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Prosecutors, Parole, and Evidence: Why Excluding Prosecutors from Parole Hearings Will Improve California's Parole Process

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PROSECUTORS, PAROLE, AND EVIDENCE: WHY EXCLUDING PROSECUTORS FROM PAROLE HEARINGS WILL IMPROVE CALIFORNIA'S PAROLE PROCESS

*E. Alex Murcia**

This Article considers whether excluding prosecutors from parole hearings will improve or compromise California's parole process. The Article begins by discussing the role that California law carves out for prosecutors at parole hearings. Next, it addresses (1) the consequences of that role and (2) Los Angeles County District Attorney George Gascón's decision to bar Los Angeles County prosecutors from attending parole hearings. The Article concludes that excluding prosecutors from parole hearings will probably reduce the amount of unhelpful and unreliable evidence introduced at parole hearings. The Article also finds that not enough evidence exists to determine whether victims benefit from increased prosecutorial participation in the parole process. The Article also conducts an analysis of statistical data maintained by the California Board of Parole Hearings and, based on that data and other evidence, finds that excluding prosecutors from parole hearings will probably increase parole release rates in California. The Article reaches the broader conclusion that excluding prosecutors from parole hearings will improve California's parole system.

* J.D., LMU Loyola Law School; B.A., Chapman University. Thank you, Professors Chris Hawthorne and Elie Miller, for your edits and guidance. Thanks also to the staff of the *Loyola of Los Angeles Law Review* for diligently editing this work.

TABLE OF CONTENTS

I. INTRODUCTION: WHAT’S GOING ON IN THE LOS ANGELES COUNTY DISTRICT ATTORNEY’S OFFICE?	444
II. BACKGROUND: WHAT DO PROSECUTORS DO AT PAROLE HEARINGS?	447
A. Representatives of the State.....	447
B. Speaking for Victims	449
III. ANALYSIS: WHAT IMPACT DO PROSECUTORS HAVE WHEN THEY OPPOSE PAROLE AND SUBMIT/READ VICTIM STATEMENTS	450
A. Prosecutors Probably Have an Impact on Parole Rates..	450
1. Studies Show That Prosecutors Probably Impact Parole Rates	450
2. Prosecutors Exert Political Pressure on Parole Boards.....	453
3. The Parole Directives May Have Impacted Release Rates Already	454
i. Data used	454
ii. Results	455
iii. Implications.....	459
B. Prosecutors Do Not Necessarily Improve the Reliability of the Parole Board’s Assessments of Dangerousness.....	460
1. Prosecutors Who Present Victim Testimony/Statements.....	461
2. Prosecutors as Attorneys for the State	465
C. Sending Prosecutors to Parole Hearings to Read Victim Testimony Sets Up a Conflict Between Section 2030 of the California Code of Regulations and Section 3043 of the California Penal Code.....	469
D. We Do Not Know Whether Prosecutors Help Victims by Increasing Victim Participation in the Parole Process	469
E. Excluding Deputy District Attorneys from Parole Hearings Will Free Up Prosecutors to Perform Other Tasks.....	471
F. Sheriff’s Deputies Will Not Negate the Effects of Gascón’s Policy	473

IV. CONCLUSION: GASCÓN'S PAROLE DIRECTIVES WILL LIKELY
IMPROVE THE PAROLE PROCESS 475

I. INTRODUCTION: WHAT'S GOING ON IN THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE?

After his swearing in as Los Angeles County District Attorney in December 2020, George Gascón instituted a laundry list of reforms to the Los Angeles County District Attorney's Office through multiple, sweeping Special Directives.¹ Among other things, the unprecedented changes barred prosecutors from charging gang and gun enhancements,² from contesting resentencing in many cases,³ and from charging juveniles as adults.⁴ In 2022, Gascón walked back some of these reforms, but most, including those referenced below, remain in place.⁵

In the Special Directives, Gascón also issued three instructions related to parole (the "Parole Directives"), which limited the role Los Angeles County prosecutors could play in the parole process. First, he instructed prosecutors not to appear at parole suitability hearings for persons serving life sentences—commonly referred to as "lifer parole hearings."⁶ Second, he ordered prosecutors to submit letters supporting parole if at the time of the parole suitability hearing the inmate had served the mandatory minimum period of incarceration.⁷ Third, he permitted prosecutors to submit neutral letters to the Board of Parole Hearings (the "Board") if the California Department of Corrections and Rehabilitation determined that an inmate posed a high risk for recidivism.⁸ These new instructions significantly reduced the role that prosecutors play in the parole process. The changes were also a departure from the policies of Gascón's predecessors, who often expected prosecutors to submit letters opposing parole and to attend lifer parole

1. *Inside LADA*, L.A. CNTY. DIST. ATT'Y'S OFF., <https://web.archive.org/web/20210227004941/https://da.lacounty.gov/about/Inside-LADA> (archived Feb. 27, 2021) (listing Special Directives 20-06, 20-07, 20-08.1, 20-08.2, 20-09, 20-10, 20-11, 20-12, 20-13, 20-14).

2. GEORGE GASCÓN, L.A. CNTY. DIST. ATT'Y'S OFF., SPECIAL DIRECTIVE 20-08.2, at 1 (2020), <https://da.lacounty.gov/sites/default/files/policies/SD-20-08-2.pdf> [<https://perma.cc/J5BF-VRB6>] (referencing CAL. PENAL CODE § 12022.53).

3. GEORGE GASCÓN, L.A. CNTY. DIST. ATT'Y'S OFF., SPECIAL DIRECTIVE 20-14, at 4 (2020), <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-14.pdf> [<https://perma.cc/Y2GG-XEEN>].

4. GEORGE GASCÓN, L.A. CNTY. DIST. ATT'Y'S OFF., SPECIAL DIRECTIVE 20-09, at 3 (2020), <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-09.pdf> [<https://perma.cc/3XJA-HRJP>].

5. James Queally, *George Gascón Wouldn't Compromise, Until He Did. Now, No One Is Happy*, L.A. TIMES (March 3, 2022, 5:00 AM), <https://www.latimes.com/california/story/2022-03-03/george-gascon-wound-not-compromise-then-he-did> [<https://perma.cc/NX58-28G2>].

6. *See* GASCÓN, *supra* note 3, at 8.

7. *Id.*

8. *See id.*

hearings to advocate against release.⁹ The Los Angeles County District Attorney's Office justified the Parole Directives on the grounds that "the *value* of a prosecutor's input in [a] parole hearing [is] . . . limited[.]"¹⁰ so prosecutors need not attend.

After publishing the Parole Directives on December 8, 2020, Gascón has faced pushback and criticism from victims' rights groups and other California district attorneys,¹¹ including former Los Angeles County District Attorney Steve Cooley.¹² Los Angeles County Sheriff Alex Villanueva also criticized Gascón, and in early 2021 sent a letter to the District Attorney's Office stating that the Sheriff's Department would send deputy sheriffs to parole hearings if prosecutors refused to attend.¹³

By contrast, criminal justice reform advocates mostly cheer the Parole Directives and criticized Gascón's opponents for trying to slow or prevent Gascón from implementing the reforms.¹⁴ Like the District Attorney's Office, many in this group argued that the Parole Directives would positively impact the parole process because, they claimed, prosecutors do not contribute meaningfully at parole hearings and, therefore, should play a lesser role in them.¹⁵

9. See Chris Kaiser-Nyman, (*In*)Justice in LA, ACLU CAL. 39–40 (Dec. 4, 2020), <https://www.lareentry.org/wp-content/uploads/2021/01/2020-ACLU-LADA-Report-.pdf> [<https://perma.cc/NS3M-7E8W>].

10. GASCÓN, *supra* note 3, at 8 (emphasis added).

11. Ben Poston, *Victims Rights Advocates Launch Recall Effort Against Newly Elected L.A. Dist. Atty. George Gascón*, L.A. TIMES (Feb. 27, 2021, 7:41 PM), <https://www.latimes.com/california/story/2021-02-27/group-plans-to-launch-recall-effort-against-newly-elected-l-a-dist-atty-george-gascon> [<https://perma.cc/ZL6D-GVBP>]; Jeremy B. White, *California Prosecutors Revolt Against Los Angeles DA's Social Justice Changes*, POLITICO (Jan. 25, 2021, 4:30 AM), <https://www.politico.com/news/2021/01/25/george-gascon-california-social-justice-461667> [<https://perma.cc/LC66-W4SR>].

12. Anabel Munoz, *Steve Cooley on Reforms by LA County DA George Gascón: 'Basically I Disagree with Virtually Everything He's Doing,'* ABC7 NEWS (Dec. 10, 2020), <https://abc7.com/steve-cooley-george-gascon-da-district-attorney/8650550/> [<https://perma.cc/MS9A-HCGK>].

13. See LA County Sheriffs (@LASDHQ), TWITTER (Feb. 3, 2021, 9:14 AM), <https://twitter.com/LASDHQ/status/1357014686022078464> [<https://perma.cc/H4TH-48HT>]; see Letter from Alex Villanueva, Sheriff, L.A. Cnty. Sheriff's Dep't, to George Gascón, District Attorney, L.A. Cnty. Dist. Att'y's Off. (Feb. 3, 2021), https://lasd.org/wp-content/uploads/2021/02/Transparency_Response_Gascon_Letter_Parole_Hearings_020321.pdf [<https://perma.cc/Z8MC-PR53>].

14. See Erwin Chemerinsky & Miriam Aroni Krinsky, Opinion, *Stop the Attempt to Derail D.A. George Gascón's Criminal Justice Reforms*, L.A. TIMES (Jan. 28, 2021, 3:05 AM), <https://www.latimes.com/opinion/story/2021-01-28/george-gascon-los-angeles-district-attorney-lawsuit> [<https://perma.cc/U94V-9578>].

15. GASCÓN, *supra* note 3, at 8 (stating that the value of a prosecutor's input in parole hearings is limited); Editorial, *No, Crime Survivors Don't Need Prosecutors at Parole Hearings. But They Do Need More Help*, L.A. TIMES (Feb. 21, 2021, 3:00 AM), <https://www.latimes.com/opinion/story/2021-02-21/prosecutors-parole-hearings-gascon> [<https://perma.cc/CQA2-65TM>].

Setting aside the vigorous disagreement on these issues, this Article conducts an empirical analysis of whether prosecutors serve a beneficial role when they oppose parole and attend parole hearings. Specifically, the Article considers (1) the role that California law carves out for prosecutors at parole hearings¹⁶ and (2) the ultimate consequences of that role.¹⁷ The Article's analysis of the latter includes consideration of (a) how prosecutorial participation in parole impacts victim attendance at parole hearings,¹⁸ (b) whether prosecutorial involvement in the parole process impacts the Board's parole grant rate,¹⁹ (c) how prosecutorial participation affects the evidence that reaches the Board at hearings,²⁰ (d) whether prosecutorial participation in parole benefits victims,²¹ and (e) how sending prosecutors to parole hearings impacts the Los Angeles County District Attorney's Office.²² Last, the Article considers whether sending Los Angeles County deputy sheriffs to parole hearings—as Sheriff Alex Villanueva has promised to do—will negate the effects of Gascón's reforms.²³

After reviewing the evidence, the Article concludes that substantial evidence supports the claim that prosecutors do not serve a beneficial role in the parole process.²⁴ As a result, reducing prosecutors' roles in that process will probably improve it.

One important point to note before we continue. This Article's inquiry into prosecutorial involvement in parole covers only the type of prosecutorial conduct authorized by California law. The Article does not discuss whether prosecutors serve valuable roles in the parole process when their roles differ meaningfully from the functions they perform under California's parole scheme. Note also that any references in this Article to “the Board” refer to the California Board of Parole Hearings. Any references to the “parole board” or “parole boards” refer to parole boards more generally.

16. See discussion *infra* Section II.A.

17. See discussion *infra* Part III.

18. See discussion *infra* Section III.A.1.

19. See discussion *infra* Section III.A.

20. See discussion *infra* Section III.B.

21. See discussion *infra* Section III.D.

22. See discussion *infra* Section III.E.

23. See discussion *infra* Section III.F. This final issue carries particular importance. If prosecutors negatively impact the parole process and Sheriff Villanueva's deputies attend parole hearings their place, Gascón's policy on parole will probably have less of an impact.

24. See discussion *infra* Part IV.

II. BACKGROUND: WHAT DO PROSECUTORS DO AT PAROLE HEARINGS?

A. *Representatives of the State*

In the pretrial phase of the criminal legal system, prosecutors have broad discretion to decide whether to charge a defendant, what crimes to charge, and what pleas to offer.²⁵ By contrast, when prosecutors participate in the parole process, they play a much smaller role.

Section 2030 of the California Code of Regulations governs prosecutors who attend parole hearings on behalf of the state.²⁶ The section permits but does not require a prosecutor from the office that prosecuted the inmate to appear at the inmate's parole suitability hearing.²⁷ Section 2030 authorizes a prosecutor who attends a parole hearing to "comment on the facts of the case and present an opinion about the appropriate disposition."²⁸ Although prosecutors may be permitted to ask clarifying questions,²⁹ they must direct their questions to the Board.³⁰ The Board may then redirect questions to the inmate.³¹ Section 3043.6 of the California Penal Code provides prosecutors the power to speak last at parole hearings,³² and section 3041.7 bars persons other than prosecutors from representing the state of California at parole hearings.³³ In lieu of an appearance, prosecutors may express their opinions on inmate parole suitability through written letters.³⁴

25. *Prosecutorial Discretion: The Decision to Charge*, NAT'L INST. L. ENF'T & CRIM. JUST. 9 (Oct. 1975), <https://www.ojp.gov/pdffiles1/Digitization/30983NCJRS.pdf> [<https://perma.cc/9DXQ-ZNRS>].

26. CAL. CODE REGS. tit. 15, § 2030 (2020).

27. *Id.*

28. *Id.* §§ 2028, 2030.

29. *Id.* § 2030(d)(2).

30. *See* Scott v. Haviland, No. CIV S-09-2830, 2012 WL 893177, at *12–13 (E.D. Cal. Mar. 14, 2012).

31. *See, e.g., id.* at *13.

32. CAL. PENAL CODE § 3043.6 (West 2011). No empirical literature has explored the impact of this provision, but I speculate that it results in the Board assigning more weight to the testimony of a prosecutor in an assessment of whether to grant parole. Support for this hypothesis stems from the recency effect. *Cf.* Elizabeth Hopper, *What Is the Recency Effect in Psychology?*, THOUGHTCO. (Feb. 29, 2020), <https://www.thoughtco.com/recency-effect-4691883> [<https://perma.cc/BVU5-BQ2N>] (explaining the recency effect).

33. PENAL § 3041.7.

34. REGS. tit. 15, § 2030 (addressing prosecutor's power to submit documents); PENAL §§ 1203.01, 3042 (same); 49 CAL. JUR. 3D *Penal and Correctional Institutions* § 294 (2018 & Supp. 2021); *cf.* Lopez v. Green, No. F069010, 2015 WL 4162509, at *2 (Cal. Ct. App. July 10, 2015) (discussing letters submitted by prosecutors to the parole board).

A prosecutor who attends a parole hearing and who opposes release might argue to the Board that the inmate is not suitable for parole because he or she minimizes his or her role in the crime, lies about the crime, or shows a lack of remorse.³⁵ A prosecutor might also point to facts about the crime or the inmate's disciplinary record in prison to argue that the prisoner still poses a danger to society and is not suitable for release.³⁶ Where prosecutors support release, they often point to positive facts about the inmate's background or the inmate's rehabilitation.³⁷

However, prosecutors who appear on behalf of the state rarely support release.³⁸ In fact, as the quote below demonstrates, some prosecutors oppose release despite acknowledging that an inmate appears to be suitable for parole.

Even while opposing petitioner's release, . . . the district attorney admitted, "I would again indicate that I believe [the inmate has] made as much progress as any inmate I've seen since I've been doing these parole hearings. Both in terms of advancing educationally, doing the self-help and also setting up very solid parole and probation plans."

*. . . [The district attorney also acknowledged that the petitioner was] "as impressive an individual as [he had] seen in terms of evidencing a changed attitude"*³⁹

The Los Angeles County District Attorney's Office does not keep official records on the rate at which its prosecutors oppose parole when appearing under section 2030.⁴⁰ However, insiders estimate that under

35. See, e.g., *In re Padin*, No. A151770, 2018 WL 1063913, at *6 (Cal. Ct. App. Feb. 27, 2018) (prosecutor argued that the Board should deny parole because "the version of the facts . . . [inmate presented] 'minimize[d] his role in the crime' . . . and constituted a 'sanitized minimization version [of events] that amount[ed] to a snow job,' a 'bald, flat-out lie'").

36. See, e.g., *In re Parole Consideration Hearing of Harvey Amezcua* at 60:14–17, 61:1–13, CDC No. V69723 (Pelican Bay State Prison Nov. 3, 2020) (questioning inmates' suitability for release in part because that inmate was a "dry drunk . . . [who had not] really program[ed], . . . chose college courses over his sobriety," and had a poor disciplinary record in prison).

37. See, e.g., *In re Parole Consideration Hearing of Brian Allen* at 65:16–25, 66:1–2, CDC No. J6200 (Cal. Men's Colony Nov. 20, 2020) ("[I]t appears to this prosecutor that, um, Mr. Allen has spent the last decade, um, really programming well, really digging deep into his, um, background and to try and understand [sic] . . . how his addiction drove his behaviors along with his, um, character defects. And, um, it would appear that given the, uh, regulations in effect today, the . . . ability to, and expectation to rehabilitate oneself in CDCR that Mr. Allen has, um, achieved that, that he has done well. And we commend him for his, um, good program over the last decade.").

38. See Kaiser-Nyman, *supra* note 9, at 39–40.

39. See, e.g., *Hernandez v. Subia*, No. 07-cv-00839, 2010 WL 2025330, at *14 (E.D. Cal. May 18, 2010) (emphasis added).

40. Kaiser-Nyman, *supra* note 9, at 39–40.

the previous District Attorney, Jackie Lacey, prosecutors opposed parole in about 80 percent of cases.⁴¹ Other District Attorneys in California—who are often more politically conservative—likely oppose parole at even higher rates.⁴²

B. Speaking for Victims

Prosecutors who attend parole hearings may also present victim statements to the Board.⁴³ Crime victims, family members of crime victims, and victims' next of kin may speak at parole hearings or have written statements read into the record by third parties.⁴⁴ Prosecutors may read these statements.⁴⁵

The statutory basis for prosecutors to speak at parole hearings on behalf of victims arises, in part, from prosecutors' rights to appear before the Board under section 2030.⁴⁶ However, the rights of prosecutors to represent the views of victims stems from the Penal Code, specifically sections 3043 and 3043.2. Section 3043 permits victims to designate any adult person to appear as a personal representative at a parole suitability hearing to comment upon (1) the inmate's suitability for release, (2) the effect of the crime on the victim, or (3) other crimes committed by the inmate.⁴⁷ Courts cite section 3043 as providing a statutory basis for a prosecutor to attend a parole hearing.⁴⁸

Section 3043.2 also provides a basis for prosecutors to speak on behalf of victims at parole hearings. While section 3043.2 begins by describing a more limited definition of personal representative, one that bars nonfamily members from presenting certain kinds of evidence to the board, the statute notes that this stricter definition of personal representatives does not “prohibit prosecutors from representing . . . the views of . . . victim[s]” at parole hearings.⁴⁹

41. *Id.*

42. *Cf.* Julissa Zavala, *Meet the Candidates: District Attorney*, THE SENTINEL (Oct. 7, 2019), https://hanfordsentinel.com/election2018/meet-the-candidates-district-attorney/article_76caec8c-0c16-5dfe-b2db-c760822c0bc6.html [<https://perma.cc/GPL5-QW49>] (quoting the Kings County district attorney as claiming his office “ensure[d] personal prosecutor appearance for all parole hearings for violent criminals”).

43. *See* CAL. PENAL CODE § 3043(c) (West 2011).

44. *Id.* § 3043.6.

45. *See infra* note 51.

46. CAL. CODE REGS. tit. 15, § 2030 (2020).

47. PENAL § 3043(b)(1), (c).

48. *See In re Weider*, 52 Cal. Rptr. 3d 147, 161 (Ct. App. 2006) (citing section 3043 in connection with a district attorney's presence at a parole hearing).

49. PENAL § 3043.2.

When prosecutors attend parole hearings to state the position of the victim, prosecutors may point to reasons voiced by the victim, including the victim's opinion on the inmate's parole suitability, as a basis to deny or grant parole.⁵⁰ Notably, a victim need not appear at the hearing for a prosecutor to read a statement drafted by the victim, a family member of the victim, or the victim's next of kin.⁵¹

III. ANALYSIS: WHAT IMPACT DO PROSECUTORS HAVE WHEN THEY OPPOSE PAROLE AND SUBMIT/READ VICTIM STATEMENTS

A. Prosecutors Probably Have an Impact on Parole Rates

The first question that this Article considers is whether a prosecutor's attendance at a parole hearing or submission of written evidence to the parole board has any measurable impact on parole board decisions.

No empirical studies directly address whether a prosecutor's attendance at a parole hearing impacts release rates.⁵² Accordingly, the first of the following two subsections discusses other conditions known to influence the outcomes of parole hearings. The same subsection then considers whether including prosecutors in the parole process alters those conditions and makes parole boards more or less likely to grant or deny parole. The second subsection considers whether prosecutors influence parole board decisions through the political process. The third subsection conducts an analysis of the Board's parole rate to determine whether the Parole Directives have already impacted release rates in Los Angeles.

1. Studies Show That Prosecutors Probably Impact Parole Rates

Victim involvement in the parole process influences the rate at which parole boards grant parole. Studies show that where victims participate in the parole process by attending parole hearings or submitting statements to parole boards, parole boards deny parole in a greater percentage of cases.

50. *See id.* §§ 3041.5(b)(1)–(3), 3043(c).

51. *See id.* § 3043.2. When I corresponded with California district attorneys' offices over the phone regarding their parole hearing policies, representatives from multiple offices stated that their offices send prosecutors to read victim statements into the record where victims decline to attend or exercise their right to attend but decline to speak. No offices were willing to provide me with a written policy. Some also declined to make a statement on the record.

52. R. Michael Cassidy, *Undue Influence: A Prosecutor's Role in Parole Proceedings*, 16 OHIO ST. J. CRIM. L. 293, 302 (2019).

For example, a detailed study of the Alabama parole process determined that the parole board denied parole more frequently when victims submitted written statements or spoke at parole hearings.⁵³ The study also found that if the victim spoke at a parole hearing, the parole board denied parole with even greater frequency than if the victim submitted only a written statement.⁵⁴ A 1992 study conducted in Pennsylvania also found that victim participation in the parole process decreased release rates. Specifically, the study determined that where victims attended parole hearings, the Pennsylvania Parole Board denied parole in 43 percent of cases.⁵⁵ When victims did not attend, the Pennsylvania Parole Board granted parole in 93 percent of cases.⁵⁶

In another study, which surveyed releasing authorities about the impact of victim input on their decisions, researchers found that 40 percent of the authorities considered victim testimony to be “highly influential” in determining whether to release.⁵⁷ An analysis of release rates in California showed that the Board’s release rate in the mid-2000s dropped from 13.8 percent to just 5 percent when victims attended parole hearings.⁵⁸ These studies provide strong evidence that when victims attend parole hearings or submit written statements to parole boards, parole boards release fewer inmates.

The findings of the studies carry significance for this Article because when prosecutors attend parole hearings, they likely increase victim participation in the parole process. For example, some district attorneys’ offices in California provide transportation or

53. Kathryn Morgan & Brent L. Smith, *Victims, Punishment, and Parole: The Effect of Victim Participation on Parole Hearings*, 4 CRIMINOLOGY & PUB. POL’Y 333, 341, 351 (2005).

54. *Id.* at 339–40.

55. See William H. Parsonage et al., *Victim Impact Testimony and Pennsylvania’s Parole Decision Making Process: A Pilot Study*, 6 CRIM. JUST. POL’Y REV. 187, 194 (1992) (finding that the Pennsylvania Board of Probation and Parole denied parole in just 7 percent of cases where victims did not provide testimony at parole hearings and denied parole in 43 percent of cases where victims testified to the Board).

56. See *id.*

57. See Maureen McLeod, *Getting Free: Victim Participation in Parole Board Decisions*, 4 CRIM. J. 12, 41–43 (1989) (parole board personnel estimated that denial rates rose 30 percent when victims participated in the parole process); cf. Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME & JUST. 347, 397, 402 (2009) (citing SUSAN C. KINNEVY & JOEL M. CAPLAN, CTR. FOR RSCH. ON YOUTH & SOC. POL’Y, FINDINGS FROM THE APAI INTERNATIONAL SURVEY OF RELEASING AUTHORITIES 18 (2008), <http://www.apaintl.org/documents/surpub/2008.pdf> [<https://perma.cc/YX33-N2HJJ>] (discussing how victim testimony may impact board decisions)).

58. Robert Weisberg et al., *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California*, STAN. CRIM. JUST. CTR. (Sept. 2011), <https://law.stanford.edu/sites/default/files/publication/259833/doc/slspublic/SCJC%20Lifer%20Parole%20Release%20Sept%202011.pdf> [<https://perma.cc/8LDF-UR7M>].

accommodations for victims seeking to attend parole hearings with prosecutors.⁵⁹ Where victims do not attend hearings with prosecutors, district attorneys' offices allow victims to appear and speak via video from the prosecutor's office.⁶⁰ Deputy district attorneys may also read victim statements into the record.⁶¹

Therefore, prosecutorial involvement in the parole process probably increases victim participation because prosecutors provide ways for victims, many of whom live far from the prisons where the California Department of Corrections holds parole hearings, to comment at parole hearings when those victims otherwise could not. Prosecutors also increase participation by victims when they help victims navigate the procedural hurdles required to get statements to the Board.

The evidence discussed above shows that greater prosecutorial involvement in the parole process likely increases victim involvement, which increases denial rates.

59. I contacted multiple California district attorneys' offices about their policies concerning parole hearings. While some declined to discuss this issue on the record, other offices indicated that they provide the above-mentioned services for victims. No offices maintained a written policy on the provision of these services.

60. See *A Guide for Writing Victim Impact Statements*, CAL. DEP'T OF CORR. & REHAB., <https://www.cdcr.ca.gov/victim-services/a-guide-for-writing-victim-impact-statements/> [<https://perma.cc/578Z-TX4W>] ("You can also submit an audio or video statement (with transcript), appear via video conference at the DA's office, or have someone speak on your behalf.")

61. Representatives from several counties stated that deputy district attorneys read victim testimony to the Board when victims decline to attend hearings. Others declined to comment. Section 3043.2 also makes clear that deputy district attorneys may represent the views of victims to the parole board. CAL. PENAL CODE § 3043.2(c) (West 2011). As for why prosecutors reading victim statements into the record will decrease release rates, two sources of evidence support this conclusion. First, the Alabama study showed that where victims appeared and spoke to the parole board, the parole board denied parole at a higher rate than when victims merely submitted written statement; nonetheless, written statements still decreased release rates. Morgan & Smith, *supra* note 53, at 351. Second, other research shows that when people hear another person, any person, read a statement, they assign more intelligence, thoughtfulness, and other human qualities to the speaker and his or her opinions than if the hearer merely reads the statement to themselves. See Juliana Schroeder & Nicholas Epley, *The Sound of Intellect: Speech Reveals a Thoughtful Mind, Increasing a Job Candidate's Appeal*, 26 PSYCH. SCI. 877, 881–82 (2015) (finding that hearing the voices of job candidates caused hearers to rate them as more competent, thoughtful, and intelligent); cf. Juliana Schroeder et al., *The Humanizing Voice: Speech Reveals, and Text Conceals, a More Thoughtful Mind in the Midst of Disagreement*, 28 PSYCH. SCI. 1745, 1749 (2017) (finding that hearing an opinion, instead of merely reading one, results in the hearer assigning more human qualities to the person who holds the opinion). Accordingly, the fact that someone read the victims' statements to the parole board, not that the victim read them, likely accounts for the greater increase in denial rates that occurred when Alabama victims attended parole hearings. This means that when prosecutors read statements to the Board, prosecutors likely have a similar effect to victims reading statements.

2. Prosecutors Exert Political Pressure on Parole Boards

When prosecutors appear at parole hearings to object to the release of high-profile offenders, they likely contribute to further reductions in release rates. Parole board commissioners in the United States know that every time they release an inmate, the odds increase that a parolee will re-offend. When an inmate released on parole re-offends and causes harm, parole boards often become targets of criticism. Commissioners may even lose their jobs or discretion as a result.⁶²

For example, in 2019, when the Pennsylvania Board of Probation and Parole released an inmate who later murdered an eight-year-old boy, officials immediately criticized the board and called for changes to the state's parole process.⁶³ Similarly, when the Oklahoma Pardon and Parole Board released a man who later killed several people, the Pardon and Parole Board faced backlash and criticism from officials, including the prosecutor who prosecuted the case.⁶⁴ Other cases have resulted in similar pressure on parole boards to tighten standards for release.⁶⁵

District attorneys—who often command press attention⁶⁶—know about the scrutiny parole boards face. As the Oklahoma case demonstrates, a prosecutor's office that opposes parole can leverage that

62. See, e.g., Andy Fox, *Virginia Parole Board Under Fire for Releasing Convicted Killer, Family Member Fighting Back*, WAVY.COM (Aug. 14, 2020, 7:51 PM), <https://www.wavy.com/news/local-news/suffolk/virginia-parole-board-under-fire-for-releasing-convicted-killer-family-member-fighting-back/> [<https://perma.cc/3CKL-44Q2>]; John Appleton, *Gov. Deval Patrick Cleans House at Parole Board in Response to the Killing of Woburn Police Officer John Maguire*, MASS LIVE (Mar. 25, 2019, 4:18 AM), https://www.masslive.com/news/2011/01/gov_deval_patrick_cleans_house.html [<https://perma.cc/N2NZ-2VZF>].

63. *6 Killings in Two Months Allegedly by People on Parole in Pennsylvania Prompt Calls for Review*, NBC NEWS (July 25, 2019, 4:43 AM), <https://www.nbcnews.com/news/crime-courts/6-killings-two-months-allegedly-people-parole-pennsylvania-prompt-calls-n1034356> [<https://perma.cc/C7RV-396E>] (quoting officials who pushed for an “independent review” of the parole board); *8-Year-Old's Murder Could Change Way Parole Cases Are Handled in PA*, WPXI (Sept. 13, 2019, 4:57 AM), <https://www.wpxi.com/news/top-stories/8-year-old-s-murder-could-change-way-parole-cases-are-handled-in-pa/985703807/> [<https://perma.cc/M2PF-RBK3>] (quoting a Pennsylvania District Attorney and state lawmakers who pushed to extend sentences for certain offenders as a result of the Board's release of inmate).

64. See Crystal Bonvillian, *He 'Cooked the Heart with Potatoes': Oklahoma Parolee Charged in Gruesome Triple Slaying*, BOS. 25 NEWS (Feb. 24, 2021, 5:01 PM), <https://www.boston25news.com/news/trending/he-cooked-heart-with-potatoes-recent-oklahoma-parolee-charged-gruesome-triple-slaying/XLR7B306NRBYZJLGCSSL4K5NXJM> [<https://perma.cc/6K88-6VDF>].

65. See *supra* note 62.

66. See, e.g., *supra* note 11.

scrutiny to pressure a parole board to deny release.⁶⁷ Although researchers have not gathered much empirical data on this issue, anecdotal data shows that prosecutors use these tactics with some frequency. For example, Boston College Law Professor R. Michael Cassidy identified a list of cases where prosecutors successfully “pressure[d] . . . parole board[s] [to deny parole by submitting] . . . information [to the parole boards] that [was] both irrelevant and inflammatory.”⁶⁸

One of the more concerning examples discussed by Cassidy involved a prosecutor who attended a parole hearing to insist, without reliable evidence, that the inmate, who had been in prison for more than twenty-five years, would “kill again” if released.⁶⁹

Where prosecutors appear at parole hearings and make blanket statements like this, it becomes difficult to argue that parole board commissioners do not become more mindful of the risks associated with releasing an inmate. As a result, when prosecutors attend parole hearings and oppose parole, they likely cause parole boards to release fewer inmates.

3. The Parole Directives May Have Impacted Release Rates Already

George Gascón was elected Los Angeles County District Attorney in November 2020, and the Parole Directives took effect in December of that year.⁷⁰ Before December 2020, prosecutors from Los Angeles County attended parole hearings and opposed parole as a matter of course.⁷¹ Gascón’s policy change provides a background for this Article to assess whether the lack of opposition to parole by prosecutors in Los Angeles has already impacted inmate release rates in California.

i. Data used

The following subsections compare the Board’s release rate from January through June 2020 (Pre-Directives Period One) and July 2020 through November 2020 (Pre-Directives Period Two). These release

67. Cassidy, *supra* note 52, at 303 (discussing how the testimony of a prosecutor might impact a parole board’s decision by reminding the board of the politically fraught circumstances they will face if an inmate is released and goes on to commit another serious crime).

68. *Id.* at 297–98.

69. *Id.* at 296–97 (discussing several examples).

70. See discussion *supra* Part I.

71. See Kaiser-Nyman, *supra* note 9, at 39–40.

rates are then compared to the release rate from December 2020 through April 2021 (Post Directives Period). All data used in this analysis was gathered from the Board's website, compiled by the author, and organized by the author. The aggregated data remains on file with the author. The raw data is available on the Board's website.⁷²

To reduce statistical noise, this analysis does not consider parole rates for inmates committed in Los Angeles County and another county (Multi-County Cases). Including Multi-County Cases in the tally of cases for the Post Directives Period would interfere with data from that period because prosecutors from other counties may have attended parole hearings in place of Los Angeles County prosecutors. Including Multi-County Cases in the Pre-Directives Period would also skew data because different district attorneys' offices have different policies on when and how often to oppose parole. For example, some district attorneys' offices may oppose parole in every case, while others may not.⁷³ Therefore, to improve accuracy, the analysis limits itself to cases involving inmates committed in Los Angeles County only.

Note that this analysis does not consider the outcomes of parole hearings where inmates waived their rights to a hearing or agreed to stipulate to denial. It also does not consider the results of parole hearings where hearings were postponed or continued. In such cases, the Board does not conduct an adjudication of the inmate's suitability for parole with a prosecutor's input. Therefore, prosecutors probably do not influence the outcomes.⁷⁴

ii. Results

Data from January through June 2020, *Pre-Directives Period One*, showed that the Board denied 68% of requests for release in January, 60% of requests for release in February, 54% of requests for

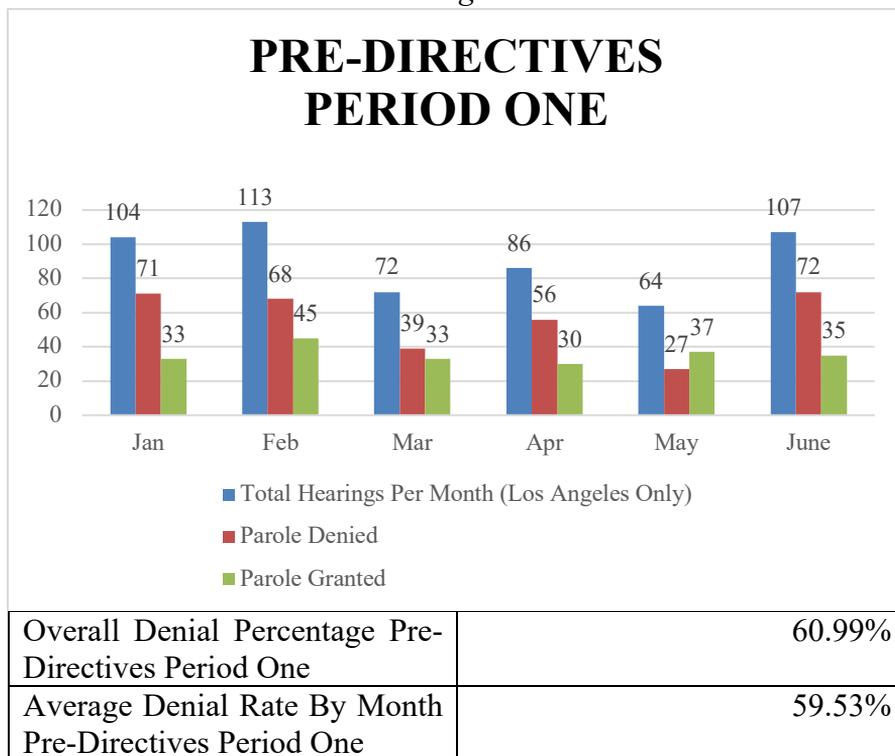
72. *Parole Suitability Hearing Results*, CAL. DEP'T OF CORR. & REHAB., <https://www.cdcr.ca.gov/bph/parole-suitability-hearing-results> [https://perma.cc/977J-LGSR]. If any records have been removed, then see the Wayback Machine's archive for earlier records. WAYBACK MACH., http://web.archive.org/web/2020*/https://www.cdcr.ca.gov/bph/parole-suitability-hearing-results/.

73. See *supra* Section II.A.

74. With that said, the fact that Los Angeles County prosecutors do not attend parole hearings, see GASCÓN *supra* note 3, at 8, may influence inmates' decisions to seek release or stipulate to denial. Since the Parole Directives went into effect, more inmates may have declined to stipulate to unsuitability because the district attorney's office will not oppose parole. This might have a variety of impacts on the data—including increasing the denial rate because more unsuitable inmates might apply for parole. This Article recommends that researchers explore this question in the future, once more data from the Post Directives Period becomes available.

release in March, 65% of requests for release in April, 43% of requests for release in May, and 67% of requests for release in June. The overall denial rate was 60.99% and the average monthly denial rate was 59.53%. For further information on the number of hearings per month see Figure 1 (*Figure 1*).

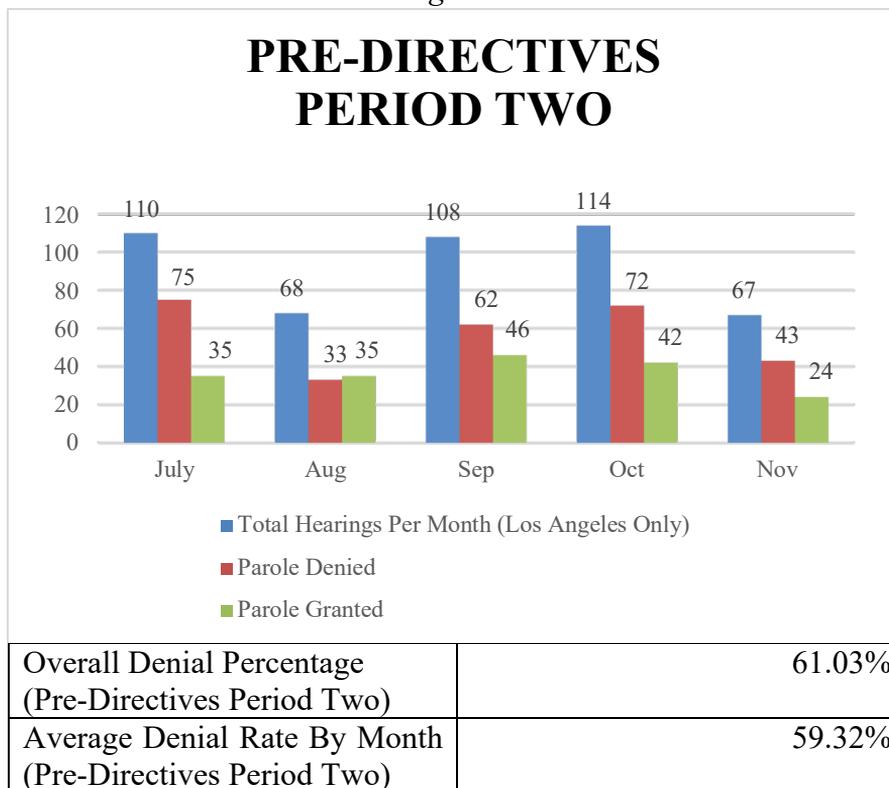
Figure 1



In *Pre-Directives Period Two*, the Board granted parole in 182 cases involving inmates committed in Los Angeles County and denied 285 requests for release. In July of 2020, the denial rate was 68%. The months of August and September saw the denial rate decline to 48% and 57%, respectively. In October, the Board denied 63% of requests for release. In November, the Board denied 59% of requests for release.

In *Pre-Directives Period Two*, the Board denied 61.03% of all requests for release from inmates committed in Los Angeles County. The average monthly denial rate was 59.32%. The total number of hearings per month and the number of parole requests denied and granted per month is broken down in further detail in Figure 2 (Figure 2).

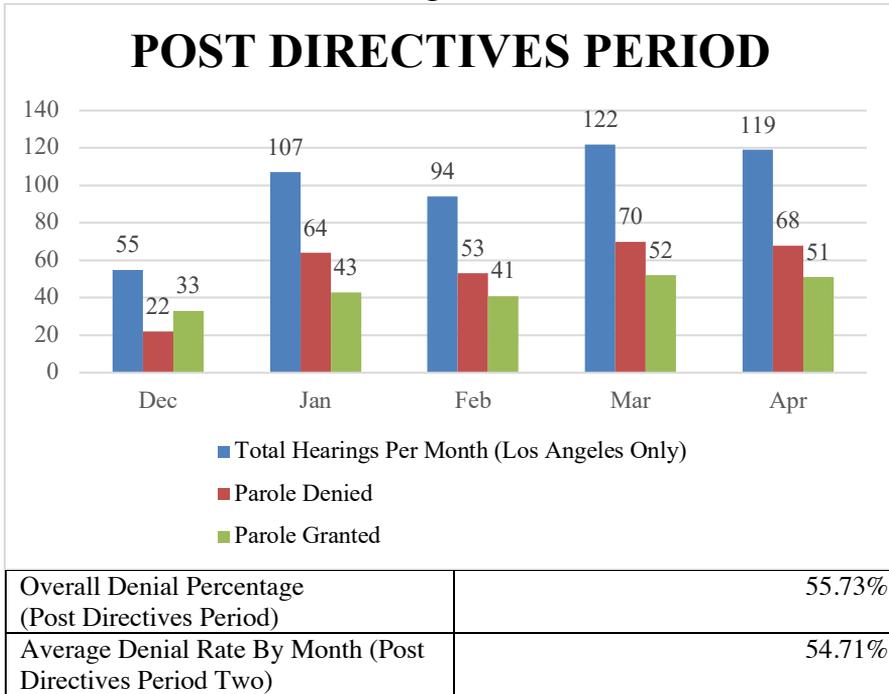
Figure 2



Data for the *Post Directives Period* showed that in the Post Directives period, the Board granted parole in 220 cases and denied parole in 277 cases. In December 2020, the Board granted 55% of requests for release.⁷⁵ In January 2021, the Board granted 41% of requests; in February, it granted 44% of requests. In March and April, the Board granted 44% of requests for release and 43% of requests, respectively. The overall denial rate for the Post Directives Period was 55.73% and the average monthly denial rate was 54.71%. The total number of hearings per month and the number of parole requests denied and granted per month appear in further detail in Figure 3 (*Figure 3*) below.

75. The Parole Directives took effect on the 10th of December. Hearings that took place from December 1 until December 10 were not included in this analysis. However, if this data is considered it does not have a meaningful impact on the results. Data on file with author.

Figure 3



iii. Implications

In Pre-Directives Period One, the board denied 60.99% of requests for release. In Pre-Directives Period Two, the Board denied 61.03% of all requests for release. In the Post Directives Period, the Board denied only 55.73% of requests. Prior to the Parole Directives, the denial rate remained consistent from January through June 2020 and July through November 2020. Specifically, the denial rate fluctuated by only .04% across two five-month periods in 2020. But from December 2021 through April 2021—after prosecutors were removed from the parole process—the parole release rate increased by over 5%. While the correlation between the increase in release rates and the implementation of the Parole Directives does not show causation, it lends more support to the evidence discussed in Sections III.A.1 and III.A.2, which indicate that prosecutorial involvement in the parole process decreases release rates.

In terms of implications, if the Parole Directives do produce higher release rates in the long term, they will probably produce at least some positive impacts for the California criminal legal system. In 2011, the U.S. Supreme Court subjected California to a federal

mandate to reduce its prison population.⁷⁶ California has since brought itself into compliance with that order.⁷⁷ Nonetheless, the population in many state prisons remains well above capacity.⁷⁸ An increase in release rates, even if slight, will help reduce overcrowding in state prisons and allow prisons to better rehabilitate inmates.

Just as importantly, the benefits of a drop in the prison population will not be offset by a meaningful increase in recidivism. Inmates released after serving life sentences must meet a uniform set of requirements before they can become eligible for parole—which helps prevent release of inmates most likely to recidivate.⁷⁹ Moreover, inmates released on parole after serving life sentences recidivate at low levels. In fact, an analysis of 860 California inmates in prison for murder showed that only five inmates had been convicted for new felonies after release (a recidivism rate of less than 1 percent, which is less than the background rate of criminality in the overall population).⁸⁰ The same analysis showed that none of these persons recidivated by committing crimes severe enough to warrant another life sentence.⁸¹

Given these considerations, we can surmise that if the Parole Directives increase release rates in the long term, that increase will likely help reduce prison overcrowding without upping the recidivism rate among parolees.

B. Prosecutors Do Not Necessarily Improve the Reliability of the Parole Board's Assessments of Dangerousness

The previous section considered whether prosecutors impact parole board release rates and, briefly, how an increase in release rates might impact the California state penal system. However, it did not consider the critical question of whether prosecutors make parole

76. Daniel C. Vock, *After Years of Court Orders, California's Prison Population Finally Hits Target*, GOVERNING (Oct. 2015), <https://www.governing.com/archive/gov-california-prison-population-proposition-47-impact.html> [<https://perma.cc/Y6PT-XXA5>].

77. *Id.*

78. Heather Harris et al., *California's Prison Population*, PUB. POL'Y INST. CAL. 1 (July 2019), <https://www.ppic.org/wp-content/uploads/jtf-prison-population-jtf.pdf> [<https://perma.cc/L74Q-F2S6>].

79. *Lifer Parole Process*, CAL. DEP'T OF CORR. & REHAB., <https://www.cdcr.ca.gov/bph/lifer-parole-process/> [<https://perma.cc/A62P-ENT3>].

80. See Weisberg et al., *supra* note 58, at 17; Alan Furry, *Study Estimates U.S. Population with Felony Convictions*, UGA TODAY (Oct. 1, 2017), <https://news.uga.edu/total-us-population-with-felony-convictions/> [<https://perma.cc/3LBM-L3SU>] (estimating that 3% of the population has a felony conviction).

81. See Weisberg et al., *supra* note 58, at 17.

boards better at determining an inmate's suitability for release.⁸² The Parole Directives derive their justification from the notion that (1) prosecutors influence the outcomes of parole hearings—by increasing victim participation or by other means—and (2) that prosecutors do not improve the parole process when they attend parole hearings. Therefore, to determine whether the Parole Directives will improve the parole process itself, we must consider whether prosecutors make the Board better or worse at performing its duty: to assess inmate suitability for release.

In *In re Lawrence*,⁸³ the California Supreme Court stated that the Board must determine inmate suitability by assessing the inmate's current dangerousness.⁸⁴ Accordingly, to determine whether prosecutors improve the Board's ability to assess dangerousness, the following section discusses whether prosecutors impact what evidence the Board uses to assess dangerousness. More specifically, the following subsections consider whether prosecutors increase the volume of reliable evidence that the Board considers when assessing offender dangerousness.

1. Prosecutors Who Present Victim Testimony/Statements

As discussed earlier in the Article, when prosecutors frequently attend parole hearings and oppose parole, they likely increase the number of victim statements that reach the Board.⁸⁵ This raises the question, does victim testimony or the reading of victim testimony by prosecutors help the Board make more informed decisions about an offender's dangerousness? Unfortunately, it does not.

Victims who attend parole hearings may testify about a variety of matters related to the inmate's crime, including how the crime impacted the victim, feelings of forgiveness or anger that the victim holds towards the inmate, and the inmate's suitability for parole.⁸⁶

The first two of these categories of evidence add little to the Board's ability to assess an offender's dangerousness. While often tragic, the long-term impacts of a crime do not relate to a determination of an inmate's current dangerousness. The same can be said for

82. *Cf. In re Lawrence*, 190 P.3d 535, 549 (Cal. 2008) (finding that Board's primary function is to assess offender dangerousness).

83. 190 P.3d 535 (Cal. 2008).

84. *Id.*

85. See discussion *supra* Section III.A.1.

86. CAL. PENAL CODE § 3043(b)(1) (West 2011).

the victim's feelings of forgiveness or anger.⁸⁷ Although many victims experience overwhelming feelings of anger towards offenders, those feelings do not relate to offender dangerousness.

The third type of commentary—victim opinion on suitability for release—does not usually help the Board assess dangerousness either. First, victims do not ordinarily have access to information about an inmate's conduct after conviction, so they lack knowledge of many of the specific facts necessary to assess an offender's current dangerousness. Second, because they do not have access to the inmate's prison and risk assessment files, victims may support release or oppose release while unaware of the offender's conduct in prison. This fact is of no small concern. As discussed in Section III.A.1, parole boards take the opinions of victims seriously. So, where a victim sets forth an uninformed opinion on an inmate's parole suitability, the victim creates a risk that he or she will improperly influence the Board. The result might be that the Board refuses to release an inmate who is suitable for parole and, just as troublingly, that the Board releases a dangerous inmate because of the inmate's ability to win over the victim.

Another problem with victim testimony at parole hearings is that it may be unreliable because it does not go through the rigorous process required for the admission of evidence at a trial. Victims, who include family and next of kin,⁸⁸ need not have personal knowledge of facts about which they testify at parole hearings.⁸⁹ By contrast, in a criminal trial, the hearsay rule, which exists to keep out unreliable evidence, usually excludes this testimony.⁹⁰ But even where hearsay statements enter evidence at trial through a hearsay exception or exemption, defendants can challenge the statements through cross-examination. At parole hearings, inmates may not cross-examine witnesses.⁹¹ This, in turn, increases the risk that the Board will use unreliable evidence to assess inmate dangerousness.

87. To be clear, this Article does not argue that victims should be barred from confronting or communicating with offenders in other contexts. To the contrary, evidence suggests that restorative justice initiatives may help victims heal. See Jill Suttie, *Can Restorative Justice Help Prisoners to Heal?*, GREATER GOOD MAG. (June 9, 2015), https://greatergood.berkeley.edu/article/item/restorative_justice_help_prisoners_heal [<https://perma.cc/63SA-T832>]. However, because of the risk of prejudice at hearings, this Article takes the position that parole suitability hearings are not suitable places for victims to confront or communicate with offenders.

88. PENAL § 3043(b)(1).

89. Edward E. Rhine et al., *The Future of Parole Release*, 46 CRIME & JUST. 279, 314 (2017).

90. CAL. EVID. CODE § 1200 (West 2011).

91. PENAL § 3043.

Victims who testify at parole hearings may also present evidence about the crime itself. On its face, this evidence appears more valuable to the Board than the types of evidence discussed above. Evidence regarding the crime will often relate to offender dangerousness and will, in theory, help the Board better assess parole suitability. The same goes for interactions between the inmate and the victim at the time of the crime—facts which may be absent from the inmate’s file.

However, despite the seemingly helpful nature of this kind of testimony, studies show that victim memory of traumatic events becomes severely distorted with time—particularly when multiple years have passed since the incident.

The most significant evidence showing that victims often misremember key details of crimes that they witnessed or experienced years ago stems from research in neuropsychology. Neuroscientists and psychologists refer to memories of traumatic events, like experiencing a violent crime, as “flashbulb” memories. Multiple studies show that these memories often become severely distorted by time⁹² and repeated recall.⁹³ For example, one study that surveyed thousands of New Yorkers about their memories of the Twin Towers’ collapse on 9/11 found that participants demonstrated poor recollection of the event within one year. In fact, researchers found that one year after 9/11, participants reported memories about 9/11 that were inconsistent with 40 percent of the memories they had described in their reports to researchers just after the incident.⁹⁴ After three years, the consistency of memories sank to 50 percent.⁹⁵ Critically, these memory studies also show that subjects who report inconsistent memories about traumatic events also report high confidence in the beliefs that are

92. See, e.g., Michael McCloskey et al., *Is There a Special Flashbulb-Memory Mechanism?*, 117 J. EXPERIMENTAL PSYCH.: GEN. 171, 177 (1988). See generally Jennifer M. Talarico & David C. Rubin, *Confidence, Not Consistency, Characterizes Flashbulb Memories*, 14 PSYCH. SCI. 455, 460 (2003) (finding significant decreases in the quality of flashbulb memories over time).

93. See generally Lia Kvavilashvili et al., *Consistency of Flashbulb Memories of September 11 over Long Delays: Implications for Consolidation and Wrong Time Slice Hypotheses*, 64 J. MEMORY & LANGUAGE 556, 572 (2009) (discussing how recalling flashbulb memories can result in “time slice errors” where persons conflate their experience recalling the event later with their experiences of the event in question).

94. See generally William Hirst et al., *Long-Term Memory for the Terrorist Attack of September 11: Flashbulb Memories, Event Memories, and the Factors That Influence Their Retention*, 138 J. EXPERIMENTAL PSYCH.: GEN. 161, 161–67 (2009).

95. See generally *id.* Notably, participants better recalled their location at the time of the event than their then contemporaneous feelings about it. *Id.* at 171, 173.

inconsistent with what they reported experiencing at the time of the event.⁹⁶ This second finding shows that over time victim memories of flashbulb events degrade, but confidence in those memories remains high.

Other studies show that persons who experience flashbulb memory events also (1) demonstrate “forward telescoping” biases, which cause them to estimate that memories happened more recently than they did;⁹⁷ (2) forget essential details;⁹⁸ (3) become easily tricked into misremembering through suggestion;⁹⁹ and (4) experience a variety of other memory distorting phenomena that impact recollection.¹⁰⁰

Perhaps most disturbingly, research also shows that persons with flashbulb memories come to remember flashbulb events as more traumatic and stressful than they really were.¹⁰¹ A study of combat veterans, which surveyed test subjects about traumatic events they had witnessed in combat, found that subjects recalled experiencing more traumatic events when surveyed two years after the events than they did when first questioned.¹⁰² The study asked subjects to mark boxes if they had experienced a traumatic event in combat.¹⁰³ The more events the subject witnessed or experienced, the more boxes he or she would fill in.¹⁰⁴ The events all concerned unquestionably memorable experiences like observing disfigured bodies, feeling an extreme threat

96. See, e.g., Talarico & Rubin, *supra* note 92, at 460 (finding that there is often a dissociation between belief in the accuracy of flashbulb memories and the consistency of memories).

97. Elizabeth F. Loftus & Wesley Marburger, *Since the Eruption of Mt. St. Helens, Has Anyone Beaten You Up? Improving the Accuracy of Retrospective Reports with Landmark Events*, 11 MEMORY & COGNITION 114, 119 (1983) (“When people are asked about their experiences as crime victims, they appear to exhibit a distortion of recollection in which the victimization appears to have occurred more recently than it actually did.”). It is unclear whether flashbulb memories become even less reliable after 3 years.

98. Elizabeth F. Loftus, *The Reality of Repressed Memories*, 48 AM. PSYCH. 518, 531–32 (1993) (discussing examples).

99. *Id.*

100. Stephen R. Schmidt, *Autobiographical Memories for the September 11th Attacks: Reconstructive Errors and Emotional Impairment of Memory*, 32 MEMORY & COGNITION 443, 452 (2004) (finding that college students who were asked about their experiences of 9/11 remembered only “schematic highlights” of what occurred); cf. Alafair Burke et al., *Remembering Emotional Events*, 20 MEMORY & COGNITION 277, 289 (1992) (discussing literature on how memory may be impacted by emotional events).

101. Nathan H. Lents & Deryn Strange, *Trauma, PTSD, and Memory Distortion*, PSYCH. TODAY (May 23, 2016), <https://www.psychologytoday.com/us/blog/beastly-behavior/201605/trauma-ptsd-and-memory-distortion> [<https://perma.cc/HN9N-J3L5>]; Steven M. Southwick et al., *Consistency of Memory for Combat-Related Traumatic Events in Veterans of Operation Desert Storm*, 154 AM. J. PSYCHIATRY 173, 173 (1997).

102. Southwick et al., *supra* note 101, at 175.

103. *Id.*

104. *Id.*

to personal safety, experiencing a friend's death, or taking sniper fire.¹⁰⁵ But despite the memorable nature of the events, the study found that 88 percent of the subjects checked at least some different boxes the second time they filled out the survey.¹⁰⁶ Most importantly, 70 percent of subjects checked off more boxes representing traumatic events in the second survey than they did in the initial survey.¹⁰⁷

Parole hearings often occur fifteen to twenty years after the crime. Although it is unclear whether flashbulb memories continue to erode after two to three years, the evidence discussed above shows that even if they do not, many victims begin to misremember critical aspects of a crime long before an inmate's first parole hearing. Because of this, victim testimony at parole hearings will likely contain inaccuracies—often through no fault of the victim. Therefore, victim testimony increases the risk that the Parole Board will use unreliable facts in their assessments of inmate dangerousness.

Accordingly, even where victim testimony carries probative value, it likely threatens the Board's ability to assess offender dangerousness because of the unreliable nature of decades-old memories. Given that prosecutors likely increase victim participation in the parole process, prosecutorial involvement in parole hearings, in its current form, likely has negative effects on the Board's ability to determine offender dangerousness. By eliminating prosecutors from parole hearings and decreasing victim participation, the Parole Directives will likely improve the Board's ability to assess dangerousness and reduce the volume of unreliable or irrelevant evidence submitted to the Board.¹⁰⁸

2. Prosecutors as Attorneys for the State

Prosecutors do not just facilitate victim participation in parole. Prosecutors also serve a separate role in the parole process when they advocate on behalf of the state.¹⁰⁹ For that reason, we must also consider whether prosecutors help the Board more accurately assess

105. *Id.* at 176.

106. *Id.*

107. *Id.* at 174.

108. To be clear, this Article does not advocate for the total exclusion of victims from the parole process. Instead, it encourages adopting an approach more like that described in Rhine et al., *supra* note 89, at 314.

109. CAL. PENAL CODE § 3041.7 (West 2011).

offender dangerousness when they speak only as representatives of the state.

To ensure that the Board considers only relevant, reliable evidence from prosecutors representing the state, California courts provide guidelines regarding what prosecutors may say and what kind of evidence the Board may consider in assessing inmate dangerousness.¹¹⁰

For example, *In re Lawrence*—which holds that the Board’s sole purpose is to assess an inmate’s current dangerousness¹¹¹—impliedly directs the Board to ignore any statements by prosecutors that do not relate to dangerousness.¹¹² In the same vein, cases like *Hernandez v. Subia*¹¹³ and others instruct the Board not to deny parole when a prosecutor opposes release without reliable evidence to support a finding that the prisoner poses a risk to society.¹¹⁴

The legislature has also taken steps to increase the reliability of evidence that prosecutors offer to the Board. Specifically, section 2030 of the California Code of Regulations bars prosecutors from providing comments or opinions about the inmate or the inmate’s suitability for parole if not “support[ed by] documentation in the [prisoner’s] file.”¹¹⁵

These guidelines seem to ensure that prosecutors who attend parole hearings on behalf of the state do not introduce unreliable evidence into the parole process. However, a closer look shows that including prosecutors in the parole process as advocates of the state creates other problems which may offset any benefits obtained by including prosecutors at parole hearings.

While most prosecutors fairly represent facts and present only reliable evidence to the Board, the lack of enforcement measures for guidelines like section 2030 and *In re Lawrence* ensure that less scrupulous prosecutors have few reasons to comply with these rules.

110. See *infra* note 112 and accompanying text.

111. *In re Lawrence*, 190 P.3d 535, 549 (Cal. 2008).

112. *Id.* (“In sum, the Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety . . . , and our discussion in both *Rosenkrantz* and *Dannenber* emphasized this point. Moreover, it is apparent from the foregoing discussion that the core determination of “public safety” under the statute and corresponding regulations involves an assessment of an inmate’s *current* dangerousness.” (citations omitted)).

113. No. 07-cv-00839, 2010 WL 2025330 (E.D. Cal. May 18, 2010).

114. See *id.* at *15 (stating that a prosecutor’s opposition to parole without other reliable evidence does not provide a basis to deny parole) (quoting *Rosenkrantz v. Marshall*, 444 F. Supp. 2d 1063, 1080 (C.D. Cal. 2006)).

115. CAL. CODE REGS. tit. 15, § 2030 (1990).

For one, section 2030 provides no mechanism for inmates or their attorneys to object to improper statements. The effect is that inmates lack procedural tools to strike prejudicial comments from the record unless a Board member admonishes the prosecutor.¹¹⁶

Other tools to keep prosecutors in check at parole hearings, like civil lawsuits, state bar discipline and employer discipline, and the appellate process, often come up short as well. With respect to civil suits, prosecutors possess immunity for misconduct in the parole process.¹¹⁷ Accordingly, civil lawsuits provide little incentive for prosecutors to comply with procedures.

Second, the threat of state bar discipline and adverse employment action also offer only a specter of a threat for those who engage in misconduct. State bars and prosecutors' offices nationwide have faced withering criticism for lax enforcement policies and for failing to hold prosecutors accountable for misconduct.¹¹⁸ For example, a scathing review of over 11,000 cases by *Chicago Tribune* journalists found that prosecutors routinely violated ethical duties but suffered little to no consequences.¹¹⁹ Judges have joined in the criticism, too, with at least one high profile judge calling out prosecutorial misconduct in the United States as a problem on the scale of an "epidemic."¹²⁰ Legal scholars who study this question have reached similar conclusions,

116. In my review of parole transcripts, I did not encounter even one case where this occurred.

117. California statutory law and federal common law bar suits against prosecutors for statements at parole hearings. See CAL. GOV'T CODE § 845.8 (West 2012) (interpreted to provide prosecutors with immunity from state law claims for statements made in parole hearings); Thomas v. Treisman, No. F068936, 2015 WL 729307, at *2 (Cal. Ct. App. Feb. 19, 2015) (applying absolute immunity from federal claims to prosecutor executing duties at parole hearing); Brown v. Cal. Dep't of Corr., 554 F.3d 747, 750 (9th Cir. 2009) (applying absolute immunity from federal claims to prosecutors functioning in their official capacities).

118. Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under Imbler: Providing a Compromise Approach to Claims of Prosecutorial Misconduct*, 48 GONZ. L. REV. 219, 242 (2012) (discussing the failure of state bars to prevent and hold prosecutors accountable for misconduct); David Leonhardt, *Two Men, Two Decades, No Evidence*, N.Y. TIMES (Feb. 16, 2021), <https://www.nytimes.com/2021/02/16/briefing/winter-storm-adam-kinzinger-pelosi-congress.html> [<https://perma.cc/26B3-CYD6>] (discussing lack of consequences for Mississippi prosecutor who was determined by the Supreme Court of the United States to have discriminated on the basis of race in jury selection in the case of Curtis Flowers, an exonerated death row inmate); Parker Yesko, *Will Doug Evans Face Accountability?*, APM REPORTS (Oct. 14, 2020), <https://www.apmreports.org/story/2020/10/14/will-doug-evans-face-accountability> [<https://perma.cc/D9WN-BBHR>] (discussing how prosecutors succeed in evading accountability for misconduct).

119. Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., (Jan. 11, 1999, 2:00 PM), <https://www.chicagotribune.com/investigations/chi-020103trial1-story.html> [<https://perma.cc/X9PB-MHHS>].

120. United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it.").

with some describing the due process checks on prosecutors as “paper tigers” because of lax enforcement.¹²¹ These findings suggest that adverse employment action by prosecutors’ offices and state bar discipline do not guarantee that prosecutors will comply with restrictions like section 2030—making it ever more important that section 2030 carries an enforcement mechanism.

In addition, the appellate and habeas process provide few safeguards to protect inmates from prosecutorial errors and misconduct at parole hearings. California courts review grants and denials of parole under the highly deferential “some evidence” standard.¹²² Under this standard, courts do not overturn the Board’s decisions on parole suitability unless no reliable evidence supports the Board’s finding.¹²³ As a result, even where a prosecutor makes a demonstrably false or prejudicial statement, the court will not reverse the Board’s decision as long as the Board lists a permissible rationale for denying or granting parole.¹²⁴ This makes it nearly impossible to reverse parole denial even in the most extraordinary cases of prosecutor error or misconduct.¹²⁵

If prosecutors substantially improved the parole process when they attended parole hearings and complied with section 2030 and *In re Lawrence*, perhaps the risks described above would be offset by benefits. However, when prosecutors comply with section 2030 and case law, they provide little to no tangible benefit to the parole process

121. See Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 742 (1987) (determining that prosecutors frequently go unpunished when they violate *Brady* rules); cf. Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 278 (2007) (analogizing prosecutorial misconduct to speeding and pointing out that the number of tickets given, just like the number of disciplinary hearings for prosecutors, likely underestimates rates of prosecutorial misconduct).

122. See, e.g., *In re Shippman*, 110 Cal. Rptr. 3d 326, 333 (Ct. App. 2010).

123. *Rosenkrantz v. Marshall*, 444 F. Supp. 2d 1063, 1079 (C.D. Cal. 2006) (“The some evidence standard is satisfied if there is any reliable evidence in the record that could support the conclusion reached.”).

124. Cf. *id.* at 1079 (“The ‘some evidence’ standard is satisfied if there is any reliable evidence in the record that could support the conclusion reached.”).

125. Highlighting the lack of accountability for prosecutors in this context, at least one court has even questioned whether prosecutorial misconduct at a parole hearing entitles inmates to bring claims for violation of due process. *Priest v. Haviland*, No. CIV S-09-2979, 2011 WL 666895, at *2 (E.D. Cal. Feb. 14, 2011) (“Prosecutorial misconduct violates due process when it has a substantial and injurious effect or influence in determining the jury’s verdict. *Petitioner has not cited any case law which applies these laws to the conduct of a prosecutor who attends a parole suitability hearing.*” (emphasis added) (citation omitted)). This court’s suggestion that it is not clear whether prosecutorial misconduct at parole hearings can give rise to a due process claim is mere dicta, and almost certainly incorrect. Nonetheless, it evidences the court system’s lack of interest in monitoring the parole process.

because under section 2030 prosecutors may only comment on evidence in the inmate's file, i.e., evidence that the Board already has.¹²⁶ Moreover, prosecutorial misconduct carries severe implications for inmates, who may spend as long as fifteen extra years in prison due to a prosecutor's indiscretion or error.¹²⁷

Thus, sending prosecutors to parole hearings as advocates of the state, whether they frequently oppose or support parole, creates significant risks. Most importantly though, those risks are not offset by any quantifiable benefit. As a result, prosecutors probably do not improve the parole process when they attend hearings as advocates of the state.

C. Sending Prosecutors to Parole Hearings to Read Victim Testimony Sets Up a Conflict Between Section 2030 of the California Code of Regulations and Section 3043 of the California Penal Code

One little-explored issue that arises when prosecutors attending parole hearings to read victim testimony is whether doing so causes prosecutors to violate section 2030 of the California Code of Regulations. As noted in Sections II.A and III.B.2, a prosecutor who attends a parole hearing must not make statements about the inmate that go beyond facts in the inmate's file.¹²⁸ However, victims are not bound by such restrictions and may make statements about evidence not included in the inmate's file.¹²⁹ This puts prosecutors in a precarious position when they read victim statements or state victim opinions as doing so may result in prosecutors providing evidence to the Board that goes beyond evidence in the inmate's file.

While this Article did not uncover any case law addressing this problem, it is something that prosecutors' offices in California should consider carefully before allowing prosecutors to read victim testimony under the Penal Code.

D. We Do Not Know Whether Prosecutors Help Victims by Increasing Victim Participation in the Parole Process

Another critical question to consider in assessing whether prosecutors play a valuable role in the parole process is whether they

126. See CAL. CODE REGS. tit. 15, § 2030 (1990).

127. *Lifer Parole Process*, *supra* note 79 (listing length of parole denials).

128. REGS. tit. 15, § 2030.

129. See *supra* Section III.B.1.

improve victim satisfaction and victim healing by increasing the contact that victims have with the justice system.

Unfortunately, little empirical research addresses this question.¹³⁰ Accordingly, this section considers research on similar matters—victim participation in sentencing—to determine whether increased victim participation in the criminal legal process benefits victims.

In many states and the federal courts, victims have expansive rights to submit victim impact statements before sentencing.¹³¹ The statements that victims submit at sentencing resemble those offered at parole hearings. The following section takes the submission of statements at sentencing to be an analog for the same action at a parole hearing.¹³²

Proponents of victim participation in sentencing and victim participation in parole argue that allowing victims to speak at sentencing hearings and parole hearings promotes psychological healing and increases victim satisfaction with the criminal legal process.¹³³ By contrast, opponents argue that victims gain little from increased participation in the legal process and victims experience adverse effects from increased contact with offenders.¹³⁴ Frustratingly, even though

130. Morgan & Smith, *supra* note 53, at 338.

131. Roberts, *supra* note 57, at 349 (discussing how victim testimony may impact board decisions). Please note too that I will not consider the benefits to victims provided by restorative justice initiatives where victims confront and engage in dialogue with offenders. The reason I do not compare these programs to victim participation in the parole process is that victim participation in the parole process does not involve the victim engaging in a dialogue with the offender but rather presenting testimony to the board. Thus it is dissimilar from restorative justice type initiatives.

132. Note that this analogy may be limited. The sentencing process is different from the parole process and the findings of studies concerning sentencing do not always mesh with the findings of studies that concern parole—even when it seems like they should. Compare Morgan & Smith, *supra* note 53, at 333 (finding that victim statements impact parole board decisions), with Edwin Villmoare & Virginia V. Neto, *Victim Appearances at Sentencing Hearings Under the California Victims' Bill of Rights*, NAT'L INST. JUST. 61 (Mar. 1987), <https://perma.cc/TFG2-MLSE> (finding that victim statements to courts do not usually impact sentencing decisions).

133. Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 8 (1987).

134. Roberts, *supra* note 57, at 366 (“Critics claim . . . that victims are unlikely to benefit from submitting a statement.”); see also Polyvictims: *Victims' Rights Enforcement as a Tool to Mitigate “Secondary Victimization” in the Criminal Justice System*, NAT'L CRIME VICTIM L. INST. 2 (Mar. 2013), <https://law.lclark.edu/live/files/13797-ncvlpvictims-rights-enforcement-as-a-tool-to> [<https://perma.cc/2767-7LC3>] (finding that certain victims will experience “revictimization” if they participate extensively in the criminal justice process).

scholars have studied this issue extensively, there is no consensus on who is right.¹³⁵

For example, some research concludes that victims obtain significant benefits from speaking at sentencing hearings.¹³⁶ But, just as many studies show the opposite: that victims obtain little to no benefit from participating in the sentencing process.¹³⁷

Problematically, a comprehensive meta-analysis of empirical studies on victim satisfaction with the criminal legal system found “severe” methodological flaws in most of the studies addressing these questions. Defects included failure to control for malingering among study participants, inadequate samples, and the use of dubious markers of correlation.¹³⁸ Correspondingly, the review’s authors found that literature on the impact of victim participation in the criminal legal process did not permit “definite conclusions to be drawn and prevent[ed] recommendations for practice and policy” on whether victims benefit from participating in the criminal legal process.¹³⁹

These findings prevent this Article from reaching a conclusion on whether victims benefit from participating in the parole process. As a result, the Article takes no position on whether an increase in the rate of victim participation in parole hearings positively or negatively impacts victims.¹⁴⁰

E. Excluding Deputy District Attorneys from Parole Hearings Will Free Up Prosecutors to Perform Other Tasks

Some critics of George Gascón’s reforms worry that his reform-minded approach to criminal law will result in dangerous offenders

135. See generally Maarten Kunst et al., *Victim Satisfaction with the Criminal Justice System and Emotional Recovery: A Systematic and Critical Review of the Literature*, 16 TRAUMA, VIOLENCE, & ABUSE 336 (2015).

136. Roberts, *supra* note 57, at 366–70 (listing multiple studies that found that most victims who submitted victim impact statements would do so again).

137. See Amanda Konradi, “I Don’t Have to Be Afraid of You”: Rape Survivors’ Emotion Management in Court, 22 SYMBOLIC INTERACTION 45, 50 (1999) (discussing the range of traumatic emotions rape victims may experience when they participate in the criminal justice process); cf. Villmoare & Neto, *supra* note 132, at 60 (“Six out of 10 victims who expressed their opinions to the sentencing court . . . had positive feelings afterwards. However, these participants were no more likely to feel satisfied than victims who took little or no action.”).

138. Kunst et al., *supra* note 135, at 354–55.

139. *Id.* at 355 (“[A]ll studies included in this review suffered from rather severe methodological shortcomings as indicated by the Cambridge Quality Checklists.” (citation omitted)).

140. The author encourages others to explore this issue in more detail.

evading conviction.¹⁴¹ However, this criticism neglects to consider that cutting prosecutors out of the parole process will likely allow the District Attorney's Office to dedicate thousands of additional hours to prosecuting cases. This, in turn, may help increase public safety.

Parole suitability hearings usually take about two hours.¹⁴² Prosecutors who attend ordinarily stay for the duration of hearings.¹⁴³ Before attending hearings, prosecutors review evidence; draft letters to the Board; and, where victims wish to attend, spend time conferencing with victims.¹⁴⁴

The Board reached a disposition in 7,684 cases in 2020.¹⁴⁵ Of the 7,684 cases before the board, 2,131 involved an inmate committed in Los Angeles.¹⁴⁶ Out of the 2,131 cases in Los Angeles, 1,108 involved defendants with charges stemming from Los Angeles County only.¹⁴⁷ If the Los Angeles County District Attorney's Office sent a prosecutor to each hearing and if the only time the prosecutor spent on the hearing was the time spent advocating before the Board, the office would dedicate approximately 2,216 hours of labor to parole suitability hearings—assuming an average hearing length of two hours.¹⁴⁸

141. See White, *supra* note 11 (quoting prosecutors who oppose Gascón's reforms on the ground that they prevent the DA's office from holding offenders "accountable" and "damag[e] the community").

142. See, e.g., *In re* Parole Consideration Hearing of Harvey Amezcua at 3:5, 77:13, CDC No. V69723 (Pelican Bay State Prison Nov. 3, 2020) (2 hours and 26 minutes); see also, e.g., *In re* Parole Consideration Hearing of Brian Allen at 3:6, 81:4, CDC No. J6200 (Cal. Men's Colony Nov. 20, 2020) (1 hour and 44 minutes); *In re* Parole Consideration Hearing of Edward Earl Allen at 3:5, 50:8, CDC No. B81763 (Cal. State Prison, Sacramento Nov. 17, 2020) (1 hour and 30 minutes); *In re* Parole Consideration Hearing of Leobardo Blancarte at 3:6, 97:8, CDC No. V12853 (Valley State Prison Nov. 6, 2020) (2 hours and 4 minutes). Average hearing length was 1 hour and 56 minutes.

143. Prosecutors must appear at the beginning of the hearing to introduce themselves for the record. They also have the power to make the final comments at the hearing. See CAL. PENAL CODE § 3043.6 (West 2011).

144. *Inside LADA*, *supra* note 1 (discussing prosecutors' usual functions in the parole process).

145. *Calendar Year 2020 Suitability Results*, CAL. DEP'T OF CORR. & REHAB., <https://www.cdcr.ca.gov/bph/2020/03/04/cy-2020-suitability-results/> [<https://perma.cc/7BAL-6D7N>].

146. The following lists the number of inmate parole hearings held in 2020 that concerned inmates committed in Los Angeles County. In the month of January 2020, the Board held 205 lifer parole hearings concerning inmates committed in Los Angeles; in February 2020, 168; in March 2020, 181; in April, 189; in May, 136; in June, 181; in July, 225; in August, 152; in September, 190; in October, 190; in November, 123; and in December, 191. *Parole Suitability Hearing Results*, *supra* note 72. If any records have been removed, see the Wayback Machine archive for records. WAYBACK MACH., *supra* note 72.

147. See Master List of Parole Hearings in Los Angeles (2020) (on file with the *Loyola of Los Angeles Law Review*).

148. Calculation based on the number of parole hearings of persons committed in Los Angeles in 2020 (1,108) multiplied by two hours per hearing. This amounts to 2,216 hours.

Suppose we add to this estimate the hours that prosecutors spend preparing for hearings. In that case—even if prosecutors spend just four hours per hearing drafting, reading, conferencing, and traveling—prosecutors devote a total of six hours to each hearing.¹⁴⁹ Multiplying that number times the number of parole hearings involving inmates committed in Los Angeles County, produces a result of 6,648 hours.¹⁵⁰

Freeing up several thousand hours of time will help the Los Angeles County District Attorney's Office focus on its primary responsibilities—prosecuting cases and obtaining plea deals. The Los Angeles County District Attorney's Office processes over 71,000 felony cases and 112,000 misdemeanor cases per year.¹⁵¹ Overworked prosecutors make more errors and oversights than prosecutors with time to review evidence more carefully.¹⁵² According to a 2010 study, a single criminal trial can cost up to \$44,000.¹⁵³ Where a prosecutor's mistake or oversight results in a reversal on appeal, the case will likely double in cost because of the retrial. In other words, errors have significant consequences.

Considering the costs associated with prosecutorial mistakes at trial and the strains placed on the Los Angeles County District Attorney's Office, reducing the role prosecutors play in the parole process may benefit the Los Angeles County criminal legal system by freeing up prosecutors to focus more closely on their caseloads.

F. Sheriff's Deputies Will Not Negate the Effects of Gascón's Policy

After George Gascón instituted the Parole Directives, Los Angeles County Sheriff Alex Villanueva, who disapproved of the changes, proposed sending deputy sheriffs to parole hearings to replace

149. I do not have access to any reliable figures estimating how long deputy district attorneys spend preparing to attend parole hearings. But an estimate of four hours is likely on the low side given that prosecutors may need to travel to and from the prison where the hearing is held, prepare a letter, and meet with victims.

150. Calculated by multiplying the number of parole hearings involving inmates committed in Los Angeles (1,108) by six.

151. *Operations*, L.A. CNTY. DIST. ATT'Y'S OFF., <https://da.lacounty.gov/operations> [<https://perma.cc/C7MJ-QJ3E>].

152. See JENNIFER WYATT BOURGEOIS ET AL., AN EXAMINATION OF PROSECUTORIAL STAFF, BUDGETS, CASELOADS AND THE NEED FOR CHANGE 4 (2019), https://assets-global.website-files.com/5ef1f236f51b59892a5aec87/5f5e0ad483b2a17b9fdd26a4_ProsecutorWorkload%20Report.pdf [<https://perma.cc/7AW6-QWGZ>].

153. *First Estimates of Judicial Costs of Specific Crimes, from Homicide to Theft*, RAND CORP. (Sept. 12, 2016), <https://www.rand.org/news/press/2016/09/12.html> [<https://perma.cc/X7CV-YV2B>].

prosecutors.¹⁵⁴ As a result of this intervention, one might argue that the Parole Directives will have little practical effect on the parole process because deputy sheriffs will take on the role of prosecutors. However, California law will only allow sheriff's deputies to attend in a limited number of cases. For that reason, sending sheriff's deputies to parole hearings will probably not negate the intended effects of Gascón's reforms.

For one, sheriff's deputies may never attend parole hearings as representatives of the state.¹⁵⁵ While they may submit written statements to the Board regarding parole suitability,¹⁵⁶ section 3041.7 of the California Penal Code bars anyone but "the prosecutor of the county from which the inmate was committed" from representing the state at a parole hearing.¹⁵⁷

In a more limited context, section 2029.1 of the California Code of Regulations permits any person to attend a parole hearing for "educational and informational" purposes, provided they receive authorization.¹⁵⁸ However, Villanueva's letter to the Los Angeles County District Attorney's Office states that deputies will attend hearings to give victims a "voice[.]"¹⁵⁹ not for educational purposes. Accordingly, deputies may not participate in parole hearings under this provision.¹⁶⁰

Section 3043.1 of the California Penal Code allows a victim who attends a parole hearing to be accompanied by "one person of his or her own choosing . . . for support[.]"¹⁶¹ Section 3043.1 will allow deputies to attend hearings in a limited number of cases. However, their presence will have little impact on parole outcomes because the statute only allows attendees to appear, not testify.¹⁶²

The only provision that will allow deputies to appear and testify before the Board is section 3043. As discussed in Section II.B, section 3043 allows "any adult person" to appear as a representative of the

154. LA County Sheriffs (@LASDHQ), *supra* note 13; see Letter from Alex Villanueva to George Gascón, *supra* note 13.

155. CAL. PENAL CODE § 3041.7 (West 2011).

156. See CAL. CODE REGS. tit. 15, § 2028(a) (1990).

157. PENAL § 3041.7. Note that in a limited set of cases the California Attorney General may replace the District Attorney at a parole hearing to represent the interests of the state. *Id.*

158. REGS. tit. 15, § 2029.1.

159. See LA County Sheriffs (@LASDHQ), *supra* note 13.

160. REGS. tit. 15, § 2029.1. Even if the Board allows deputies to participate in hearings under this provision, deputies will not be permitted to make any comments. Section 2029.1 allows persons to attend but not speak. *Id.* ("Visitors and observers may not participate in the hearing except to review written records as permitted by law.")

161. PENAL § 3043.1.

162. *Id.*

victim and to speak or read testimony on the victim's behalf.¹⁶³ However, a representative's power to come before the Board under this provision comes into being only if the victim designates the person as a representative.¹⁶⁴ In contrast to section 2030, which allows prosecutors to speak at any parole hearing, this provision will only allow deputy sheriffs to speak at a limited number of hearings.

The Sheriff's Department also states on its website that deputies will not attend parole hearings unless the inmate's case was investigated by the Los Angeles County Sheriff's Department.¹⁶⁵ This restriction further limits the number of cases that the office may attend and, thus, the effect that deputies will have on parole hearings.

Accordingly, even if Villanueva continues to follow through on this policy, he will only succeed in placing deputies in hearings when victims (1) want to be involved in the parole process, (2) victims also take the affirmative step of designating the Sheriff's Department as their representative, and (3) the Los Angeles County Sheriff's Department previously investigated the case. The Policy will impact only a small number of cases and will probably not have a significant impact on the parole process.

IV. CONCLUSION: GASCÓN'S PAROLE DIRECTIVES WILL LIKELY IMPROVE THE PAROLE PROCESS

This Article addressed whether sending prosecutors to parole hearings compromises or improves the parole process and whether excluding prosecutors from parole hearings will improve the criminal legal system more generally. A review of empirical literature in Section III.A.1 showed that prosecutorial involvement in the parole process correlates positively with a condition, victim participation, that decreases inmate release rates. The Article also determined that prosecutorial attendance at parole hearings does not help the Board assess offender dangerousness.¹⁶⁶ These findings alone show that prosecutorial participation in the parole process probably does not improve the parole system's effectiveness.

The Article determined that data does not present a clear picture of whether prosecutorial involvement in the parole process benefits or

163. *Id.* § 3043(c).

164. *Id.* § 3043(b)(2).

165. *Victim Representation at Parole Hearings*, L.A. CNTY. SHERIFF'S DEP'T, <https://lasd.org/parole-hearing-victim-representation> [<https://perma.cc/38PK-MKSU>].

166. *See* discussion *supra* Sections III.A–C.

harms victims—an issue that should be studied further. It also concluded that when prosecutors attend parole hearings on behalf of victims, they may violate their obligations under section 2030 of the California Code of Regulations.¹⁶⁷

In terms of the Parole Directives' likely effects on the criminal legal system more generally, the Article determined that the Parole Directives will likely help relieve the workload placed on Los Angeles County's prosecutors.¹⁶⁸ The evidence discussed in section III.A.3 showed that the Parole Directives may also help California reduce overcrowding in prisons.¹⁶⁹

Based on the empirical findings discussed above, the Article reaches the overall conclusion that Gascón's Parole Directives will likely improve California's parole process and have small but beneficial effects on other areas of California's criminal legal system.

167. See discussion *supra* Section III.C.

168. See discussion *supra* Section III.E.

169. See discussion *supra* Section III.A.3.iii.