discusses the level of influence that victim input has had on the release decision in practice.

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27. See *infra* notes 53–63 and accompanying text.

28. See *infra* Part I.D.2.

29. See *infra* Part III.

30. See *infra* Part III.A.

A. *Discretionary Parole Release in the United States: A Turbulent History*

Parole traces its roots in the United States back to 1876, when it was first implemented at the New York State Reformatory for Juveniles in Elmira (“Elmira”).<sup>31</sup> In response to the old penological system’s failure to achieve rehabilitation, Elmira instituted indeterminate sentencing, in which an inmate could “work out his own salvation” and then be granted conditional supervised release if deemed fit.<sup>32</sup> This innovation, commonly known as parole, aimed to foster and achieve rehabilitation.<sup>33</sup> Further, it incentivized good behavior among the prison population,<sup>34</sup> reduced overcrowding in prisons,<sup>35</sup> and reduced prison expenses dramatically.<sup>36</sup> In fact, the Supreme Court in *Morrissey v. Brewer*<sup>37</sup> stated that the “purpose [of parole] is to help individuals reintegrate into society as constructive individuals as soon as they are able . . . . It also serves to alleviate the costs to society of keeping an individual in prison.”<sup>38</sup>

The Elmira approach proved popular,<sup>39</sup> and by 1922, practically every state implemented an indeterminate sentencing regime whereby a judge would sentence an individual to a minimum and maximum term of imprisonment and then the parole board would assess when to grant that individual supervised parole release within that range.<sup>40</sup> In this sense, the judiciary and parole board worked together to determine a criminal defendant’s true period of incarceration.

Then, between the 1970s and the 1990s, states moved toward greater determinacy in sentencing, in which a judge determined very closely the exact release date through sentencing, and the parole board’s release authority was heavily curtailed.<sup>41</sup> This was, in part, due to a rising “tough on crime” movement that viewed as suspect rehabilitation as an underlying principle of parole.<sup>42</sup> Additionally, there was concern among the public and

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31. See NEIL P. COHEN & JAMES J. GOBERT, *THE LAW OF PROBATION AND PAROLE* 15 (2d ed. 1983).

32. See Alexander W. Pisciotta, *Scientific Reform: The “New Penology” at Elmira, 1876–1900*, 29 *CRIME & DELINQUENCY* 613, 616 (1983).

33. See Daniel S. Medwed, *The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 *IOWA L. REV.* 491, 499 (2008).

34. See *id.* at 499–500.

35. See Dashka Slater, *Can You Talk Your Way Out of a Life Sentence*, *N.Y. TIMES MAG.* (Jan. 1, 2020), <https://www.nytimes.com/2020/01/01/magazine/prison-parole-california.html> [<https://perma.cc/7W4Z-JHV7>].

36. See COHEN & GOBERT, *supra* note 31, at 20; see also Kevin R. Reitz, *Prison-Release Reform and American Decarceration*, 104 *MINN. L. REV.* 2741, 2751 (2020).

37. 408 U.S. 471 (1972).

38. *Id.* at 477.

39. *Id.* (discussing that, since 1912, parole “has become an integral part of the penological system”).

40. See Slater, *supra* note 35.

41. See RUHLAND ET AL., *supra* note 21, at 9.

42. See *id.* (detailing how the public’s desire for greater severity in sentencing and the difficulty of determining when one was rehabilitated led to decreased support for parole among legislators, scholars, and the public).



state legislatures over a lack of transparency in the parole release process.<sup>43</sup> Thus, states eschewed the rehabilitative ideals of indeterminacy and turned toward stiffer determined sentences.<sup>44</sup> This change in the tides led nearly twenty states to abolish their parole regimes or limit the scope of their boards' discretion and culminated with the federal government's abolition of federal parole with the passage of the Comprehensive Crime Control Act of 1984.<sup>45</sup>

Despite these setbacks, discretionary parole release has witnessed a renewed interest,<sup>46</sup> reassuming its place as a crucial element in the U.S. criminal justice system.<sup>47</sup> The majority of states today have indeterminate sentencing regimes, in which the state parole boards retain discretionary release authority,<sup>48</sup> and other states have boards that retain discretionary release authority over specific inmate populations.<sup>49</sup> In fact, at least 187,052 inmates were granted discretionary release in the United States in 2016.<sup>50</sup> Due to budget constraints and worsening prison overcrowding, many scholars and prison officials have concluded that discretionary parole is likely to grow in prominence, as it has proven to effectively reduce prison overcrowding.<sup>51</sup> Some prominent U.S. senators have even begun to explore reestablishing federal parole.<sup>52</sup>

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43. See *id.*; see also Jennifer Gonnerman, *Prepping for Parole*, NEW YORKER (Nov. 15, 2019), <https://www.newyorker.com/magazine/2019/12/02/prepping-for-parole> [<https://perma.cc/63XR-5GZV>] (discussing how an official state investigation in New York in the 1970s found that the “decisions of the parole board are fraught with the appearance of arbitrariness”).

44. See Medwed, *supra* note 33, at 501.

45. Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (codified as amended in scattered sections of 18 and 28 U.S.C.).

46. See Edward E. Rhine et al., *The Future of Parole Release*, 46 CRIME & JUST. 279, 280 (2017) (“At least one state, Mississippi, recently expanded its parole granting function . . . . Others are considering restoring parole release as part of a larger program to lower incarceration rates.”).

47. See Medwed, *supra* note 33, at 503 (stating that the population under parole supervision has tripled from 1980 to 2000).

48. See Reitz, *supra* note 36, at 2742; see also Edward E. Rhine et al., *Parole Boards Within Indeterminate and Determinate Sentencing Structures*, ROBINA INST. OF CRIM. L. & CRIM. JUST. (Apr. 3, 2018), <https://robinainstitute.umn.edu/news-views/parole-boards-within-indeterminate-and-determinate-sentencing-structures> [<https://perma.cc/FA59-K9VE>] (detailing that 34 states still have discretionary release authority within an indeterminate sentencing regime).

49. See Rhine et al., *supra* note 48 (explaining that these specific inmate populations are those serving life terms and/or those who committed crimes prior to the passage of the determinate sentencing system).

50. DANIELLE KAEBLE, U.S. DEP'T OF JUST., PROBATION AND PAROLE IN THE UNITED STATES, 2016, at 20 (2016).

51. See Medwed, *supra* note 33, at 504. *But see* Reitz, *supra* note 36, at 2745–50 (arguing that discretionary release is in part to blame for rising prison populations, but if managed better, discretionary release can in fact reduce prison overcrowding more effectively than other methods).

52. See Rory Fleming, *Lindsey Graham Remarks Offer Hope for Reinstatement of Federal Parole*, FILTER MAG. (Nov. 21, 2019), <https://filtermag.org/lindsey-graham-federal-parole/> [<https://perma.cc/4H9W-CE3X>].

Yet, criticisms of discretionary parole release remain because board decision-making processes are likened to an inscrutable “black box,”<sup>53</sup> as the process for the decision-making is not so transparent.<sup>54</sup> This is principally due to the U.S. Supreme Court’s decision in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*,<sup>55</sup> which held that inmates have no liberty interest in the parole release process and thus are afforded no due process rights therein unless the parole system of a given state specifically grants such an interest.<sup>56</sup> For example, a liberty interest is created when the state statute governing parole provides that a state shall release an inmate if certain factors are met.<sup>57</sup> However, even in cases in which such a liberty interest is established, the due process afforded is still minimal. In *Greenholtz*, the Court held that Nebraska’s parole system had created a liberty interest in release but that the board satisfied due process because it provided the inmate with an opportunity to be heard and a brief description, with no corroborating evidence, of how he fell short of qualifying for parole release.<sup>58</sup> In its ruling, the Court reversed the Eighth Circuit’s requirement that the Nebraska parole board give “a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole.”<sup>59</sup> Further, the Court held that states can be general in how they define the factors parole boards should consider in their release determinations to afford themselves wide latitude in making these “‘equity’ type judgment[s] that cannot always be articulated in traditional findings.”<sup>60</sup>

Therefore, in the current landscape, due process protections do not attach to the parole release process unless a state explicitly says they do, and parole boards are afforded broad discretion to determine how to weigh the multiple factors at their disposal.<sup>61</sup> Further, boards need not carefully explain the rationales underlying their decisions.<sup>62</sup> This has had the effect of discouraging inmate appeals of release decisions, as courts and administrative review are highly deferential to board decisions.<sup>63</sup> Thus, to better understand discretionary release, one must examine the decision-making process in practice.

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53. RUHLAND ET AL., *supra* note 21, at 10.

54. *See id.* at 9, 33 (highlighting that 41 percent of parole boards never even make public their rationale for a denial).

55. 442 U.S. 1 (1979).

56. *See id.* at 1, 7, 11–12.

57. *See id.* at 11–12.

58. *See id.* at 13, 16.

59. *See Inmates of Neb. Penal & Corr. Complex v. Greenholtz*, 576 F.2d 1274, 1285 (8th Cir. 1978), *rev’d*, 442 U.S. 1 (1979).

60. *Greenholtz*, 442 U.S. at 8, 13.

61. *See id.*

62. *See id.*; *see also* Rhine et al., *supra* note 46, at 315 n.44 (finding that when rationales are required for parole decisions, boilerplate explanations are more than sufficient to satisfy judicial review of release decisions).

63. *See, e.g.*, Rhine et al., *supra* note 46, at 315–16.

### B. *To Release or Not to Release?: How the Decision Is Made*

This section discusses the typical parole decision-making process and the structure of parole boards and examines the release factors considered at release hearings.

#### 1. The Members of the Board

While each state has developed its own parole system, the basic approach to parole release is rather uniform across the United States.<sup>64</sup> Most state parole boards are made up of fewer than a dozen members, with only approximately 350 board members nationwide.<sup>65</sup> The governor of a state typically appoints members to the board,<sup>66</sup> and board members can be removed as easily as they are appointed.<sup>67</sup> Accordingly, the board is principally politically accountable.<sup>68</sup>

On the whole, parole board members “enjoy low professional status, high job insecurity, and no insulation from media and political reprisals” when release decisions go wrong.<sup>69</sup> In fact, parole boards themselves cite political vulnerabilities, such as the threat of job loss or political retaliation for an unpopular decision and the pressure to limit risk, as the greatest problems they face.<sup>70</sup> Coinciding with this vulnerability, there are few required credentials for appointment to a parole board—educational, experience-based, or otherwise.<sup>71</sup> The eligibility requirements in the states that do have formal requirements are often vague and open-ended, and the expectations for knowledge or expertise are low.<sup>72</sup> Thus, a consistent source of criticism for boards nationwide is that board members lack the credentials needed for the complex job with which they are tasked.<sup>73</sup>

#### 2. The Parole Hearing Process

The parole hearing is an administrative hearing to determine whether an inmate should be released from prison to conditional supervision. Statutes that describe when an inmate is suitable for release are often written in general terms, which provide boards with significant discretion regarding

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64. See RUHLAND ET AL., *supra* note 21, at 10–14.

65. Reitz, *supra* note 36, at 2743.

66. See RUHLAND ET AL., *supra* note 21, at 18.

67. Rhine et al., *supra* note 46, at 286.

68. See Alejo Rodriguez, *The Obscure Legacy of Mass Incarceration: Parole Board Abuses of People Serving Parole Eligible Life Sentences*, 22 CUNY L. REV. F. 33, 52–53 (2019) (documenting former New York Governor George Pataki’s capricious political influence on parole decisions).

69. Reitz, *supra* note 36, at 2748–49.

70. See *id.* at 2750; see also KALEENA J. BURKES ET AL., ROBINA INST. OF CRIM. L. & CRIM. JUST., RELEASING AUTHORITY CHAIRS: A COMPARATIVE SNAPSHOT ACROSS THREE DECADES 20 (2017), [https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/parole\\_chairs\\_report\\_final.pdf](https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/parole_chairs_report_final.pdf) [<https://perma.cc/4BBA-DC2Y>].

71. See Rhine et al., *supra* note 46, at 286.

72. See *id.*

73. See *id.* at 286–88.

their assessment of individual cases.<sup>74</sup> Common principles underlying parole release are: (1) recidivism (i.e. whether there is a reasonable probability the inmate will violate the law again),<sup>75</sup> (2) whether release is compatible with the welfare of society, and (3) whether release would devalue the seriousness of the crime for which the inmate was convicted.<sup>76</sup>

Further, there is overwhelming consensus on the release criteria considered by states.<sup>77</sup> Those most commonly considered by parole boards are divided among: (1) static factors, which an inmate cannot change during their period of incarceration; (2) dynamic factors, which account for the inmate's behavior while in prison; and (3) opinion factors proffered by third parties.<sup>78</sup> The most important static factors are the nature of the underlying offense and the inmate's prior criminal record.<sup>79</sup> Dynamic factors include the inmate's prison program participation, disciplinary record while incarcerated, and importantly, the inmate's demeanor and testimony at the actual parole hearing.<sup>80</sup> As for opinion factors (in essence, input from interested third parties), victim input is the one factor that is nearly universally assessed.<sup>81</sup> Every state permits written victim impact statements and nearly every state allows victims to provide in-person testimony.<sup>82</sup> Further, beyond simply permitting this input, thirty-nine of forty responding parole boards stated in a survey that they do factor victim input into their release decision-making processes.<sup>83</sup>

All these factors are contemplated at the parole hearing. The hearing, in popular imagination and often in practice, consists of a panel of board members who make a release decision after a discussion with the inmate.<sup>84</sup>

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74. See, e.g., N.Y. EXEC. LAW § 259-i(2)(c)(A) (McKinney 2021) (“Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law.”).

75. See RUHLAND ET AL., *supra* note 21, at 23–27 (discussing risk assessment tools parole boards rely on, as well as board members' own views of risk of recidivism, as important factors).

76. Many systems prohibit release if release: (1) would substantially depreciate the seriousness of the crime, (2) is incompatible with the welfare of society, or (3) undermines respect for the law. See, e.g., N.Y. EXEC. LAW § 259-i(2)(c)(A) (McKinney 2021); see also CONN. GEN. STAT. § 54-125 (2021) (requiring that release not be incompatible with the welfare of society). In addition, some states task boards with weighing the sufficiency of time served or severity of the offense. See, e.g., GA. CODE ANN. § 42-9-40(a) (2021); TEX. GOV'T CODE § 508.144(a)(2) (2021).

77. See RUHLAND ET AL., *supra* note 21, at 25.

78. See *id.* at 26.

79. See *id.*

80. See *id.* at 25.

81. See Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 400, 404–05 (2014) (finding that of the 45 states that responded to a 2012 survey, all indicated they consider victim input).

82. See *id.* at 400–05; see also RUHLAND ET AL., *supra* note 21, at 28.

83. See RUHLAND ET AL., *supra* note 21, at 26 (finding that 97.5 percent of responding states consider victim input).

84. See *id.* at 32–34; see also Slater, *supra* note 35.

The reality, though not terribly far off, differs by state based on the twin constraints of time and resources.<sup>85</sup> The interview with the inmate is synonymous with the hearing in a majority of states, and most often board members themselves conduct the interview and make a release decision soon afterward.<sup>86</sup> These interviews are often in-person, but they can also be done via phone or video conference.<sup>87</sup> However, victims also play a role at these hearings. When there is a hearing in which both board members and the inmate are present, roughly half of states allow for victim testimony at the hearing.<sup>88</sup> Some allow victims to be present but not to speak, while others do not allow victims to be present at all.<sup>89</sup>

Typically, a panel of board members presides over the release hearing and can grant release only upon a majority vote.<sup>90</sup> Inmates have a limited ability to appeal or challenge the decision. Some states permit parole boards to deny release and force the inmate to serve the maximum sentence with no possibility of future release.<sup>91</sup> Most states allow for an appeal pursuant to either statute or administrative policy, but some states do not even entitle inmates to appeal a parole denial.<sup>92</sup> And, given *Greenholtz*, it is very difficult to overturn a parole denial, as courts are highly deferential to the parole boards' broad discretion.<sup>93</sup> However, even in the absence of meaningful appeal, most inmates do have recourse in that they are given periodic reconsideration for parole release, often once every two years,<sup>94</sup> unless the parole board has disqualified them from periodic review.<sup>95</sup>

Lastly, the depth of consideration a parole board dedicates to an individual inmate during the release process varies considerably. In Colorado, for example, studies have revealed what is termed a "conveyor belt" approach to parole decisions, in which cases are handled in mere minutes.<sup>96</sup> On the other hand, in California, the process can be incredibly long, personal, and

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85. See Beth Schwartzapfel, *How Parole Boards Keep Prisoners in the Dark and Behind Bars*, WASH. POST (July 11, 2015), [https://www.washingtonpost.com/national/the-power-and-politics-of-parole-boards/2015/07/10/49c1844e-1f71-11e5-84d5-eb37ee8eaa61\\_story.html](https://www.washingtonpost.com/national/the-power-and-politics-of-parole-boards/2015/07/10/49c1844e-1f71-11e5-84d5-eb37ee8eaa61_story.html) [<https://perma.cc/5JBS-EEKK>].

86. See Russell, *supra* note 81, at 400–01.

87. See *id.* In New Jersey, an administrative hearing officer interviews the inmate, who writes recommendations to a panel of board members; the inmate subsequently has an additional interview with a panel of board members who then make a release decision. *Division of Release*, N.J. STATE PAROLE BD., <https://www.nj.gov/parole/functions/release-division/> [<https://perma.cc/F9JZ-NDN7>] (Sept. 9, 2021).

88. See RUHLAND ET AL., *supra* note 21, at 29 (finding that twenty-three of forty responding states permit victims to be present and speak at a parole hearing that is also attended by the inmate).

89. See *id.*

90. See *id.* at 30.

91. See *id.* at 33.

92. See *id.*

93. See *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 16 (1979).

94. See COHEN & GOBERT, *supra* note 31, at 21–22.

95. See *supra* note 91 and accompanying text.

96. See Medwed, *supra* note 33, at 510.

draining, as board members can interrogate inmates for hours,<sup>97</sup> and victims can speak at length about the impact the crime has had on them.<sup>98</sup> On the whole, however, parole boards are severely limited in the amount of time they can afford to review each individual case.<sup>99</sup>

### 3. How the Factors Are Assessed

While there is a great degree of uniformity in the factors parole boards assess in their decision-making processes, there is less unanimity in weighing a particular factor. As an initial matter, it is hard to know how factors are given weight because more than two-thirds of parole boards do not publicize their deliberations.<sup>100</sup> In addition, sixteen states do not even publish their rationale for a denial.<sup>101</sup> Further, some boards' explanations of their release decisions are hardly informative, as their rationales are often short one-line sentences that can be unrevealing; for example, "The Board concludes that you should serve more of your sentence prior to release on parole."<sup>102</sup>

However, drawing from a survey of twenty-nine individual board members, a somewhat clearer picture begins to form. The "first tier" factors—the most important factors—were the "nature" or "severity" of the underlying crime and any other criminal record of the inmate eligible for parole.<sup>103</sup> The "second tier" factors represented inmate conduct while incarcerated and were reflected in program participation, disciplinary records, and other actuarial tools that determine risk.<sup>104</sup> The "third tier" factors were opinion factors, including inmate testimony as the most important and sentencing judge input, prosecutor input, and the offender's family input as even less important.<sup>105</sup> There was one notable exception to the trend that opinion factors are the least important: victim input.<sup>106</sup> In fact, the importance of victim input has increased dramatically over time relative to other opinion factors.<sup>107</sup> The importance of victim input to the release decision traces the rise of the victim rights movement, which calls for greater involvement of victims in all aspects of the criminal justice process.

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97. See Kathryn M. Young, *Parole Hearings and Victims' Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 431, 444–45 (2016); see also Slater, *supra* note 35.

98. See Young, *supra* note 97, at 457.

99. See Reitz, *supra* note 36, at 2750 n.26 (describing that some board members have between three and twenty minutes to make a release decision).

100. See RUHLAND ET AL., *supra* note 21, at 29.

101. *Id.* at 33.

102. See, e.g., VIRGINIA PAROLE BOARD, PAROLE DECISIONS FOR OCTOBER 2020, WITH REASONS (2020), <https://vpb.virginia.gov/files/1185/vpb-decisions-oct20.pdf> [<https://perma.cc/S8CE-V7EV>].

103. See RUHLAND ET AL., *supra* note 21, at 26–27.

104. *Id.* at 27.

105. *Id.*

106. *Id.*

107. BURKES ET AL., *supra* note 70, at 23–24.

C. *The Victim Rights Movement and Parole*

Prior to the 1970s, the prosecutorial goal to convict defined the extent of victim involvement in the criminal justice system.<sup>108</sup> The interest in the concept of victim rights gained traction with the publication of the seminal *Final Report of the President's Task Force on Victims of Crime* in 1982, which noted that the current criminal justice system “burdened” rather than protected crime victims.<sup>109</sup> The report spawned a movement that pushed successfully for greater victim involvement in all aspects of the criminal justice system, from sentencing to parole.<sup>110</sup>

The movement sought to prevent the distinct problem of secondary victimization—in which the government’s lack of care toward the victim inflicts harm beyond that of the original crime<sup>111</sup>—and impress on judges and prosecutors that behind the state are people with their own interests.<sup>112</sup> Victims’ interests include having a voice in the process, maintaining their dignity and respect, and healing after the underlying crime, which collectively can reduce feelings of helplessness and disillusionment with the justice system.<sup>113</sup>

However, there are different approaches to realizing those specific interests. One is for the state to afford victims an instrumental role with direct influence on the punishment process itself.<sup>114</sup> Another is to provide victims an expressive role, whereby victims have an opportunity to share their experience for cathartic and therapeutic purposes even though their testimony would not impact the decision.<sup>115</sup> For both approaches, procedural justice theorists have posited that an evaluation of a decision’s fairness is not based solely on the outcome but rather on the process by which the decision

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108. See Young, *supra* note 97, at 435.

109. LOIS HAIGHT HERRINGTON ET AL., FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME 76, 114 (1982), <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/87299.pdf> [<https://perma.cc/VS63-MN9G>].

110. See Young, *supra* note 97, at 435–39.

111. See DANIELLE SERED, UNTIL WE RECKON 30–31 (2019).

112. See Kathryn Morgan & Brent L. Smith, *Victims, Punishment, and Parole: The Effect of Victim Participation on Parole Hearings*, 4 CRIMINOLOGY & PUB. POL’Y 333, 335–36 (2005).

113. See Paul H. Robinson, *Should the Victims’ Rights Movement Have Influence over Criminal Law Formulation and Adjudication?*, 33 MCGEORGE L. REV. 749, 758 (2002); see also Lara Bazelon & Bruce A. Green, *Victims’ Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 299–301 (2020).

114. See Morgan & Smith, *supra* note 112, at 336. *But see* Robinson, *supra* note 113, at 755–57 (challenging the propriety of such schemes, as direct victim influence causes a host of problems given that victims are not impartial and can contribute to disparities in punishment since some want more lenient sentences and others push for harsher sentences).

115. See Robinson, *supra* note 113, at 755–57. Additionally, in the parole context, some states offer victims post-conviction opportunities to meet with their offender to discuss their feelings and other questions they may have to make sense of the crime. See *Victim Offender Dialogue*, MINN. DEP’T OF CORR., <https://mn.gov/doc/victims/restorative-justice/victim-initiated-restorative-practices/victim-offender-dialogue/> [<https://perma.cc/UW8X-KKHF>] (last visited Sept. 17, 2021).

was reached.<sup>116</sup> If the process itself is unfair, victims may question the legitimacy of the proceedings and find themselves revictimized.<sup>117</sup> However, if the process is fair, it can provide the victims with a positive experience in which they are not revictimized, even if they ultimately disagree with the final decision.<sup>118</sup> To achieve such a process, these procedural justice theorists argue the process must be fashioned to ensure that: (1) victims can share their experiences, (2) the decision-maker is neutral, (3) victims view the decision-maker as attentive and trustworthy, and (4) victims are treated with respect throughout the process.<sup>119</sup>

While there are different ways to champion victim interests generally, victims' rights in the parole context have expanded dramatically such that victim input at parole hearings is almost as common as it is at sentencing.<sup>120</sup> Lobbying on behalf of victims has led parole boards to establish much-needed victim services offices<sup>121</sup> and to expand victim notification systems to alert victims about any case developments.<sup>122</sup> Rather than relegate victims to an expressive role, many states provide victims an instrumental role in the process by actively considering victim input when it comes to the release decision.<sup>123</sup> However, as the Herman Bell and Sirhan B. Sirhan cases reveal, there is a real probability of parole boards inconsistently treating victim input which can lead to unmet expectations for victims and inmates alike.

#### D. *The Dramatic Yet Inconsistent Effect of Victim Input*

This section describes, first, what information victims provide and, second, how victim input has affected the release decision since parole boards began permitting their input.

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116. Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 85 (2010).

117. *See id.* at 86–92.

118. *See id.*

119. *Id.* at 90–91.

120. Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME & JUST. 347, 382 (2009).

121. *See, e.g., Victims' Rights in the Parole Process*, GA. STATE BD. OF PARDONS & PAROLES, <https://pap.georgia.gov/georgia-office-victim-services/victims-rights-parole-process> [<https://perma.cc/HKZ5-D424>] (last visited Sept. 17, 2021); *Victims Services*, STATE OF IOWA BD. OF PAROLE, <https://bop.iowa.gov/victim-services> [<https://perma.cc/U3E2-K57D>] (last visited Sept. 17, 2021); *Victim Services: Information for Crime Victims*, N.J. STATE PAROLE BD., <https://www.nj.gov/parole/functions/victim-services/> [<https://perma.cc/K342-8QTP>] (May 24, 2021).

122. *See Roberts, supra* note 120, at 348, 383.

123. *See supra* Part I.B.2.



### 1. What Are Victims Saying?

Most victims attend and submit testimony to oppose an inmate's release,<sup>124</sup> but some victims advocate for release.<sup>125</sup> Precisely what victims say in their impact statements is not always known, as most states keep victim input confidential.<sup>126</sup> A select few states provide victim input to the inmate, and a handful more provide the information to the inmate if it is disclosed in a public hearing.<sup>127</sup>

The information victims provide either for or against release varies considerably because states offer scant guidance to victims when they solicit information from them. For example, many states explicitly ask victims for their opinion on whether an inmate should be released but do not say if they should offer specific evidence in support of their opinion.<sup>128</sup> Parole boards often encourage a subjective interpretation of relevance<sup>129</sup> by asking victims to share any information they would like the board to consider when making its decision.<sup>130</sup> In Alabama, for example, the board allows victims to be present at an inmate's parole hearing and give any reason whatsoever for why an inmate should not be released.<sup>131</sup> When being most specific, parole boards ask victims to detail the continuing effects of the crime, such as financial loss or inability to work, and other relevant information that would help the board determine the likelihood an offender might commit a new crime upon release.<sup>132</sup>

While little is known about the substance of these confidential victim impact statements, in reality, victims only attend approximately 10 percent of release hearings.<sup>133</sup> Possible reasons for low attendance could be a desire to avoid reliving crimes that are too painful, impracticability to attend, or even a lack of interest.<sup>134</sup> Interestingly, many California board members believe the rate of victim attendance is higher (between 20 and 30 percent), reflecting that victims' participation likely looms large in some board

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124. See Rhine et al., *supra* note 46, at 317.

125. See *supra* note 9 and accompanying text.

126. See RUHLAND ET AL., *supra* note 21, at 29.

127. See *id.*

128. See *Victims' Rights in the Parole Process*, *supra* note 121 ("The [victim] can object to future parole and say why, or the writer can simply ask to be notified before any final parole decision is made."); see also *Making a Statement: Victim Input into the Parole Process*, PA. OFF. OF THE VICTIM ADVOC., <https://www.oa.pa.gov/Documents/Making%20a%20Statement%20English.pdf> [<https://perma.cc/8ZZP-PPXN>] (stating that the victim advocate at the direction of the victim can petition the board to deny parole).

129. See Roberts, *supra* note 120, at 388–89.

130. See *id.*

131. *Victim Services Brochure*, ALA. BUREAU OF PARDONS & PAROLES, <https://paroles.alabama.gov/victim-services/> [<https://perma.cc/9B7T-LFS5>] (last visited Sept. 17, 2021).

132. See Roberts, *supra* note 120, at 388 (discussing the approach to victim input in New Jersey).

133. Young, *supra* note 97, at 456.

134. See *id.* at 480, 489.

members' minds.<sup>135</sup> The next section discusses the precise effect victim input has on the parole release process.

## 2. The Effect of Victim Input

Multiple studies have concluded that victim input can be—and often is—a decisive factor in parole release decisions. The first empirical study on the subject, conducted in 1994 in Pennsylvania, found that parole was denied at a rate of 43 percent when victim testimony was presented, as opposed to a rate of 7 percent when it was not.<sup>136</sup> Although based on a small sample, this 1994 study pointed to an alarming phenomenon. Subsequent studies and surveys have verified this finding, with one interview eliciting an administrator of a board to comment that “where no victim impact statements are available for board review, 40 to 50 percent of parole applications are denied; where statements are submitted, the rate of parole denial rises sharply to approximately 80 percent.”<sup>137</sup> In addition, studies conducted in Alabama<sup>138</sup> and California<sup>139</sup> found that when victims or their next of kin testify at a parole hearing, board members are far less likely to grant parole.<sup>140</sup> The Alabama study found that written victim statements had a profound impact on release—oral testimony even more so—and that victim participation, in general, was the second-best predictor of a release denial.<sup>141</sup>

Additionally, inmates believe victims wield influence over the release decision.<sup>142</sup> One study “found that almost a third of parole board interviewers believed that prisoners postponed or waived hearings because of the likely presence of the victim.”<sup>143</sup> In the same study, thirteen board members also stated that victim presence has a negative impact on the inmate as it could hamper their performance at the hearing.<sup>144</sup> Perhaps, this fear

135. *See id.* at 456.

136. *See* William Parsonage et al., *Victim Impact Testimony and Pennsylvania's Parole Decision-Making Process: A Pilot Study*, 6 CRIM. JUST. POL'Y REV. 187, 194 (1992).

137. *See* Morgan & Smith, *supra* note 112, at 339.

138. *See* 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, 71 (1997) (finding that victim input is a highly significant predictor of parole decision-making in that the number of releases decreases when victims participate in the process); *see also* Morgan & Smith, *supra* note 112, at 354, 357 (“The more victim participation present relative to the offender, the more likely that parole will be denied . . . . The more letters of protest in an offender's file, the more persons protesting at an offender's hearing, the more likely that parole will be denied.”).

139. ROBERT WEISBERG ET AL., *LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA* 5 (2011), [https://law.stanford.edu/index.php?webauth-document=child-page/164096/doc/slspublic/SCJC\\_report\\_Parole\\_Release\\_for\\_Lifers.pdf](https://law.stanford.edu/index.php?webauth-document=child-page/164096/doc/slspublic/SCJC_report_Parole_Release_for_Lifers.pdf) [<https://perma.cc/SN3D-D26K>] (finding that the grant rate when victims attend is less than half the rate than when victims do not attend).

140. *See supra* notes 138–39.

141. *See* Morgan & Smith, *supra* note 112, at 355–57.

142. *See* Rhine et al., *supra* note 46, at 317.

143. *See id.* at 317–18.

144. Kim Polowek, *Victim Participatory Rights in Parole: Their Role and the Dynamics of Victim Influence as Seen by Board Members* 126–27 (2005) (Ph.D. dissertation,

stems from the fact that parole boards are rarely forthcoming about their reasons for denial<sup>145</sup> and are known to avoid making controversial decisions, such as releasing an inmate over a victim's wishes.<sup>146</sup>

In addition, many board members perceive that victims have a profound effect on the release decision-making process. A survey found that 40 percent of board members acknowledged that victim input was "very influential" in decisions to grant or deny release.<sup>147</sup> Another study found that for 90 percent of fifty-two board members in the United States and Canada, victim input had an impact on the release decision.<sup>148</sup>

Lastly, the visceral and emotional intensity of victim testimony appears to influence board members toward denying release. In California, a state that allows victim involvement but does not statutorily require boards to factor it into their release decision-making processes,<sup>149</sup> board members believe victim testimony can subconsciously affect their decisions.<sup>150</sup> One board member stated it was easy to become mired in a victim's sadness at these hearings and that "[i]t *does* affect [them]."<sup>151</sup> Another commented that anyone who says otherwise—that victim presence does not have a heavy emotional impact—is likely lying.<sup>152</sup> One board member even stated that victim involvement likely explains high turnover rates for parole board members, as it is often so "emotional [and] gut wrenching."<sup>153</sup>

In reiterating that victims appear to exert great influence on the release process, one scholar, Julian V. Roberts, posits that victim participation exerts a greater influence on parole release decisions than sentencing decisions.<sup>154</sup> First, Roberts notes that the parole board has greater discretion than a sentencing judge.<sup>155</sup> Second, Roberts argues victims mainly use their voice to seek parole denial, whereas in sentencing they have many other motives, such as compensation.<sup>156</sup> And, third, Roberts posits that board members are more ill-suited to disregard prejudicial rather than probative information than a professional judge<sup>157</sup> because they often have nonlegal credentials and are

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Simon Fraser University), [summit.sfu.ca/system/files/iritems1/10276/etd2042.pdf](https://summit.sfu.ca/system/files/iritems1/10276/etd2042.pdf) [<https://perma.cc/F7Z2-Y5J6>].

145. See *supra* notes 100–02 and accompanying text.

146. See Reitz, *supra* note 36, at 2750; see also Schwartzapfel, *supra* note 85.

147. See Rhine et al., *supra* note 46, at 317.

148. Polowek, *supra* note 144, at 131–32 (finding that 13 assigned it "some influence," 26 assigned it "moderate influence," and 4 assigned it "substantial influence").

149. Young, *supra* note 97, at 478 n.274 (detailing that no mandate exists in California requiring board members to consider victim input in their release decisions). *But see, e.g., Making Parole Decisions*, PA. PAROLE BD., <https://www.parole.pa.gov/Parole%20Process/Making%20Parole%20Decisions/Pages/default.aspx> [<https://perma.cc/7H6N-TNF5>] (last visited Sept. 17, 2021) (stating that Pennsylvania requires board members to factor victim input into their release decision by law).

150. See Young, *supra* note 97, at 472 & n.240.

151. *Id.* at 460 (emphasis in original).

152. See *id.*

153. *Id.* at 461.

154. See Roberts, *supra* note 120, at 396–97.

155. See *id.* at 397.

156. See *id.* at 397–98.

157. *Id.* at 398.

political appointees, making them more sensitive to public support for victim rights.<sup>158</sup>

There is deep controversy regarding the fact that victim input can so thoroughly influence the parole release decision. Some scholars of parole have voiced deep skepticism regarding the propriety of victim influence over the release decision, arguing their input adds no relevant information for boards to consider when making release decisions.<sup>159</sup> They argue that boards should focus solely on whether an inmate is sufficiently rehabilitated for release back into the community<sup>160</sup> and that victim input almost never speaks to this issue.<sup>161</sup>

In turn, board members have been receptive to these scholars' arguments, as 61 percent of those surveyed believe the most important factor in their decision-making is an inmate's likelihood of committing crimes upon conditional release.<sup>162</sup> As discussed above, this approach would leave little room for victims to have a meaningful impact on the release calculus. Further, there are many board members who think victim input is an inappropriate factor to consider.<sup>163</sup> In 1988, a survey found that 44 percent of responding board members agreed that victims provide valuable input, whereas 37 percent disagreed or strongly disagreed that victims should even be permitted to give such input.<sup>164</sup> It is important to note that while there are board members who push back against victim influence, victim input is regarded as highly important by an even larger proportion of board members today. A comparative survey from 2015 found that eighteen out of thirty-one board members agreed or strongly agreed that victims offered valuable information on the release decision, while only two strongly disagreed and eleven expressed no opinion.<sup>165</sup> Thus, while fewer board members disagree about the propriety of victim influence over parole release, there are varied approaches and inconsistencies among board members regarding how they view the value of victim input.

These divergent approaches to victim testimony are further reflected by the fact that the same California board members who described the emotional toll of victim involvement on them<sup>166</sup> almost unanimously stated that they "rarely put much weight into it"<sup>167</sup> because it is not a determinant for suitability of release in their state.<sup>168</sup> They stated that victims do not influence their decisions because the inquiry is about the inmate's risk of recidivism, not the people whom the inmate hurt, and also "that *not*

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158. *See id.*; *see also* Part I.B.1 (describing the general composition of parole boards).

159. *See* Roberts, *supra* note 120, at 386; *see also* Rhine et al., *supra* note 46, at 318.

160. *See* Roberts, *supra* note 120, at 385–86.

161. *See id.* at 347; *see also* Young, *supra* note 97, at 485–86.

162. BURKES ET AL., *supra* note 70, at 17–18.

163. *Id.* at 18.

164. *Id.*

165. *Id.*

166. *See supra* notes 150–53 and accompanying text.

167. Young, *supra* note 97, at 473.

168. *See* CAL. CODE REGS. tit. 15, §§ 2281(c), 2402 (2021) (not delineating victims' right to speak as a factor for determining suitability for release).

disregarding victims' testimony would be unfair to the thousands of victims who chose not to—or *could* not—come to the hearing.”<sup>169</sup>

That being said, the same board members uniformly support the unrestricted participation of victims<sup>170</sup> because it confers a procedural and moral legitimacy on the hearings, keeps board members sensitive to victim interests, and can be therapeutic for victims.<sup>171</sup> Board members' support for victim participation, which they believe has no influence on their decision, could also be attributed to the fact that it appears fundamentally wrong not to allow victims to express their emotions when inmates who caused them such distress might be released back into society.<sup>172</sup> Thus, in California the conundrum of uniformly supporting victim participation, while insisting they have no influence on the release decision, largely relegates victims to an expressive role that confers procedural integrity.<sup>173</sup>

Nonetheless, victim input appears to exert a dramatic impact on release decisions in most jurisdictions. Empirical studies not only uniformly show that victim input is a strong indicator of release denial but also that board members and inmates themselves view the input as quite influential and, at times, outcome-determinative. Moreover, the emotionally charged nature of victim input makes it difficult for board members not to be influenced by it.<sup>174</sup> However, the degree to which victim input is valued is inconsistent, as some jurisdictions and individual board members view victim influence on the release decision as improper<sup>175</sup> and, in turn, may accord it different degrees of weight in their analyses.<sup>176</sup> Yet, those very same board members often view victim participation at the hearing as indispensable to the integrity of the process, reflecting that even those who are skeptical believe there must be some role for victims in the release process.<sup>177</sup>

Thus, it appears most parole boards believe victim input matters, yet there is no consensus on exactly *how* it matters. The lack of clarity over the proper role of victims in the release process is addressed in Part II, which explains that the lack of clarity is a product of the fact that there are several approaches to understanding parole and the purposes it serves and that each approach treats victim input differently.

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169. See Young, *supra* note 97, at 472–73 (emphasis in original).

170. *Id.* at 455–56. Also, in California, victim participation can become marathon hearings, as victims can speak for hours often disrupting the schedule for parole hearings. See *id.* at 456–57.

171. *But see id.* at 475–76 (commenting that while participation can be therapeutic for some, other board members viewed participation as preventing closure for victims, as they feed on hate for the inmate rather than focusing on healing themselves).

172. See *id.* at 483.

173. See *id.* at 477.

174. See *id.* at 460–61.

175. See *supra* notes 163–69 and accompanying text.

176. See *supra* notes 163–65 and accompanying text.

177. See *supra* notes 170–72 and accompanying text.

## II. AN UNCERTAIN PURPOSE: DISCRETIONARY RELEASE AND THE RELEVANCE OF VICTIM INPUT

The days of victims playing a peripheral role in the parole process as passive witnesses are over. Not only is their level of participation increasing,<sup>178</sup> but as states proclaim how important victims' voices are, an increasing number of parole boards are incorporating victim input into their release decisions.<sup>179</sup> Currently, most states require their parole boards to "consider" or "evaluate" victim input when they make release decisions.<sup>180</sup> Such guidance leaves the parole board, an already nontransparent institution with broad discretion,<sup>181</sup> in the position of deciding how victim testimony is relevant to the purposes of discretionary release.<sup>182</sup> As a result, victim input is assessed inconsistently—at times with alarming results for inmates,<sup>183</sup> but also for victims, who can be revictimized by unmet expectations.<sup>184</sup> The status quo fosters a system in which victims serve an ambiguous purpose, as states fail to specify why they require boards to consider victim input. This ambiguity prompts an even more important question: what purposes should discretionary parole release serve more generally? The answer to this question goes a long way to clarify how victim input may or may not be relevant to the release decision.

Part II dissects the ambiguity surrounding the purpose of victim input in parole by identifying four frameworks, drawn from theory and practice, to understand parole release decisions. It then examines how each framework accords varying degrees of importance to victim input. The frameworks have certain explanatory power for what is happening in practice, a certain amount of theoretical persuasion, or some combination of both. The frameworks are not mutually exclusive, as each approach blends factors applicable to all, except with different degrees of emphasis. These four approaches and their corresponding treatment of victim input highlight the benefits and consequences of each approach, which helps to frame how victim input *should* be evaluated.

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178. See Young, *supra* note 97, at 439.

179. See *supra* Parts I.C, I.D.2.

180. See Young, *supra* note 97, at 478–79. For example, in Colorado, the parole board will "consider the totality of the circumstances, which include . . . [t]he testimony or written statement from the victim of the crime, or a relative." COLO. REV. STAT. § 17-22.5-404(4)(a)(I) (2021). The same approach is found in New Jersey. See N.J. STATE PAROLE BD., THE PAROLE BOOK: A HANDBOOK ON PAROLE PROCEDURES FOR ADULT AND YOUNG ADULT INMATES 47–48 (5th ed. 2012), <https://www.nj.gov/parole/docs/AdultParoleHandbook.pdf> [<https://perma.cc/J6MA-3XY9>].

181. See *supra* Part I.A; see also *supra* Part I.B.2.

182. The panel of board members overseeing Herman Bell's hearing stated that the forgiveness by one victim was important but did not directly address Diane Piagentini's suffering as a consideration to deny parole. See *Piagentini v. N.Y. State Bd. of Parole*, 176 A.D.3d 138, 148 (N.Y. App. Div. 2019) (Egan, J., dissenting).

183. See *supra* Part I.D.2.

184. See Roberts, *supra* note 120, at 371 (explaining that a negative consequence of allowing victim input at parole is decreased levels of victim satisfaction if the true level of victim influence over parole release decisions is less than a victim expected).

Part II.A presents the most theoretically persuasive understanding of discretionary parole release, which is that the release decision is primarily a judgment on an inmate's rehabilitation. Such an approach renders nearly all victim input irrelevant.<sup>185</sup> However, given that parole boards do consider victim input, this theory lacks real explanatory power. Part II.B presents a second understanding of parole release that, while an inmate must be rehabilitated, the decision is also a judgment on whether the ends of sentencing have been met, which makes victim input as relevant as it is at initial sentencing. This theory, while perhaps more persuasive than the pure rehabilitation approach, still lacks real explanatory power because data shows that victim input exerts more influence on parole release than at sentencing.<sup>186</sup> Part II.C then presents a third framework for understanding release in that it can also be a victim-centered decision, in which all victim input is given significant weight because it is important itself. Then, a fourth framework examines how practice reveals that the significance of victim input may very well depend on whether a victim is sympathetic or not. Thus, Part II.D posits that, in addition to rehabilitation, sentencing goals, and victim preference, board members consider public sentiment when making decisions, as release is inherently a politically accountable decision. In this framework, victim input is relevant to the extent the victims are sympathetic in the public's eye.

*A. Rehabilitation as the Key Determinant for Discretionary Release*

The most common theoretical understanding of discretionary parole release is that its fundamental purpose is to determine if rehabilitation has been attained and to reward that achievement with release.<sup>187</sup> In turn, parole boards, in making release decisions, are concerned with "two principal questions: does the prisoner represent a significant risk to the community, and will his release on conditions promote his rehabilitation?"<sup>188</sup> Parole boards have a narrow mandate because, as Roberts articulates, "[f]rom sentencing to parole, the justice system changes from one concerned with retribution to one preoccupied primarily with risk and the rehabilitation of the offender."<sup>189</sup>

The idea is that, in an indeterminate sentencing regime, the parole board should be bound by the sentencing judge's determination that the minimum sentence is long enough to meet those ends of punishment exclusive of rehabilitation, such as retribution and deterrence.<sup>190</sup> Under this framework, the parole board should not deny release based on the belief that a longer sentence is necessary on retributive grounds, but boards must instead focus

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185. *See id.* at 385–86; *see also* Rhine et al., *supra* note 46, at 318.

186. *See supra* Part I.D.2.

187. *See* COHEN & GOBERT, *supra* note 31, at 16; *see also supra* Part I.A.

188. Roberts, *supra* note 120, at 385–86.

189. Rhine et al., *supra* note 46, at 318; *see also* Roberts, *supra* note 120, at 386 (stating that "[f]rom sentencing to parole, the justice system therefore moves from consideration of retribution into one preoccupied with risk and only latterly the rehabilitation of the offender").

190. *See* Rhine et al., *supra* note 46, at 297.

exclusively on evidence germane to an inmate's ability to lead a crime-free life if released.<sup>191</sup> In other words, "[t]he inmate, not the crime, is at the center of the inquiry," as the determination is to what degree the inmate is rehabilitated.<sup>192</sup>

This way of understanding parole is frequently reflected in statements from parole boards, such as California's Board of Parole Hearings, which states that the "purpose of a parole suitability hearing is to determine whether an inmate currently poses an unreasonable risk of danger to society if released from prison."<sup>193</sup> In Virginia, the parole board website states, "The Board's mission is to grant parole or conditional release to those inmates whose release is compatible with public safety."<sup>194</sup> In Ohio, the mission statement is simple: "Reduce Recidivism Among Those We Touch."<sup>195</sup> Following the logic that rehabilitation is the key determinant for release, it would appear victim input is almost never relevant, and therefore insignificant, because it rarely, if ever, speaks to that concern.<sup>196</sup> The rare instance when victims might have pertinent information relevant to an inmate's rehabilitation is if, for example, they can demonstrate the inmate has sent threatening letters to victims or otherwise engaged with them in disturbing or inappropriate ways post-sentencing.<sup>197</sup>

However, since most boards encourage victims to discuss whatever they think is relevant,<sup>198</sup> victims almost exclusively and principally advocate for denial of parole and detail their continued suffering from the crime—information that is not germane to assessing the risk of recidivism.<sup>199</sup> This common type of victim testimony does not speak to the risk of reoffense an inmate poses; as such, it would appear improper for boards to consider it as a rationale for denying release under this framework.<sup>200</sup>

The result of this logic is similar to the reality detailed at California Board of Parole hearings, in which victims participate in hearings and are told their voice is important but, in reality, their input has no bearing on the release decision.<sup>201</sup> Thus, victims—if parole is understood as primarily concerned with rehabilitation—are relegated to a purely expressive role, where their voice has no impact on release (as opposed to an instrumental one, where it

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191. See Roberts, *supra* note 120, at 352.

192. Young, *supra* note 97, at 438.

193. *Information Considered at a Parole Suitability Hearing*, CAL. DEP'T OF CORR. & REHABILITATION, <https://www.cdcr.ca.gov/bph/parole-suitability-hearings-overview/information-considered-at-a-parole-suitability-hearing/> [<https://perma.cc/NE53-2BVN>] (last visited Sept. 17, 2021).

194. VA. PAROLE BD., <https://vpb.virginia.gov/> [<https://perma.cc/TJP7-W5G2>] (last visited Sept. 17, 2021).

195. OHIO DEP'T OF REHAB. & CORR., <https://drc.ohio.gov/> [<https://perma.cc/WXX3-MRDH>] (last visited Sept. 17, 2021).

196. See Roberts, *supra* note 120, at 385–86; see also Young, *supra* note 97, at 485–86.

197. See Roberts, *supra* note 120, at 386; see also Young, *supra* note 97, at 438 n.25, 487.

198. See Roberts, *supra* note 120, at 388.

199. See Rhine et al., *supra* note 46, at 317.

200. See Roberts, *supra* note 120, at 392.

201. See *supra* notes 168–73 and accompanying text (discussing the difference between instrumental and expressive roles for victims).



does).<sup>202</sup> Relegating victim input to an expressive role is based on the idea that sharing one's experience in a public setting can be cathartic and even therapeutic for victims and inmates.<sup>203</sup> However, not every parole hearing is public, and victim input is often treated confidentially.<sup>204</sup> This begs the question: just how therapeutic is it for victims to relive a terrible experience with a panel of board members they have never met before? Moreover, if victims are assigned a purely expressive role at hearings, it would appear victims are being deceived about the actual significance of their input given victims are often assured that their opinion matters.<sup>205</sup> This discrepancy between messaging and reality can lead to further victimization because victims suffer as a result of unmet expectations.<sup>206</sup>

While this approach is theoretically persuasive and in line with parole's conception, it fails to explain how decisions are made in practice because victims *are* in many instances quite influential.<sup>207</sup> If it really is all about rehabilitation, victim input would be given no weight whatsoever and likely would not be involved in the first place. This leads one to wonder: Are boards routinely considering and acting on impermissible criteria when they consider victim input? Or, is rehabilitation not the key determinant for parole since release decisions are also a judgment of other important considerations?

### B. Discretionary Release as a Resentencing Scheme

If parole boards in an indeterminate sentencing system are supposed to work hand-in-hand with the sentencing judge to define an inmate's true period of incarceration,<sup>208</sup> discretionary release can also be understood as a quasi-judicial assessment of whether the ends of sentencing have been met. Such an assessment not only requires, at a minimum, that the inmate is rehabilitated but also embraces criminal punishment's other ends: retribution and deterrence.<sup>209</sup> Retribution is the sentencing principle that "offenders should be punished in proportion to their blameworthiness," as defined "by the nature and seriousness of the harm caused," and their culpability.<sup>210</sup> This can serve as both a justification for and against punishment, as people should not be punished any more or less than they deserve.<sup>211</sup> Specific deterrence is the sentencing principle that seeks to discourage the defendant from reoffending by instilling fear of receiving a similar penalty in the future.<sup>212</sup> General deterrence is the principle that, by instilling a fear of receiving a

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202. See *supra* notes 114–15 and accompanying text.

203. See Roberts, *supra* note 120, at 384.

204. See RUHLAND ET AL., *supra* note 21, at 29.

205. See *supra* Part I.D.2.

206. See *supra* note 184 and accompanying text.

207. See *supra* Part I.D.2.

208. See Slater, *supra* note 35.

209. See Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287, 2291 (2020); see also U.S. SENT'G GUIDELINES MANUAL 1–2 (U.S. SENT'G COMM'N 2018).

210. Richard S. Frase, *Purpose: Punishment Purposes*, 58 STAN. L. REV. 67, 73 (2005).

211. See *id.* at 73–74.

212. See *id.* at 70.

comparable sentence, an inmate's period of incarceration must be sufficiently long to discourage other would-be offenders from committing crimes.<sup>213</sup>

Understanding parole decisions as incorporating these elements of sentencing, parole boards might be seen as well-situated to implement the ideals of retribution and deterrence, as they potentially operate with more knowledge of the inmate and the nature of the inmate's crime than the sentencing court did.<sup>214</sup> The board has access to the inmate's behavior posttrial<sup>215</sup> and potentially relevant information from a victim concerning the impact of the crime.<sup>216</sup> For example, if the parole board believes the sentencing judge was too lenient and underestimated the long-term consequences of the crime, the parole board could deny release to reflect a fairer sentence, even if an inmate poses little risk of reoffense.<sup>217</sup> In essence, this approach embraces the idea that board members are able to put themselves in the shoes of the sentencing judge and divine what the judge's decision would be if the judge had access to the information the board members had.

Such an approach, however, is controversial because it may violate a judge's intentions about the sentence and the judge's assumptions about the board's role.<sup>218</sup> If a sentencing judge expects the parole board to engage in retrospective sentencing when it has more information, there appears to be no issue. However, if the sentencing judge believes release is presumed once the inmate poses no crime risk, there can be real tension as the board could violate the sentencing judge's expectations of the proper sentence.<sup>219</sup> Some have even argued that permitting the board to entertain sentencing principles is wrong, as it condones an administrative act performing a responsibility properly entrusted to the judiciary.<sup>220</sup>

Further, there are concerns regarding the propriety of such a resentencing scheme because, as an initial matter, board members are not judges, are often less qualified, and have less legal experience.<sup>221</sup> This might very well lead to more parole denials based on deterrent or retributive motives, because approaches to these principles can vary widely.<sup>222</sup> Lastly, some critics have argued that if the sentencing decision is poor, the proper remedy lies not with the parole board but with better sentencing procedures.<sup>223</sup>

It appears, though, that many states embrace something akin to this approach for their parole system, as demonstrated by their assigning parole

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213. *See id.* at 71.

214. *See* COHEN & GOBERT, *supra* note 31, at 19.

215. *See id.*

216. *See* notes 124–32 and accompanying text.

217. *See* Roberts, *supra* note 120, at 392; *see also* COHEN & GOBERT, *supra* note 31, at 19.

218. *See* COHEN & GOBERT, *supra* note 31, at 19; *see also* Roberts, *supra* note 120, at 392.

219. *See* Schwartzapfel, *supra* note 85 (describing how the Michigan parole board denied release to an inmate for over thirty years, shocking the sentencing judge who presumed, when crafting the inmate's sentence, that the inmate would be released after his first hearing).

220. *See id.*

221. *See supra* Part I.B.1.

222. *See* Frase, *supra* note 210, at 70–74; *see also infra* Part III.B.2.

223. *See* COHEN & GOBERT, *supra* note 31, at 19.

boards the task of ensuring that release decisions are compatible with the welfare of society and do not undermine the seriousness of the crime committed.<sup>224</sup> Indeed, board members nearly unanimously state that the nature and severity of the underlying crime is a key factor in their release calculus.<sup>225</sup> In Virginia, for example, an appropriate reason for denial is the nature of the crime, as defined by “the harm committed or caused to others, the magnitude of the crime, and its impact on the victim and community.”<sup>226</sup> Such a mandate seems to channel sentencing principles into parole decision-making, as these considerations—nature and impact of the crime—shed little light on the risk of reoffense.

The relevance and significance of victim input under this approach to parole is similar to the relevance of victim input at sentencing.<sup>227</sup> It is important to note, though, that victims seldom influence sentencing decisions, as judges are adept at ignoring evidence with no probative value, such as a victim’s appeal for a more severe sentence.<sup>228</sup> However, in the parole context, victim input does matter to the extent that it sheds light on the true long-term consequences of the crime and its corresponding severity; those issues affect the degree to which retribution and deterrence are necessary. How victim input influences the calculus depends on one’s approach to meeting requisite retribution and deterrence.<sup>229</sup> If the parole board thinks the sentencing judge misinterpreted the true degree of the victim’s suffering—and thus the severity of the crime—members can deny parole to reflect the fact that the minimum sentence did not achieve retribution proportionate to the impact of the underlying crime.<sup>230</sup> Further, if a victim forgives an inmate or argues hardship might result from longer incarceration because it prevents the offender from securing work to pay restitution,<sup>231</sup> such information would be relevant. This information points toward release because it would reveal that the need for retribution on the victim’s part has been achieved.<sup>232</sup>

Lastly, victims are typically not solicited for their opinions about how a particular sentence will impact them,<sup>233</sup> though some U.S. jurisdictions do permit sentence recommendations from victims.<sup>234</sup> Thus, if one understands parole as a resentencing scheme, victim testimony is only relevant to the

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224. See *supra* note 76 and accompanying text; see, e.g., N.Y. EXEC. LAW § 259-i(2)(c)(A) (McKinney 2021) (stating that an inmate’s release must be compatible “with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law”); see also NEV. REV. STAT. § 213.1099 (2021); COLO. CODE REGS. § 8–1511–1:6.01 (2021).

225. See RUHLAND ET AL., *supra* note 21, at 27–28.

226. *About the Parole Board*, VA. PAROLE BD., <https://vpb.virginia.gov/about-the-parole-board/> [<https://perma.cc/S58U-X9UR>] (last visited Sept. 17, 2021).

227. See Roberts, *supra* note 120, at 373–77.

228. See *id.* at 373–76.

229. See *id.* at 392.

230. See *id.*

231. See, e.g., *id.* at 376.

232. See *id.*

233. See *id.* at 389.

234. See *id.* at 358–59.

extent it provides information regarding the crime's actual impact. As frustrating as it may be for victims, their desire for parole denial with nothing else linking that desire to sentencing's goals would not be considered by the board because it would be considered irrelevant in this scheme.

While this framework possesses certain theoretical persuasiveness, the inquiry does not end here. This framework fails to fully explain how parole boards make decisions in practice because victim input is not only considered for its probative value regarding proper sentencing. Instead, several parole boards directly solicit victims' personal opinions about how parole release might impact them and whether they support release.<sup>235</sup> Thus, one must dig further and infer a third approach that has more explanatory power—an approach that assigns great value and significance to victim input because it should, itself, be considered important.<sup>236</sup>

### C. Discretionary Release as a Victim-Centric Decision

Discretionary release decisions can also be understood as placing a high value on victim input because board members, like much of the public, are supportive of a criminal justice system that is responsive to and concerned with victims' unique needs. As the victim rights movement mobilized for increased victim involvement in the criminal justice system,<sup>237</sup> many parole boards responded with well-intentioned efforts to encourage victim participation and ensure victims that their voices mattered.<sup>238</sup> Today, many parole boards convey that victims are important and at the "heart" of the release decision.<sup>239</sup> This messaging reflects what appears to occur in practice because victim participation is a significant predictor of parole denial in many jurisdictions.<sup>240</sup> While the old parole system may have detrimentally excluded victims, some argue the modern system, by allowing victims to play an instrumental role,<sup>241</sup> may better help victims shed feelings of helplessness during their offenders' criminal proceedings.<sup>242</sup> Under this approach, victim input can legitimately exert direct influence on the release decision.

If one believes release should be attuned to victims' interests, victim input is significant and relevant regardless of what it conveys. Thus, even if a board finds that an individual is rehabilitated and that the sentencing principles of retribution and deterrence met, a board member may still deny parole based on the victim's needs and preferences. In Alabama, for example, inmates are almost never granted release over a victim's

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235. *See id.* at 388–89; *see also supra* Part I.C.

236. *See supra* Part I.C.

237. *See* Erin Ann O'Hara, *Victims and Prison Release: A Modest Proposal*, 19 FED. SENT'G REP. 130, 130 (2006).

238. *See* Young, *supra* note 97, at 478.

239. *See id.*

240. *See supra* notes 138–39.

241. *See* Mary Margaret Giannini, *The Swinging Pendulum of Victims' Rights: The Enforceability of Indiana's Victims' Rights Law*, 34 IND. L. REV. 1157, 1160–62 (2001).

242. *See* Morgan & Smith, *supra* note 112, at 336.

objection.<sup>243</sup> In New York, the parole board on some occasions has rescinded parole, weeks after granting it, after victims expressed disapproval of not being given an opportunity to be heard at the original hearing.<sup>244</sup> The courts have upheld such rescissions, so long as the victim input offered was “significant” and “not known” by the board at the time release was granted.<sup>245</sup> In those cases, victim testimony concerned victims’ lingering suffering.<sup>246</sup> Although the law of parole rescission is not relevant to this Note, such cases demonstrate that parole boards can effectively give victims veto power, even if the parole board determined that release was acceptable according to other criteria. However, in one case, with a familiar fact pattern—release followed by victims protesting that they did not have an opportunity to be heard at the hearing<sup>247</sup>—the New York Court of Appeals reversed a parole rescission and ordered release but was careful to note that the case “should not be interpreted as minimizing . . . the importance of victim impact statements in parole board hearings.”<sup>248</sup>

Lastly, under this approach, it would appear that all victim input must be treated equally, irrespective of whether the victim is sympathetic or able to appear at a hearing, because not doing so would offend notions of equality and fairness.<sup>249</sup> Input from the family of a murdered gang member must be accorded the same significance as input from the family of a murdered police officer.<sup>250</sup> Moreover, victims who are unable to attend a hearing—due to illness or inability to travel or because the crime’s impact was so physically or psychologically devastating that they are unable or unwilling to relive the experience—must be afforded the same care and attention in the release decision as those who can attend hearings. Otherwise, there is a possibility that an inmate, who would have been denied release had a victim appeared, could be released because a victim could not be present. This would result in the unequal treatment of victims.

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243. See Schwartzapfel, *supra* note 85.

244. See *Benson v. N.Y. State Bd. of Parole*, 176 A.D.3d 1548, 1549–50 (N.Y. App. Div. 2019) (upholding parole rescission based on a victim impact hearing that occurred after the release decision had been made because the mother and one brother of the victim offered new evidence of the crime’s lingering impact on them, information that was not available to the board when it made the original decision); *Thorn v. N.Y. State Bd. of Parole*, 156 A.D.3d 980, 982 (N.Y. App. Div. 2017) (upholding rescission of release based on a subsequent victim impact hearing in which three of the victim’s sisters and the victim’s brother-in-law offered evidence not known to the board when it made the original decision, including that the inmate had sent unnerving letters to one sister and made other threats to them when he was originally sentenced); *Pugh v. N.Y. State Bd. of Parole*, 19 A.D.3d 991, 993–95 (N.Y. App. Div. 2005) (upholding rescission of a release decision based on the victim’s children’s distress regarding the inmate’s lack of remorse, which constituted significant information previously unknown to the board).

245. See *Benson*, 176 A.D.3d at 1549.

246. See *id.* at 1550–51.

247. See *supra* Part I.B.2.

248. *Costello v. N.Y. State Bd. of Parole*, 23 N.Y.3d 1002, 1004 (N.Y. 2014).

249. See *Robinson*, *supra* note 113, at 757.

250. See *id.*

However, it appears that the influence of victim input often depends on whether victims appear at a hearing,<sup>251</sup> give oral as opposed to written testimony,<sup>252</sup> or are sympathetic in the public's eyes.<sup>253</sup> This illustrates that parole has perhaps strayed from the victim rights movement's goal of equally supporting all victims. The acknowledgment that victim impact can be relative and may not be given consistent weight presents a fourth way to understand parole release decisions—that release could be driven, in many instances, by political considerations since parole boards are accountable to the public.

#### D. Discretionary Release as a Political Decision

Release decisions can also be understood as political decisions that reflect public sentiment. In fact, discretionary parole release has been described as “in most instances, a political decision [because] parole board members are typically political appointees sensitive to the emotional utterances of victims”<sup>254</sup> and to larger societal pressures.<sup>255</sup> The fact that parole release is attuned to public sentiment makes sense because members enjoy low professional status, high job insecurity, and are offered little insulation from public reprisals.<sup>256</sup> Further, surveys have found that board members rate political vulnerability and the pressure to minimize risk as their greatest concerns<sup>257</sup> because they are often held accountable for a single decision that goes wrong, while hundreds of correct ones are glossed over.<sup>258</sup> In general, parole boards face grave political exposure when they take controversial pro-release stances in closely watched cases, which often involve murdered law enforcement officers, sympathetic victims, or particularly gruesome crimes.<sup>259</sup> Therefore, in these cases, the guiding principle is not

251. See Morgan & Smith, *supra* note 112, at 355–57.

252. See *supra* note 141 and accompanying text.

253. Many controversial board decisions often concern releasing inmates convicted of murdering police officers or committing sex crimes, whereas others generate less public scrutiny. See Baker, *supra* note 8; see also Mike Bergazzi & Jon Burkett, *Virginia Inspector General Reviewing Controversial Parole Decision of Man Who Murdered Richmond Cop*, CBS 6 NEWS RICHMOND (May 8, 2020, 11:54 PM), <https://www.wtvr.com/news/local-news/virginia-watchdog-reviewing-controversial-parole-decision-of-man-who-murdered-cop> [<https://perma.cc/K8V6-CNSR>].

254. James W. Marquart, *Bringing Victims In, But How Far*, 4 CRIMINOLOGY & PUB. POL'Y 329, 330 (2005).

255. See Schwartzapfel, *supra* note 85.

256. Reitz, *supra* note 36, at 2748–49.

257. See *supra* Part I.B.1.

258. See Reitz, *supra* note 36, at 2748–49 (describing this phenomenon as part of the “lore of the field”); see also Schwartzapfel, *supra* note 85 (reporting that after a parolee killed a policeman, five members of Massachusetts's Parole Board were forced to resign and then Governor Deval Patrick commented that “the public has lost confidence in parole”). After this mass resignation, the discretionary release rate went from 42 percent to 26 percent. See *id.*

259. See Schwartzapfel, *supra* note 85 (“‘You generally don’t get reappointed if you take a controversial stand on a media case. And most cases involving law enforcement personnel become media cases,’ said Thomas Grant, a former member of the New York parole board.”).

rehabilitation, sentencing, or even being pro-victim but instead the fulfillment of the public's preferences.

This idea recently played out following the outcry over Herman Bell's release. Jalil Abdul Muntaqim, who was also convicted for the murder of Officers Piagentini and Jones, was denied release in 2018, with the Board declaring, "There is considerable community opposition to your release."<sup>260</sup> Professor Steven Zeidman speculated that the public outcry led the board to deny release for Muntaqim.<sup>261</sup> Interestingly, in New York, community members' input is not listed as a statutory factor that the board is directed to consider under Executive Law § 259-i(2)(c)(A).<sup>262</sup> Yet, courts in New York have routinely held that the Board may consider input from individuals other than those identified in the statute.<sup>263</sup> For example, in *Applewhite v. New York State Board of Parole*,<sup>264</sup> the court rejected the petitioner's argument that the Board's "consideration of certain unspecified 'consistent community opposition' to his parole release was outside the scope of the relevant statutory factors that may be taken into account in rendering a parole release determination."<sup>265</sup> The court argued that community members' opinions could be considered by the Board even though they are not listed as factors in the relevant statute because a separate portion of the statute—§ 259-i(2)(c)(B)—protects the confidentiality of community members who submit written input concerning an inmate's potential release.<sup>266</sup> The court held that, by including this confidentiality provision, "the Legislature demonstrated a clear intent that such opinions [from community members] are a factor that may be considered by [the Board] in rendering its ultimate parole release decision."<sup>267</sup>

Such an approach to release can be defended on the grounds that the public may hold certain wisdom regarding proper punishment. Perhaps community members' input should be considered for tough questions, such as whether those convicted of murdering police officers should even be eligible for parole.<sup>268</sup> However, Professor Zeidman argued that board members should not be influenced by the public, as such an approach turns the release decision into a "popularity contest."<sup>269</sup>

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260. Gross, *supra* note 7.

261. *See id.* (discussing Professor Zeidman's understanding of how the release process played out in this instance).

262. *See* N.Y. EXEC. LAW § 259-i(2)(c)(A) (McKinney 2021).

263. *See, e.g.,* Jones v. N.Y. State Bd. of Parole, 175 A.D.3d 1652, 1652. (N.Y. App. Div. 2019) (finding that "letters in support and in opposition to [the inmate's] release" are relevant factors to consider); Clark v. N.Y. State Bd. of Parole, 166 A.D.3d 531, 531–32 (N.Y. App. Div. 2018) (holding that "the Board permissibly considered letters in opposition to the parole application submitted by public officials and members of the community").

264. 167 A.D.3d 1380 (N.Y. App. Div. 2018), *appeal dismissed*, 32 N.Y.3d 1219 (2019).

265. *Id.* at 1381.

266. *Id.* at 1381–82.

267. *Id.* at 1382.

268. *See* Letter from Bill De Blasio, *supra* note 17.

269. Gross, *supra* note 7.

“Popularity contest” may be an apt description for how victims fit into this way of understanding parole release, as boards would decide which victims are more deserving of influence based on their ability to garner the public’s sympathy. In other words, the relevance of victim input strictly correlates with the alignment of victims’ interests with the public’s. It is often the case that these interests align, as victim rights groups have been successful in capturing the public’s sympathy.<sup>270</sup> This symbiotic relationship has resulted in enormous pressure on boards to adopt a cautious disposition toward release since victims and the public are broadly opposed to release.<sup>271</sup>

Conversely, victim input can be ignored entirely if victims cannot marshal sufficient public sympathy for their cases. It may be easier for the family of a slain police officer to gain public support and exert pressure on a board than it may be for an unsympathetic victim to do the same.<sup>272</sup>

As Part II illustrates, there may be great discrepancies among board members in how they approach the parole release decision and treat victim input.<sup>273</sup> This has resulted in a muddled mess in which victim input occupies an ambiguous position and can be treated inconsistently among board members depending on the framework board members adopt. Accordingly, Part III recommends a solution to define the proper approach to the release decision and victim input. Further, it recommends a more holistic approach to the parole process so that it can work better for victims, inmates, and board members.

### III. PIERCING THE FOG: GUIDANCE FOR THE TREATMENT OF VICTIM INPUT

The Herman Bell case highlights the many unanswered questions concerning how release decisions should be made and what victims’ role should be. Rather than resolving these pressing questions, the current system gives parole boards great discretion in their approach to victim input.<sup>274</sup> To make sense of this situation, this Note identified four approaches to discretionary release to demonstrate the ways parole boards evaluate victim

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270. See *supra* Part I.C.

271. See Schwartzapfel, *supra* note 85 (“The heavy pressure for being super conservative is from your victims’ groups,” said McVey, the Pennsylvania board chair . . . . “You’ve got a very politicized victim community in the state of Alabama,” which impacts the board’s disposition towards release.”).

272. See *Santos v. Brown*, 189 Cal. Rptr. 3d 234, 237 (Ct. App. 2015) (upholding then-Governor Schwarzenegger’s commutation of the sentence of Esteban Núñez over the objection of the murder victim’s family members, who did not receive notice and did not have an opportunity to be heard before a decision was made). Esteban Núñez’s father was a powerful Democratic assemblyman in California who had a warm relationship with then-Governor Schwarzenegger, who said that his commutation was an act designed to help a friend. See Laurel Rosenhall & Adria Watson, *From Prison to the Halls of Power: A Politician’s Son Lobbies to Let People on Parole Vote*, CALMATTERS (June 22, 2020), <https://calmatters.org/projects/california-parolees-voting-rights-nunez-aca6/> [<https://perma.cc/F75V-6NLY>].

273. See *also supra* notes 164–66 and accompanying text.

274. See *supra* notes 53–63 and accompanying text; see *also* Medwed, *supra* note 33, at 508–09.



input.<sup>275</sup> These approaches show the dramatically different options at board members' disposal, which, if left unguided, could lead to unmet expectations and inconsistent decision-making. Left to their own devices, board members might allow victim input to dominate the process, thus potentially resulting in a higher denial rate.<sup>276</sup>

Accordingly, clarifying the approach parole boards should employ requires balancing the benefits and consequences of involving victims. Opening the doors of hearings to victims has had adverse consequences, including putting board members in the untenable position of deciding how to incorporate victims' input and thus creating public distrust in the process.<sup>277</sup> Also, victim influence has unmoored parole from its roots as a gauge of an inmate's rehabilitation, leading to denials for otherwise rehabilitated inmates and frustrating a core principle of indeterminate sentencing—incentivizing rehabilitation.<sup>278</sup> This situation has elicited criticism, and there are many calls for excluding victims or limiting their role.<sup>279</sup> However, permitting victims to participate has positive outcomes: victims can be genuinely heard, have their legitimate interests addressed, and have their pain at least acknowledged, thus fueling greater trust in the criminal justice system.<sup>280</sup> Moreover, to bar victims completely from the process or deny them any influence is wrong,<sup>281</sup> as it has adverse consequences of its own, such as secondary harm for victims who believe the state has ignored them<sup>282</sup> or, worse, has falsely promised them more influence than they actually have.<sup>283</sup> Striking a balance between no victim participation and significant victim influence is critical for the future of a well-functioning parole system. The proper purposes of the release decision should be clarified, not left to the whims of an individual board member.

To this end, Part III recommends that discretionary parole release should be treated both as a gauge of rehabilitation and as a resentencing scheme. Accordingly, victim input should only influence the release decision if it provides information, not emotion, showing either that the inmate is not rehabilitated or that the judge's minimum sentence did not accurately reflect the impact of the crime and thus did not meet punishment's retributive and deterrent goals. If a victim's testimony reveals, in the eyes of the parole board, that either rehabilitation, deterrence, or retribution are not met, the input should legitimately influence the release decision. That being said, victims should be allowed to participate freely in the release process even though their influence on the actual release decision is curtailed in the ways

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275. See *supra* Part II.

276. See, e.g., Polowek, *supra* note 144, at 131–33; Morgan & Smith, *supra* note 112, at 336; Parsonage et al., *supra* note 136, at 193.

277. See *supra* Part I.D.2.

278. See Pisciotta, *supra* note 32, at 616–17.

279. See Roberts, *supra* note 120, at 384–85; Young, *supra* note 97, at 485–86; Rhine et al., *supra* note 46, at 316–19.

280. See *supra* Part I.C.

281. See Young, *supra* note 97, at 482–83.

282. See SERED, *supra* note 111, at 30–31.

283. See Roberts, *supra* note 120, at 371.

described above. Part III.A presents the rationale for treating the release decision as a resentencing of sorts that gauges rehabilitation and the goals of sentencing and the corresponding treatment of victim input such an approach signals. Part III.B considers the implications of this recommendation and the procedural changes required for its implementation in a consistent, fair manner that does not trample the legitimate interests and expectations of victims and inmates. Part III.C argues that, considering this Note's proposed solution, care must be exercised to avoid causing victims secondary harm, and parole boards should think beyond the release-deny dichotomy as a means for securing justice and ensuring healing for victims.

*A. Information, Not Emotion: Limiting Victim Influence on Discretionary Release*

This Note proposes that parole boards should treat the release decision as a gauge of rehabilitation and the goals of sentencing. Only information offered by the victim that is pertinent to the question of an inmate's rehabilitation or the extent to which sentencing goals have been met should influence the decision. This approach to discretionary release can lead to more just, consistent, and impartial considerations of victim input than the alternative approaches of treating the release decision as either a victim-centered one or as one sensitive to the public's needs.<sup>284</sup> In addition, this approach can better reap the rewards of a properly functioning indeterminate sentencing scheme—fewer costs, less crowded prisons, and a prison populace with a strong incentive to behave and reform.<sup>285</sup>

First, this Note embraces this more limited approach to victim influence because granting or denying parole should be treated as a quasi-judicial act based on law and fact.<sup>286</sup> This profoundly important decision determines how much longer an individual serves behind bars and should reflect the same careful and impartial analysis required of a judge during sentencing.<sup>287</sup> Board members must determine whether an inmate is sufficiently rehabilitated to lead a crime-free life and should also consider victim input regarding the impact of the crime, as society has an interest in enforcing punishment proportional to the harm caused.<sup>288</sup> If the parole board thinks the sentencing judge misinterpreted the true degree of the victim's suffering—and collaterally the severity of the crime—it can deny parole to reflect the fact that the minimum sentence did not achieve retribution proportionate to the crime's impact.<sup>289</sup> Of course, permitting board members to consider sentencing principles poses risks of its own.<sup>290</sup>

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284. *See supra* Parts II.C–D.

285. *See supra* notes 33–36 and accompanying text.

286. *See* Rhine et al., *supra* note 46, at 280–81.

287. *See id.*

288. *See* Frase, *supra* note 210, at 68, 70, 75.

289. *See* Roberts, *supra* note 120, at 392.

290. The implications of permitting board members to consider sentencing principles are addressed in *infra* Part III.B.2, which details the procedural adjustments that can be

Second, victim influence on the release decision should be limited because the criminal justice system should not necessarily be governed by the victims' needs. Just as a judge is generally adept at ignoring "extralegal" material, like a victim's opinion on punishment, and instead solicits information about the crime's impact to fashion a proper sentence,<sup>291</sup> so too should the board consider only information regarding an inmate's risk of recidivism and the true impact of the crime. Board members should not consider the victim's emotionally driven preference for a certain type of punishment. While such an approach may appear callous to victims and further sideline them in a criminal justice system that has historically and wrongfully ignored victims,<sup>292</sup> the fact remains that considering a victim's emotional desire for greater severity, or perhaps leniency, is inappropriate in the parole release context. As Professor Susan Bandes rightly points out, it is important not to equate the question of what victims need with the question of what the legal system ought to provide.<sup>293</sup> Victims' interests need not account for the wrongdoer's rights and society's interests; on the other hand, the legal system must adequately account for fairness and due process, in light of the high stakes and troubling but real possibility of error.<sup>294</sup>

The other approaches are simply inappropriate for parole. The approach that posits that parole release could be understood as a victim-centric decision<sup>295</sup> and the approach that posits that victim preferences for parole should be significant so long as they are sympathetic with the public<sup>296</sup> are inappropriate because they create a web of fairness concerns. In addition, they frustrate the goals of establishing an indeterminate sentencing system in the first place; these goals include: (1) reducing the financial costs of incarceration, (2) addressing overcrowding in prisons, and (3) providing a strong incentive for inmates to follow prison rules and achieve rehabilitation.<sup>297</sup>

As many studies have shown, victim input can be afforded significant weight if board members are left to evaluate it at their own discretion;<sup>298</sup> yet, only 10 percent of victims appear at hearings, raising concerns of unequal treatment for similarly situated inmates.<sup>299</sup> Similarly, it raises concerns of unequal treatment of victims in that only victims who have the means to attend hearings can have their preferences considered by board members, whereas those who cannot, through no fault of their own, are ignored.<sup>300</sup> The

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implemented to prevent a parole board from being too focused on retribution or deterrence, as it may be hard to place a meaningful cap on these goals.

291. See Roberts, *supra* note 120, at 374–76.

292. See HERRINGTON ET AL., *supra* note 109, at 114.

293. Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 FORDHAM URB. L.J. 1599, 1603 (2000).

294. See *id.* at 1606.

295. See *supra* Part II.C.

296. See *supra* Part II.D.

297. See *supra* notes 33–36 and accompanying text.

298. See *supra* Part I.D.2.

299. See Young, *supra* note 97, at 456.

300. See *id.* at 488–89.

idea that release decisions—and thus the criminal justice system’s evaluation of the importance of a victim’s suffering—can turn on a victim’s ability to attend a hearing or timely submit an impact statement seems arbitrary because it will lead to unjustifiable discrepancies, a result that is unfair to inmates.<sup>301</sup> Given these troubling realities, the release decision should instead be guided by a holistic analysis of inmates’ behavior and the impact of their crimes.

Further, affording victim input significant weight can frustrate the rationale of establishing an indeterminate sentencing system. This approach often results in release denials for otherwise rehabilitated inmates because of a victim’s compelling testimony.<sup>302</sup> Additionally, permitting board members to significantly consider victim input can discourage inmates from involving themselves in the parole process. Studies show inmates postpone or even waive their own parole hearings altogether when they learn a victim will attend because they fear that the hearing will be a “fait accompli.”<sup>303</sup> Thus, rather than working out their own salvation as indeterminate sentencing imagined,<sup>304</sup> inmates instead can be easily disillusioned with the process when the extent of victim influence is not properly cabined.

Finally, the approach that posits that victim input can be treated as more or less influential based on the public’s sympathy for a particular victim<sup>305</sup> poses equally disturbing complications. As Professor Zeidman rightly puts it, such an approach transforms the parole system into a popularity contest.<sup>306</sup> Moreover, it is unsustainable to approach parole release in such a manner, as it would discriminate among victims, further harming victims already alienated by the public’s failure to see their suffering as legitimate.<sup>307</sup> Allowing the public’s preference for the victim’s personal interests to be a legitimate consideration for boards is no way to sustainably run a fair and impartial parole system.

While the criminal justice system should be more accommodating to victims, the parole hearing is one place where the law should not determine outcomes based on the victim’s preference. Board members—who preside over a powerful instrument of the justice system—must remain cognizant of inmates’ rights and should make decisions based on the best information available, not necessarily the very real and legitimate emotionally driven needs of victims. Society has an interest in ensuring that proper, not disproportionate, punishment is meted out. Therefore, victims should have

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301. *See id.* (“In two identical cases, one victim may show up and the other may not; allowing the victim’s presence or absence to affect a releasing decision introduces an arbitrariness into the decision-making process that may unfairly disadvantage certain inmates.”).

302. *See supra* Part I.D.2.

303. *See* Rhine et al., *supra* note 46, at 317–18; *see also* notes 143–44 and accompanying text.

304. *See* COHEN & GOBERT, *supra* note 31, at 15.

305. *See supra* Part II.D.

306. *See* Gross, *supra* note 7 (describing Professor Zeidman’s understanding through an interview).

307. *See supra* Part II.D.

limited influence on the release decision, and their input should only affect the decision if the information they provide addresses issues of rehabilitation or proper punishment.

However, permitting board members to second-guess a judge's sentence and cabining victim influence is not without controversy. It will require adaptation. There must be procedural and structural changes to parole release to put this approach into effect in a fair and consistent manner.

### *B. The Procedural Implications of Defining Victim Influence*

Regardless of how one thinks victim input should be evaluated, there is one procedural change all can agree with: states must codify the purposes of parole release so relevant parties can understand beforehand how victim input will be evaluated. This section presents the procedural implications of limiting victim influence according to this Note's resolution.

#### 1. States Must Codify the Purposes of Parole Release

As a threshold matter, even if one disagrees with the position that parole boards should permit victim input to influence the release decision in limited circumstances, the fact remains that board discretion must be channeled in some articulable way so that the board's treatment of victims meets a legitimate purpose. Whichever approach to victim input is adopted,<sup>308</sup> there must be regulation or legislation clearly articulating that standard. A factor, like victim input, should serve a predetermined purpose, and the decision about how to incorporate that factor should not be left to board members, as practice reveals their approaches can vary considerably.<sup>309</sup> If board members are not provided guidance beforehand, they will continue to apply disparate standards. It will be too easy for them to overvalue victim input because they may be quite empathetic toward emotionally charged victim testimony.<sup>310</sup> Alternatively, board members might improperly undervalue victim input if they personally think victims should have no say.<sup>311</sup> Accordingly, even if there is disagreement about the level of influence victims should have, all should agree that, at a minimum, state legislatures must codify which approach or theory of parole release governs. Parole boards must be transparent regarding the approach they apply so that all can understand the extent to which victim input will factor into the board's decision. Not doing so can expose victims to secondary harm through unmet expectations<sup>312</sup> and cause inmates to question the legitimacy of the process,<sup>313</sup> diminishing both groups' trust in the criminal justice system. If states allow victim input to

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308. *See supra* Part II.C.

309. *See supra* Part I.D.2.

310. *See supra* notes 149–53.

311. *See* BURKES ET AL., *supra* note 70, at 17–18 (finding that one board member disagreed and one strongly disagreed that victims offer valuable input); *see also* Young, *supra* note 97, at 473.

312. *See* Roberts, *supra* note 120, at 371.

313. *See supra* notes 142–46 and accompanying text.

influence decisions only when it relates to rehabilitation or the goals of sentencing, there are additional procedural implications that the states must take into account. These are addressed below.

## 2. Procedural Implications of Limiting Victim Influence

Changes to the parole release process must be enacted if a state wants to ensure that victim input is applied in a manner consistent with this Note's recommendation. First, states must require higher qualifications for board members and afford them greater protections from public or political reprisal to ensure they are sufficiently capable of performing their quasi-judicial task. Second, board members must justify their release decisions through reasoned analysis, much like judges. Third, there must be a real opportunity for judicial review of these decisions to ensure due process is met. Without these procedural changes, parole boards' natural tendency toward caution could lead to a crush of denials based on deterrent or retributive motivations.<sup>314</sup>

First, the qualifications required of board members are insufficient given the complex nature of the work board members perform.<sup>315</sup> Coinciding with this lack of requisite expertise and credentials, board members suffer from political vulnerability and can be removed easily.<sup>316</sup> Thus, if board members are expected to evaluate rehabilitation and the satisfaction of sentencing goals, they must have expertise similar to that of a judge and must be insulated from nonstatutory considerations such as political, public, or other pressures. If one allows board members to second-guess a sentencing judge's minimum sentence, such second-guessing must come from a similarly adept and independent decision-maker.<sup>317</sup> Thus, qualifications must be similar to those required for judges. To insulate board members from improper pressures, some states use a nonpartisan panel of individuals with law enforcement and criminal defense backgrounds to recommend appointments and work with the governor to nominate board members.<sup>318</sup> Another option is to use for board members the same process used for the selection and removal of judges.<sup>319</sup>

Second, states must require board members to be forthcoming in their rationales. One-line explanations, or even no explanations at all, for release decisions is inadequate,<sup>320</sup> especially if a board member is denying release

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314. See Schwartzapfel, *supra* note 85 (documenting many cases where parole boards are overly cautious and deny release to individuals who pose little risk of recidivism).

315. See *supra* Part I.B; see also Rhine et al., *supra* note 46, at 286.

316. See Reitz, *supra* note 36, at 2750 (likening parole boards to "sitting ducks" when a decision goes wrong).

317. See Rhine et al., *supra* note 46, at 280 ("[P]arole release decision[s] should be approached with the same care and consideration given judicial sentencing.").

318. See *id.* at 288–89. Hawaii, for example, relies on nominations forwarded by a panel comprised of the chief justice of the Supreme Court of Hawaii, the president of the Hawaii Criminal Justice Association, and the president of the Bar Association of Hawaii, among other similarly capable nominators. *Id.* Utah draws its nominees from its Commission on Criminal and Juvenile Justice. *Id.*

319. See *id.* at 289.

320. See *supra* notes 100–02 and accompanying text.

based on what the board member believes was an incorrect minimum sentence. It is more difficult for board members to be arbitrary and inconsistent in their rulings if they must defend their decisions with facts and evidence. Thus, board members, if permitted to entertain principles of sentencing must transparently explain how the victim input was not available to the sentencing judge or was improperly overlooked at sentencing, such that the true severity of the crime was miscalculated. Investment is required to enable board members to engage in such thorough decision-making if it is to be comparable to a sentencing decision.<sup>321</sup> Currently, there are too few board members, and decisions are often made in mere minutes, which shows just how rushed they can be.<sup>322</sup> Thus, states must hire more parole board members to allow for such a reasoned decision-making process. With committed resources, this approach can prevent board members from being overly focused on retribution or deterrence, as their opinions will have to show that the sentencing judge made a mistake—a serious claim to make.

In addition to counteracting a board that might overvalue deterrent or retributive principles, requiring a judicial-like opinion for release decisions can also better protect board members from negative public reaction and reduce feelings of disillusionment among victims<sup>323</sup> and inmates<sup>324</sup> when a decision goes against their wishes. Requiring board members to publicly explain how their decisions comport with the letter of the law, while not a panacea for those who disagree with the decision, will at least show that these decisions are not arbitrary or inherently unfair and can promote better understanding among the affected parties. Currently, the black box nature of parole does not offer board members any protection, as the public may struggle to have faith in an institution which can be nontransparent.<sup>325</sup> Requiring thorough opinions can counteract negative perceptions of discretionary release.

Third, parole board decisions must be subjected to legitimate appeal and review in the state court system; such an appeal process is currently not available in some states.<sup>326</sup> This reform requires written board opinions, as well as transcripts of proceedings, to be maintained, as meaningful review of release decisions is hindered by the absence of these key records.<sup>327</sup> Thus, having written opinions and transcripts available can subject decisions to

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321. See Rhine et al., *supra* note 46, at 312 (discussing that “greater institutional investment is needed” so that “adequate attention” and “good substantive decision making” can be applied in every case).

322. See Medwed, *supra* note 33, at 510; Reitz, *supra* note 36, at 2750 n.26.

323. See Roberts, *supra* note 120, at 371.

324. See *supra* Part I.D.2.

325. See *supra* notes 53–62, 100–02 and accompanying text.

326. See *supra* notes 91–93 and accompanying text; see also COHEN & GOBERT, *supra* note 31, at 21 (describing judicial review of the merits of release decisions as, while technically available, essentially a fruitless exercise).

327. See Rhine et al., *supra* note 46, at 315 (“Oversight of any kind is hindered by the absence in many states of transcripts or verbatim records of parole proceedings and the general absence of requirements of reasoned explanations for decisions.”).

more meaningful appellate review.<sup>328</sup> This can then provide a check on board members to ensure they are following the statutory criteria and producing sufficiently transparent and consistent release decisions.

While this Note recommends limited victim influence on the release decision and advocates for procedural changes that would allow parole decisions to better attain that goal, there must also be procedural changes that safeguard victims from further harm and allow their interests to be heard.

### C. *Assuring Procedural Justice for Victims*

While it is important for the parole release process to be fair and impartial for all parties, it is equally, if not more, important that the release process treats victims and their interests with care and does everything possible to avoid causing them secondary harms.<sup>329</sup> While this Note proposes an approach to parole release that would limit the extent victims can influence the actual release decision, it nonetheless advocates for a process that is attuned to victims' needs and argues that parole boards should move beyond the release-deny dichotomy as a means to aid victims in their healing.

First, the discretionary release process itself must be fair to victims if board members are going to ask for their participation. States should incorporate principles of procedural justice when they tailor their processes so as to reduce the potential for secondary harms to victims.<sup>330</sup> According to proponents of procedural justice, victims can be satisfied with a criminal justice process, like parole release, even if they do not agree with the outcome, so long as they believe that the parole release process is fair.<sup>331</sup> To develop a trustworthy process, victims should be allowed to discuss what is important to them with the parole boards; however, the parole board must display its neutrality and be honest with the victim regarding the way they will factor the victim's input into the release decision.<sup>332</sup> Further, parole boards must afford victims dignity and respect, rather than deceiving them about the functioning of the process.<sup>333</sup>

As a result, states should reflect the true relevance of victim input on the release decision in their public messaging and in their guidelines. Implying victim input lies at the heart of the decision process—when it may or may not be<sup>334</sup> or only does 10 percent of the time<sup>335</sup>—deceives victims about the actual treatment of their input.<sup>336</sup> Such an approach cultivates secondary harm if a release decision goes against the victims' wishes. For example, if this Note's recommendations were applied to Herman Bell's case, perhaps Diane Piagentini, while almost certainly still disagreeing with the outcome,

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328. *See id.*

329. *See SERED, supra* note 111, at 30–31.

330. *See generally* Giannini, *supra* note 116.

331. *See id.* at 85–104.

332. *See id.* at 90–91.

333. *See id.*

334. *See supra* Part I.D.2.

335. *See Young, supra* note 97, at 456.

336. *See id.* at 490.



might have been less harmed by the decision, had the Board been forthcoming about the weight her input would be afforded. Instead, the Board cited the testimony of what was likely some members of Officer Jones' family<sup>337</sup> as compelling and neglected to mention Diane Piagentini at all.<sup>338</sup> It is not hard to see how she might view this outcome as unfair and as an act of secondary victimization, as it may have rightly appeared to her that the New York Board of Parole chose to value another victim's preference over hers with no explanation.

While parole boards should be truthful with victims regarding the weight and role of their input, parole boards should also permit unrestrained access to the hearings if a victim so desires. Rather than provide victims an instrumental role, parole boards should be clear with victims that their role at hearings is entirely expressive unless the information they provide speaks to an inmate's rehabilitation or shows that the sentencing minimum did not accomplish certain sentencing goals. Though affording this transparency might be uncomfortable, a victim's expectations will at least not be manipulated even if their role is smaller than they would have wished; as scholar Kathryn Young notes, "honesty and legitimacy go hand in hand."<sup>339</sup> Further, if boards only permit victim input to have a limited influence, parole boards should discuss the benefits and drawbacks of reliving the experience in a public setting with a victim beforehand.<sup>340</sup> Additionally, to better realize the therapeutic and cathartic potential inherent in victim expression, parole boards should improve hearings for the victims that choose to attend.<sup>341</sup> Parole boards should consider offering mental health support for victims who make the decision to submit testimony concerning what could be one of the most haunting and significant moments of their lives.<sup>342</sup> In the same vein, hearing times should be longer than twenty-minute conveyor-belt-like sessions.<sup>343</sup>

Finally, parole boards should abandon the notion that a victim's needs or interests can or should be satisfied only by granting or denying parole. Parole boards should not link caring for victims with denying parole, as that is simply unsustainable for the health of both the system and the victim. It may prevent healing for victims because they focus on protesting at parole hearings and have a deep emotional attachment to getting denial for their offenders, instead of "moving on" with their lives.<sup>344</sup> Moreover, it is unsustainable because an inmate may still be released, causing real anguish for the victim who has so much emotionally invested in the outcome. Instead,

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337. See *supra* notes 8–9 and accompanying text.

338. See *Piagentini v. N.Y. State Bd. of Parole*, 176 A.D.3d 138, 148 (N.Y. App. Div. 2019) (Egan, J., dissenting).

339. See Young, *supra* note 97, at 490.

340. See *id.*

341. See *id.* at 490–92.

342. See *id.* at 492.

343. See Medwed, *supra* note 33, at 510; Reitz, *supra* note 36, at 2750 n.26.

344. See Young, *supra* note 97, at 476 (commenting that some board members felt victim participation prevented the victim from "moving on," as they would dwell on their anger and be consumed by it).

board members should care about how victims will feel about release—not for purposes of deciding whether release is just, but for purposes of supporting the victim after the fact. Perhaps parole boards should invest in greater counseling and health services for victims as they are often the primary, if not the only, point of contact between victims and the criminal justice system after sentencing.<sup>345</sup> In addition, parole boards, given their unique position as a conduit between victims and inmates, can facilitate more restorative justice models of healing by providing the option for Victim Offender Mediation (VOM),<sup>346</sup> which has had promising results in promoting victims' well-being.<sup>347</sup> States should empower parole boards to move beyond linking victim interests with parole release decisions and look to other more sustainable ways to address their legitimate needs and interests.

#### CONCLUSION

As the use of discretionary parole release increases, questions about victims' role in the process persist. These questions often center on the general purpose parole release serves, as the level of influence victim input has is often dictated by a particular board member's approach to the release decision.

This Note identified four ways that parole boards approach release decisions. Under the first theory, parole boards may primarily focus on rehabilitation and thus assign little to no importance to victim input. This theory lacks explanatory power because victims do exert incredible influence in reality. Under the second theory, parole boards may treat the release decision as a resentencing decision that is concerned with considering the retributive and deterrent principles of punishment. This theory does not explain how victim testimony is often outcome-determinative. Under the third theory, release is a victim-centric decision. This theory also falls short of explaining how release decisions are made because it appears that, to some board members, some victims matter more than others. Under the fourth theory, parole decisions are political decisions that reflect public sentiment about victims' input.

All of these frameworks present benefits and drawbacks. Some are theoretically persuasive, while others have real explanatory power—or a mix of both. In addition, there is the overarching question of whether victim input

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345. *See id.* at 492.

346. Over a thousand VOM centers have been opened in the past decade, enabling victims and offenders to meet in person to discuss the crime and its impact. *See O'Hara, supra* note 237, at 131. VOM has been described as successful in both reducing recidivism rates among inmates and increasing satisfaction among victims who felt their opinions were heard and who were able to finally receive a genuine apology and public reckoning for the crime's effects on them. *Id.* Though, much of VOM's success could be a product of the fact that its participants are selectively screened. *Id.*; *see also supra* note 115 and accompanying text (discussing a VOM process in Minnesota).

347. *See O'Hara, supra* note 237, at 131 (“[T]hose who instead opt for VOM are significantly more likely to report that their opinions were considered, the outcomes were fair and satisfactory, and the offender was held accountable.”).

should be a factor. On one hand, permitting victim input poses fairness concerns for inmates; on the other hand, shutting victims out of the process can also lead to adverse consequences.

This Note attempts to strike a balance between these extremes and posits that board members should evaluate inmates' rehabilitation as well as the extent to which sentencing's retributive and deterrent goals have been met. Thus, victim input should only influence the release decision if it provides information showing either that the inmate is not rehabilitated or that the judge's minimum sentence did not accurately reflect the impact of the crime. Recognizing the implications of this approach, this Note proposes stricter requirements for board member qualifications and explanation of decisions. Additionally, states should tailor release procedures to minimize the risks of secondary harms to victims. States should give victims the opportunity to be heard, but they must be truthful about the weight victims' input is afforded. Finally, states should empower parole boards to move beyond the release-deny dichotomy as the principal means to aid victims in their healing.