

NOTE

REBUTTING THE PRESUMPTION: AN EMPIRICAL ANALYSIS OF PAROLE DEFERRALS UNDER MARSY'S LAW

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The California Department of Corrections and Rehabilitation oversees the largest population of inmates serving life terms, or “lifers,” in the country. Every year, over 1800 of these lifers go before the Board of Parole Hearings, and around 75% are denied parole. Proposition 9, or Marsy’s Law, dramatically changed the consequences of that denial. Previously, when lifers were denied parole, they typically waited a maximum of two years to have the opportunity to plead their case again. Under the new system implemented by Marsy’s Law, lifers who are denied parole must presumptively wait fifteen years for another chance at release. Though many scholars have examined the decision to grant or deny parole, almost nothing has been written about the related decision of how long to defer the reconsideration of parole after a denial. Given the sheer magnitude of the change ushered in by Marsy’s Law, we seek fill this void in the literature by empirically exploring the operation of this new system in practice. This Note ultimately finds evidence that several extralegal considerations, such as gender and commissioner identity, may be influencing the length of deferral periods granted under this new regime. It also provides a firm empirical footing for our recommendation that new guidelines be promulgated that specifically address this phase of the parole decisionmaking process.

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INTRODUCTION.....	175
I. THE LIFER PAROLE HEARING	179
A. <i>To Grant or Deny: The Parole Suitability Decision</i>	179
B. <i>Recent Judicial Scrutiny</i>	182
C. <i>Marsy's Law and the Parole Deferral Decision</i>	183
II. PAST EMPIRICAL WORKS.....	186
A. <i>Evaluating Institutional Behavior</i>	187
B. <i>Evaluating the Severity of the Commitment Offense</i>	188
C. <i>Evaluating Parole Readiness</i>	188
D. <i>Parole Deferrals</i>	189
III. METHODOLOGY	189
A. <i>Data Collection and Sample Selection</i>	189
B. <i>Coding Methods</i>	190
C. <i>Control Indices</i>	192
D. <i>Methods of Analysis</i>	193
E. <i>Limitations</i>	193
IV. FINDINGS	194
A. <i>Analysis of the Coded Dataset</i>	194
1. <i>Extralegal factors</i>	196
a. <i>Race</i>	196
b. <i>Gender</i>	196
c. <i>Attorney type</i>	196
d. <i>Identity of commissioner</i>	197
e. <i>Presence at hearing</i>	198
2. <i>Public safety factors</i>	200
a. <i>Individual factors</i>	200
b. <i>Indices</i>	202
B. <i>Analysis of Control Dataset</i>	202
1. <i>Race</i>	204
2. <i>Gender</i>	204
3. <i>Attorney type</i>	205
4. <i>Identity of commissioner</i>	205
5. <i>Commitment offense</i>	205
6. <i>Age</i>	205
7. <i>Mental health status</i>	205
V. DISCUSSION	206
RECOMMENDATIONS & CONCLUSION	211
APPENDIX A: DIAGRAM OF CALIFORNIA LIFER PAROLE HEARING PROCESS	213
APPENDIX B: THE FACTORS	214
APPENDIX C: THE INDICES	215

INTRODUCTION

On November 4, 2008, California voters took to the polls to adopt an initiative championing the rights of crime victims. Proposition 9 (more popularly known as Marsy's Law) captured over fifty-three percent of the California vote.¹ Of its many changes to the California Constitution and the California Penal Code, one standout was a shift to less frequent parole hearings for inmates serving life terms. Marsy's Law disrupted the status quo of annual or biennial parole hearings for most inmates and replaced it with a presumption that all inmates would wait fifteen years for their next hearing upon being denied parole.

To fully understand the significance and the impact of Marsy's Law on the parole suitability hearing process, we must take a step back to view the California criminal justice system holistically. California is a rather unique state: it was once heralded as having the nation's premier corrections system for its cutting-edge programs and research between the 1940s and 1960s.² But today, some researchers label the California Department of Corrections and Rehabilitation (CDCR) a "paradox of excess and deprivation,"³ or quite plainly a "mess."⁴ The CDCR faces chronic overcrowding, a court-ordered mandate to downsize, and ballooning budgetary obligations that are growing faster than the resources allocated to cover them.⁵ But perhaps no one statement more accurately describes the state of the system than Governor Arnold Schwarzenegger's 2006 proclamation "that a State of Emergency exists within the State of California's prison system."⁶

1. CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008), available at http://www.sos.ca.gov/elections/sov/2008-general/7_votes_for_against.pdf.

2. See Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 209 (2008); see also DANIEL GLASER, PREPARING CONVICTS FOR LAW-ABIDING LIVES: THE PIONEERING PENOLOGY OF RICHARD A. MCGEE 22 (1995) ("By 1961, . . . the Department of Corrections had become perhaps the most advanced state organization of its type in the nation . . .").

3. Petersilia, *supra* note 2, at 210-11.

4. Kathleen Noone, Note, *Keeping the Commitment: Why California Should Maintain Consideration of the Commitment Offense in Determining Parole for Life Inmates*, 37 HASTINGS CONST. L.Q. 789, 789 (2010).

5. Adam Liptak, *Justices, 5-4, Tell California to Cut Prison Crowding*, N.Y. TIMES (May 23, 2011), <http://www.nytimes.com/2011/05/24/us/24scotus.html>; see also *Brown v. Plata*, 131 S. Ct. 1910 (2011) (upholding a structural injunction ordering California to cut its prison population).

6. Arnold Schwarzenegger, *Prison Overcrowding State of Emergency Proclamation*, OFFICE OF GOVERNOR EDMUND G. BROWN JR., (Oct. 4, 2006), <http://gov.ca.gov/news.php?id=4278>.

As of today, the CDCR oversees over 132,000 prisoners,⁷ a marked decrease from the all-time high of 173,479 prisoners at the time of Schwarzenegger's State of Emergency Proclamation⁸—in part a result of a historical effort known as “Realignment.”⁹ The CDCR houses each state prisoner at an annual cost of \$51,889, a sum that is over seventy percent higher than the national average.¹⁰ Yet for each prisoner over the age of fifty—a population dominated by inmates serving life sentences—the state outlays between \$98,000 and \$138,000 each year.¹¹ Adding to the state's budgetary woes is the precipitous growth of its population of older inmates. The percentage of prisoners over forty swelled from about 16% of the total prison population in 1990 to around 40% in 2009.¹² Unsurprisingly, the rise in the average age of prisoners has closely mirrored the rise in the population of prisoners serving life terms, or “lifers.”¹³ What's more, the California lifer population almost tripled to an unprecedented 34,164 inmates between 1992 and 2009, thereby establishing the largest concentration of lifers of any state prison system in the country.¹⁴

California's tough-on-crime determinate sentencing laws and three-strikes laws have contributed to its ballooning prison population while the parole release valves that traditionally kept the system's population in check have diminished in relevance.¹⁵ The sole remnant of an eroded discretionary release

7. CAL. DEP'T OF CORR. & REHAB., WEEKLY REPORT OF PRISON POPULATION AS OF MIDNIGHT JANUARY 9, 2013, at 1 (2013), available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad130109.pdf.

8. CAL. DEP'T OF CORR. & REHAB., CORRECTIONS: MOVING FORWARD 5 (2009), available at http://www.cdcr.ca.gov/News/Press_Release_Archive/2009_Press_Releases/docs/CDCR_Annual_Report.pdf.

9. See *Public Safety Realignment*, CAL. DEP'T OF CORR. & REHAB., <http://www.cdcr.ca.gov/realignment> (last visited Dec. 18, 2013) (explaining that Realignment is a recent statewide effort led by Governor Jerry Brown to “close the revolving door of low-level inmates cycling in and out of state prisons” by shifting the jurisdiction over such offenders from the state prisons to the county jails and programs).

10. This was the sum reported for the fiscal year 2011-2012. MAC TAYLOR, CALIFORNIA LEGISLATIVE ANALYST'S OFFICE, CALIFORNIA'S CRIMINAL JUSTICE SYSTEM: A PRIMER 50 (2013), available at <http://www.cdcr.ca.gov/Reports/docs/External-Reports/criminal-justice-primer-011713.pdf>.

11. Solomon Moore, *Number of Life Terms Hits Record*, N.Y. TIMES (July 22, 2009), <http://www.nytimes.com/2009/07/23/us/23sentence.html>.

12. CAL. DEP'T OF CORR. & REHAB., CORRECTIONS: YEAR AT A GLANCE 6 (2010), available at http://www.cdcr.ca.gov/News/docs/CDCR_Year_At_A_Glance2010.pdf. In the study that follows, the average age of our sample of California lifers was fifty.

13. This population includes all prisoners serving life terms, with or without the possibility of parole.

14. Moore, *supra* note 11.

15. GLASER, *supra* note 2, at 166; see also ALBERT J. LIPSON & MARK A. PETERSON, RAND, CALIFORNIA JUSTICE UNDER DETERMINATE SENTENCING: A REVIEW AND AGENDA

system is California's parole system for lifers—a potential vehicle for helping alleviate the strains of overcrowding on the state's prison system and budget.¹⁶ However, the implementation of Marsy's Law may further limit the system's ability to act as a release valve: the law decreases the number of opportunities that a low-risk inmate may have to present her case for parole by raising the number of years that she must wait for a subsequent hearing.

These dramatic changes seem to represent a sea change in the way parole is administered in California. Under the changes implemented by Marsy's Law, the Board of Parole Hearings (Board) is directed to defer the reconsideration of parole for lifers for fifteen years “unless the [B]oard finds by clear and convincing evidence that the criteria *relevant to the setting of parole release dates* . . . are such that consideration of the *public and victim's safety*” does not require such a lengthy deferral period.¹⁷ Before this change, the former statute presumed that commissioners would deny parole for *only* one year, reserving the option for the Board to deny parole for up to five years if it determined that “it [was] not reasonable to expect that parole would be granted at a hearing during the following years.”¹⁸ That statute further compelled the Board to specifically “adopt procedures that relate to the criteria for setting the hearing between two and five years,”¹⁹ thereby signaling that the legislature intended for the decision to set a denial period (deferral decision) to be “a separate and additional choice” from the decision to deny or grant parole (suitability decision).²⁰ However, Marsy's Law has effectively collapsed these two decisions and directed that, just as in the suitability decision context, the “public and victim's safety” should be the overriding consideration, not simply when the inmate will be rehabilitated. We contemplate the potential consequences of this reorientation at

FOR RESEARCH 38 (1980) (“[T]he DSL virtually eliminated the use of parole releases to reduce prison population. There simply is no relief valve for reducing overcrowded prison conditions.” (footnote omitted)); W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. L. & POL'Y REV. 395, 395 (2011) (“[S]tates can use parole as a population safety valve without indiscriminately endangering public safety, since parole boards can release only those prisoners least likely to reoffend.”).

16. *But cf.* Eric Dunn & Michael Ruiz, Parole Board Discretion and the Use of Base Term Enhancements 11 (Jan. 28, 2013) (unpublished manuscript) (on file with authors) (finding in a recent study of parole base term enhancements that “[t]en inmates . . . would [have] be[en] released from prison on parole sooner if not for the application of enhancements to their base term due to concurrent counts and firearm enhancements”).

17. CAL. PENAL CODE § 3041.5(b)(3)(A) (West 2013) (emphasis added).

18. *Id.* § 3041.5(b)(2)(B) (West 1994), amended by *id.* § 3041.5(b)(3) (West 2008).

19. *Id.* It is worth noting that although the former statute explicitly required the Board to adopt procedures for deciding the parole deferral period length, there is no record of the Board adopting such procedures separate from those that relate to the decision to grant or deny parole. *See In re Lugo*, 164 Cal. Rptr. 3d 521, 534-35 (Ct. App. 2008).

20. *In re Jackson*, 703 P.2d 100, 110 (Cal. 1985) (en banc) (quoting *People v. Belmontes*, 667 P.2d 686, 693 (1983) (en banc)).

length in this study and also compare this new system to those in place in other jurisdictions.²¹ We do not, however, attempt in this study to offer comparisons of how parole decisionmaking has changed since the enactment of Marsy's Law.

Though many researchers have analyzed the California parole system and the discretion of parole commissioners,²² few studies have assessed the decisionmaking of commissioners since the recent changes in the law.²³ In this Note, we seek to redress this absence of research by attempting to (1) identify what factors parole commissioners, at least ostensibly, are relying on when deciding the appropriate parole deferral period and (2) assess whether parole commissioners are consistently applying the statutory standard outlined in Marsy's Law.

We pursue the first inquiry because Marsy's Law drastically changed the touchstone of the deferral decision, and we hypothesize that at least some commissioners may not actually be making these decisions with regard to public safety. We pursue the second inquiry because, as a normative matter, one would expect similarly situated inmates to receive deferral periods of similar lengths. Moreover, the California Penal Code generally directs that suitability decisions be made "uniform[ly] . . . with respect to [the] threat to the public," and we see no reason why this principle should not govern deferral decisions as well.²⁴ In the context of this inquiry, given the discretion afforded commissioners and the huge changes wrought by Marsy's Law, we hypothesize that commissioners may not be applying the new rules consistently.

We address these inquiries in five Parts. In Part I, we provide an overview of the California parole hearing process and the relevant changes initiated by Marsy's Law. In Part II, we cover past empirical works that influence our study. In Part III, we present the methodology for our study. In Part IV, we review our empirical findings. In Part V, we offer a discussion of the changes ini-

21. See *infra* notes 116-20 and accompanying text.

22. See, e.g., Robert M. Garber & Christina Maslach, *The Parole Hearing: Decision or Justification?*, 1 LAW & HUM. BEHAV. 261 (1977); Steve Disharoon, Note, *California's Broken Parole System: Flawed Standards and Insufficient Oversight Threaten the Rights of Prisoners*, 44 U.S.F. L. REV. 177 (2009); Christopher R. Mock, Note, *Parole Suitability Determinations in California: Ambiguous, Arbitrary, and Illusory*, 17 S. CAL. REV. L. & SOC. JUST. 889 (2008); Daniel Weiss, Note, *California's Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1573 (2005).

23. But see ROBERT WEISBERG ET AL., LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA 10 (2011), available at http://blogs.law.stanford.edu/newsfeed/files/2011/09/SCJC_report_Parole_Release_for_Lifers.pdf (analyzing the factors that affect the suitability decision under Marsy's Law); Laura L. Richardson, *The Impact of Marsy's Law on Parole in California*, 49 CRIM. L. BULL. 1091 (2013) (assessing the impact of victim participation on the parole deferral decision under Marsy's Law).

24. PENAL § 3041(a) (West 2013).

tiated by Marsy's Law. We conclude with several policy recommendations. Our main findings are: (1) commissioners sometimes allow extralegal factors to influence the length of deferral periods, thus resulting in some inconsistency; and (2) beyond these extralegal factors, an inmate's institutional behavior, social history, and insight into his crime are typically the principal determinants of the length of his deferral period.

I. THE LIFER PAROLE HEARING

A. *To Grant or Deny: The Parole Suitability Decision*

We begin our discussion with an overview of the California parole system.²⁵ California inmates serving life terms are released only upon the recommendation of the Board and the subsequent approval of the governor. One year prior to a lifer's minimum eligible parole release date,²⁶ members of the Board must meet with the inmate to determine her suitability for parole.²⁷ The inmate has the right to be present at this hearing, to speak on her own behalf, to ask and answer questions, and to have representation by counsel.²⁸ If she is not

25. The California parole system has its roots in an 1893 legislative bill signed into law by Governor Henry Harrison Markham. Sheldon L. Messinger et al., *The Foundations of Parole in California*, 19 LAW & SOC'Y REV. 69, 84 (1985). It began as a system to relieve the governor of the growing burden of evaluating petitions for pardons and commutations of sentences. *Id.* at 69. In its first ten years, inmates applying for parole were required to, among other things, include notices of intent in two newspapers of "opposite politics"—at a cost of at least \$55—and provide a letter certifying available employment post-prison. *Id.* at 85. Of the roughly 200 applications that were considered by the Board during the ten years between 1893 and 1903, the Board approved 156 of the petitions. *Id.* at 85-86.

As the young California prison system began to face a mounting crisis of overcrowding in 1907, Governor George Pardee foresaw the parole system as a means of "lessening the congestion consequent upon having too many prisoners and too few cells to put them in." *Id.* at 93 (quoting George C. Pardee, *Second Biennial Message to the Legislature of the State of California*, 1907 CAL. ASSEMBLY J. 37). Governor Pardee initiated a number of significant changes to the composition of the Board, and the legislature loosened some requirements to encourage more parole releases. By 1914, the Board was releasing approximately 520 inmates annually—nearly the same number as were being released annually upon the expiration of their sentences. *Id.* at 95; see also Kara Dansky, *Understanding California Sentencing*, 43 U.S.F. L. REV. 45, 59 (2008) ("[B]y 1914 there were almost as many inmates being paroled as there were inmates discharged at the expiration of their terms.").

26. The minimum eligible release date, excluding any credits for good behavior and program participation, is generally "twenty-five years for inmates convicted of first-degree murder, fifteen years for those convicted of second-degree murder, and seven years for those convicted of other crimes punishable with a life sentence." Disharoon, *supra* note 22, at 180 n.26.

27. PENAL § 3041.

28. *Id.* §§ 3041.5, 3041.7.

granted release at this initial hearing, reconsideration is deferred for some period of time, which, as mentioned earlier, has varied greatly over the years.

The Board oversees all of the parole suitability hearings for California prisoners sentenced to life terms with the possibility of parole,²⁹ in addition to its many other duties.³⁰ The governor appoints its seventeen commissioners, subject to confirmation by the state senate, for three-year terms.³¹ Notably, commissioners are typically appointed after having completed lengthy careers in law enforcement and criminal justice.³² They are joined by a larger pool of deputy commissioners that assists during hearings.³³ In each hearing, at least two commissioners will preside over a panel—of which at most one member can be a deputy commissioner.³⁴

The statute governing the suitability decision provides that a panel is to set a release date “*unless* it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the *public safety* requires a more lengthy period of incarceration.”³⁵ The panel is charged with making decisions that “provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public.”³⁶

Title 15 of the California Code of Regulations adds more color to the parole decisionmaking process. The Board must deny parole to an inmate who

29. First enacted in 1917, the Indeterminate Sentencing Law permitted the courts to sentence an inmate to prison on the condition that the court “shall not fix the term or duration of the period of imprisonment.” Indeterminate Sentencing Law, ch. 527, § 1, 1917 Cal. Stat. 665, 666. The regime “place[d] emphasis upon the reformation of the offender” and was intended to “mitigate the punishment which would otherwise be imposed upon the offender.” *Ex parte Lee*, 171 P. 958, 959 (Cal. 1918). Consequently, judges issued discretionary sentences in broad ranges of years—with some statutory guidance—with the final consideration of the total time an inmate would serve left to the discretion of the Board. *See* W. David Ball, *Heinous, Atrocious, and Cruel: Appendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 909-10 (2009).

30. Other duties of the Board include, but are not limited to, parole rescission hearings, parole progress hearings, investigation of requests for pardons, reprieves, and commutation of sentences, and sexually violent predatory screenings and hearings. *Lifer Parole Process*, CAL. DEP’T OF CORR. & REHAB., http://www.cdcr.ca.gov/Parole/Life_Parole_Process/Index.html (last visited Dec. 18, 2013).

31. CAL. GOV’T CODE § 12838.4 (West 2013).

32. *Commissioners*, CAL. DEP’T OF CORR. & REHAB., <http://www.cdcr.ca.gov/BOPH/commissioners.html> (last visited Dec. 18, 2013); *see also* Disharoon, *supra* note 22, at 179 (“At the time of publication, the majority of these commissioners had backgrounds in law enforcement and/or military service.”).

33. WEISBERG ET AL., *supra* note 23, at 7.

34. CAL. PENAL CODE § 3041(a) (West 2013).

35. *Id.* § 3041(b) (emphasis added).

36. *Id.* § 3041(a).

will pose an “unreasonable risk of danger” if released.³⁷ In making that assessment, the Board is entitled to use “[a]ll relevant, reliable information” available.³⁸ Title 15 provides six specific factors that tend to show unsuitability for parole: (1) an especially heinous commitment offense; (2) a prior record of violence; (3) an unstable social history; (4) cruel sexual offenses; (5) psychological and mental illnesses; and (6) a bad record of institutional behavior.³⁹ It also lists nine factors tending to show suitability for parole: (1) a clean juvenile record; (2) a stable social history; (3) signs of remorse or an understanding of the magnitude of harm to others; (4) a compelling motive for committing the offense; (5) signs of Battered Woman Syndrome; (6) a clean criminal history; (7) an inmate’s age; (8) realistic plans for life following release; and (9) good institutional behavior.⁴⁰

Following an evaluation on the basis of the factors enumerated above,⁴¹ the Board must then decide whether to grant or deny the inmate’s petition. In murder cases, if the Board grants parole, the governor is permitted to affirm, modify, or reverse the decision based on that same set of factors.⁴² In nonmurder cases, gubernatorial review is limited to remanding the case back to the Board for reconsideration. California is uniquely situated as one of four states that empowers its governor to overturn the decisions of its parole board.⁴³ Since the start of this practice in 1988, gubernatorial review has been a wildly political tool. Governor Gray Davis reversed nearly 100% of the Board’s grants, allowing only six inmates serving indeterminate terms to be released on parole during his tenure—five of whom were lifers purportedly suffering from Battered Woman Syndrome.⁴⁴ Governor Arnold Schwarzenegger averaged a reversal rate close to 60%.⁴⁵ In his first year, Governor Jerry Brown reversed fewer than 30% of the Board’s grants.⁴⁶

37. CAL. CODE REGS. tit. 15, § 2402(a) (2013).

38. *Id.* § 2402(b).

39. *Id.* § 2402(c).

40. *Id.* § 2281(d).

41. After reviewing one hundred audio recordings of California parole hearings, Robert M. Garber and Christina Maslach described the hearings as “short, unstructured interview sessions where the hearing officers typically ask psychologically oriented questions and the prisoners respond passively in a minimally informative, nonaffirmative manner.” Garber & Maslach, *supra* note 22, at 270-71.

42. CAL. CONST. art. V, § 8(b).

43. WEISBERG ET AL., *supra* note 23, at 10.

44. *See id.* at 13; Noone, *supra* note 4, at 793.

45. WEISBERG ET AL., *supra* note 23, at 13.

46. *See* BD. OF PAROLE HEARINGS, CAL. DEP’T OF CORR. & REHAB., SUITABILITY HEARING SUMMARY: CY 1978 THROUGH CY 2011 (2011), available at http://www.cdcr.ca.gov/BOPH/docs/BPH_Suitability_Hearing_Summary_1978-2011.pdf.

B. *Recent Judicial Scrutiny*

California courts have provided a judicial avenue to challenge adverse decisions from commissioners and the governor. In 2002, the California Supreme Court held in the case of *In re Rosenkrantz* that courts are entitled to “limited judicial review” of parole board *and* gubernatorial decisions to ensure that the decisions “are supported by a modicum of evidence and are not arbitrary and capricious.”⁴⁷ The *Rosenkrantz* court went on to hold that a court may make an inquiry *only* into whether “some evidence” in the record supports the decision by the panel or the governor to grant or deny parole.⁴⁸ In 2005, the California Supreme Court applied this “some evidence” standard and reaffirmed that the “suitability determination should focus upon the public safety risk” posed by each individual inmate.⁴⁹

Following the *Dannenberg* decision, lower courts faced mounting tensions concerning how to interpret the “some evidence” standard.⁵⁰ Recognizing their inconsistencies, the California Supreme Court set out in *In re Lawrence* to answer “whether the aggravated circumstances of the commitment offense, standing alone, provide *some evidence* that the inmate remains a current threat to public safety.”⁵¹ Indeed, it held that the “aggravated nature” of the inmate’s offense may not in and of itself “provide *some evidence* of *current* dangerousness to the public unless the record also establishes that something [else] . . . indicates that the implications regarding the prisoner’s dangerousness . . . remain probative to the statutory determination of a continuing threat to public safety.”⁵² And on the same day, it further held in *In re Shaputis* that the gravity of the offense and the petitioner’s attitude toward the crime “provide evidence of the risk *currently* posed by petitioner to the community,” and in turn “provide ‘some evidence’ that petitioner constitutes a current threat to public safety.”⁵³

Taken together, these cases demonstrate that Board suitability decisions have been exposed to an increasing amount of scrutiny in recent years. As part of this process, inmates and judges alike have questioned what factors are *actually* being used to inform suitability decisions. Given the potentially severe consequences of a long deferral period under Marsy’s Law, we suspect courts will soon be asking this same question in the context of deferral decisions, an

47. 59 P.3d 174, 183-84 (Cal. 2002).

48. *Id.* at 205.

49. *See, e.g., In re Dannenberg*, 104 P.3d 783, 794, 802-03 (Cal. 2005).

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

51. *Id.* (emphasis added).

52. *Id.* at 555 (first emphasis added).

53. 190 P.3d 573, 575 (Cal. 2008).

inquiry we hope to inform through this study. First, however, we examine the background and details of this controversial measure.

C. *Marsy's Law and the Parole Deferral Decision*

Marsy Nicholas was a twenty-three-year-old college senior when her ex-boyfriend, Kerry Conley, murdered her in 1983. Within days of her funeral, her mother encountered Marsy's murderer at a local grocery store. "She went up to the checkout stand, and there was my sister's murderer, staring her down," Marsy's brother, Henry Nicholas, later recounted. To the family's surprise, Conley had posted bail and was driving around their neighborhood without any notice having been provided to the family.⁵⁴

Marsy's assailant was eventually found guilty of murder and sentenced to life with the possibility of parole. Before Conley's death in 2007, Marsy's family members made frequent trips to his prison every two to three years to present their best case for why he should not be released on parole. "It's 105 degrees and you're in sitting in a room across the table from this murderer," Henry said of the encounters. On just their second trip to the prison for Conley's parole hearings, the stress is alleged to have caused Marsy's mother to have had a heart attack. Though her mother survived, the family's frustrations with the California criminal justice system would continue to fester.⁵⁵

More than twenty years after Marsy's death, Henry Nicholas, now a billionaire tech entrepreneur, sought to amend the California Constitution to proclaim and enhance the rights of victims like his family. Injecting over \$4.8 million of his own fortune into the political war to advance the measure, Henry Nicholas became the lead supporter for the ballot initiative named for his sister.⁵⁶ His prolonged struggle with his sister's murderer undoubtedly was a motivating force: "Thousands of other crime victims have shared the experiences of Marsy's family, caused by the failure of our criminal justice system to notify them of their rights, failure to give them notice of important hearings . . . , failure to provide them with an opportunity to speak and participate"⁵⁷

The fruit of these efforts, Marsy's Law, made a number of changes to the California Constitution and the California Penal Code that enhanced victims'

54. Frank Mickadeit, *On Victims' Day, Henry Nicholas Recalls Sister*, ORANGE COUNTY REG. (Apr. 21, 2010), <http://www.oregister.com/news/nicholas-245053-marsy-victims.html> (internal quotation marks omitted).

55. *Id.*

56. Robert Greene, Op-Ed., *The Two Henry T. Nicholases: Reconciling the Indicted Billionaire Businessman with the Anti-Crime Crusader*, L.A. TIMES (June 11, 2008), <http://www.latimes.com/news/opinion/la-oe-w-greene11-2008jun11,0,119616.story>.

57. CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION TUESDAY, NOVEMBER 4, 2008 OFFICIAL VOTER INFORMATION GUIDE 129 (2008), available at <http://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf>.

rights.⁵⁸ Its stated purpose was to spare homicide victims the “ordeal of prolonged and unnecessary suffering, and to stop the waste of millions of taxpayer dollars, by eliminating parole hearings in which there is no likelihood a murderer will be paroled.”⁵⁹ And its changes to victims’ rights, in particular, significantly impacted how parole hearings operate. For example, Marsy’s Law requires that parole panels “admit the prior recorded or memorialized testimony or statement” of victims when making the decision to grant or deny, and it requires the panels to consider the “views and interests of the victim” when setting deferral periods for inmates denied parole.⁶⁰

Of the changes wrought by Marsy’s Law, the most dramatic has been the shift to longer presumptive deferral periods. Prior to Marsy’s Law, lifers were presumptively entitled to a parole hearing every year. If the Board found that it was not “reasonable to expect that parole would be granted at a hearing during the following year,” it could grant a lifer a deferral period of two years.⁶¹ If the Board found the same with respect to a lifer convicted of murder, it had the option of extending the deferral period to up to five years. In this extraordinary circumstance, the Board was required to review the lifer’s file within three years to determine if a hearing should, in fact, be scheduled earlier.⁶²

58. Marsy’s Law implements a general state policy of concern for crime victims by amending article I, section 28 to read, “[I]t is necessary that the laws of California relating to the criminal justice process be amended in order to protect the legitimate rights of victims of crime.” *Id.* (italics omitted). It also amends the California Constitution to provide a more specific “Victims’ Bill of Rights” that consists of seventeen enumerated rights, including the right to be informed of and participate in parole hearings. *Id.* at 129-30. Moreover, Marsy’s Law expands the definition of “victim” in the context of parole hearings by amending section 3043 of the California Penal Code to allow participation by crime victims, their next of kin, members of the victims’ families, and two unrelated representatives designated by victims. *Id.* at 131.

59. *Id.* at 129.

60. CAL. PENAL CODE § 3041.5(b)-(c) (West 2013).

61. *Id.* § 3041.5(b)(2)(A) (West 1994), amended by *id.* § 3041.5(b)(3) (West 2008). In greater detail, the previous version of the statute provided that:

The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than the following: (A) Two years after any hearing at which parole is denied if the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following year and states the bases for the finding. (B) Up to five years after any hearing at which parole is denied if the prisoner has been convicted of murder, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding in writing. . . . The board shall adopt procedures that relate to the criteria for setting the hearing between two and five years.

Id.

62. *Id.* This option of giving certain lifers a five-year deferral period was itself a somewhat new practice. Prior to 1991, the Board was limited to deferring the consideration of parole for most inmates for no more than two years, and no more than three years for inmates who had committed two or more murders. The 1994 amendment permitted five-year deferrals for inmates convicted of a single murder. See *In re Brown*, 118 Cal. Rptr. 2d 156, 157-58 (Ct. App. 2002) (reviewing the history of section 3041.5 in connection with an inmate’s

Marsy's Law presumptively requires commissioners to grant inmates fifteen-year deferral periods unless they find "clear and convincing evidence" that the interest of the "public and victim's safety does not require a more lengthy period."⁶³ If they do find that a fifteen-year deferral period is not "require[d]," they presumptively must give a ten-year deferral period.⁶⁴ If they similarly find "clear and convincing evidence" that these same considerations of public and victim's safety do not require a ten-year deferral period, they can give the inmate a seven-year, five-year, or three-year deferral period.⁶⁵ This last decision does not appear to be governed by the same "clear and convincing evidence standard," although it is somewhat ambiguous. In making this complex decision, Marsy's Law directs commissioners to consider the same "criteria relevant to the setting of parole release dates" as they relate to the "public and victim's safety."⁶⁶ We discuss at length the implications of these new provisions in Part V.

unsuccessful claim that he was ineligible to receive a five-year deferral period). And prior to 1982, every lifer was entitled to an annual parole hearing, with no exceptions. *Compare* Act of Sept. 27, 1982, ch. 1435, sec. 1, § 3041.5(b)(2), 1982 Cal. Stat. 5474, 5474, with Act of Sept. 21, 1976, ch. 1139, § 281.8, 1976 Cal. Stat. 5062, 5152 (codified as amended at PENAL § 3041.5 (West 2013)).

63. PENAL § 3041.5(b)(3)(A) (West 2013). The presumption of a fifteen-year deferral period stands in tension with the presumption that an inmate is suitable for parole when he appears before the Board. *Compare id.* § 3041.5(b)(3) ("The board *shall schedule the next hearing*, after considering the views and interests of the victim, as follows: (A) *Fifteen years* after any hearing at which parole is denied, unless the board finds by clear and convincing evidence that the criteria relevant to the setting of parole release dates enumerated in subdivision (a) of Section 3041 are such that consideration of the public and victim's safety does not require a more lengthy period of incarceration for the prisoner than 10 additional years." (emphasis added)), with *id.* § 3041(b) ("The panel or the board, sitting en banc, *shall set a release date* unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual . . ." (emphasis added)).

64. *Id.* § 3041.5(b)(3)(B).

65. *Id.* § 3041.5(b)(3)(C).

66. *Id.* § 3041.5(b)(3)(A)-(C).

TABLE 1
Comparing the Pre- and Post-Marsy's Law Deferral Regimes⁶⁷

Period	Pre-Marsy's Law	Post-Marsy's Law
Deferral Options	1, 2, 3, 4, or 5 Years	3, 5, 7, 10, or 15 Years
Presumptive Deferral	1 Year	15 Years
Minimum Deferral	1 Year	3 Years
Maximum Deferral	5 Years (murderers only)	15 Years
Burden	Board must find that a lengthier deferral period is appropriate	Board must find by clear and convincing evidence that a shorter deferral period is appropriate

II. PAST EMPIRICAL WORKS

Before we get into the details of our study, we find it important to first highlight the body of works on which we attempt to build. The broad exercise of discretion by parole boards has been the subject of numerous past empirical studies. Notably, many of these past empirical studies are now more than twenty or thirty years old, and they describe parole systems that may differ significantly from parole systems and practices of today.⁶⁸ These studies employ a host of competing methodologies, ranging from real-time simulations of parole hearings to statistical analyses of actual parole hearing results and prison case-work notes.⁶⁹ Most, however, focus almost exclusively on predicting the decisions of parole boards using data from hearing transcripts and correctional

67. A similar version of Table 1 appeared in Ryan S. Appleby, Note, *Proposition 9, Marsy's Law: An Ill-Suited Ballot Initiative and the (Predictably) Unsatisfactory Results*, 86 S. CAL. L. REV. 321, 341 tbl.2 (2013).

68. Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, FED. PROBATION, June 2007, at 16, 18. In particular, the advent of determinate sentencing laws has diminished the influence of parole boards.

69. Compare John S. Carroll, *Judgments of Recidivism Risk: Conflicts Between Clinical Strategies and Base-Rate Information*, 1 LAW & HUM. BEHAV. 191, 195-97 (1977) (employing a simulation where participants were given case descriptions of offenders and asked to predict their recidivism rates), with Terrill R. Holland et al., *Social Roles and Information Utilization in Parole Decision-Making*, 106 J. SOC. PSYCHOL. 111, 113-14 (1978) (using multiple regression analysis to compare the decisionmaking of parole boards with caseworkers).

files.⁷⁰ In large part, these studies confirm that parole boards do not consistently apply suitability criteria, and that parole suitability decisions are “primarily a function of institutional behavior [and] crime severity,” among other factors.⁷¹

A. *Evaluating Institutional Behavior*

Peter Hoffman’s 1972 study on parole suitability decisions is one of the earliest empirical works to produce evidence that an inmate’s institutional behavior is a primary determinant of parole release decisions.⁷² In his study, Hoffman analyzed the parole cases of 270 federal inmates who were sentenced under the Youth Corrections Act. Thirty percent of the parole board members were asked to complete evaluation sheets for each hearing—a process that required them to identify the perceived influence of four individual factors that may have influenced their decisions: (1) the severity of the offense, (2) the inmate’s participation in institutional programs, (3) the inmate’s institutional discipline, and (4) the probability of a favorable parole outcome for the inmate.⁷³ Though Hoffman found that the severity of the commitment offense plays a key role in commissioners’ decisionmaking during an initial parole hearing, he found that institutional behavior is the primary determinant at subsequent hearings.⁷⁴ Several more recent studies have supported Hoffman’s findings on the significance of institutional behavior in the decisionmaking of parole commissioners.⁷⁵ Strikingly, Mary West-Smith et al. argue that an inmate’s behavior while incarcerated may be the only significant factor to commissioners.⁷⁶ In our study, we hypothesize that similar to its effect on parole suitability

70. Eric Metchik, *Parole Decisionmaking: A Comparative Analysis*, 32 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 233, 236 (1988).

71. Caplan, *supra* note 68, at 16; Beth M. Huebner & Timothy S. Bynum, *An Analysis of Parole Decision Making Using a Sample of Sex Offenders: A Focal Concerns Perspective*, 44 CRIMINOLOGY 961, 978 (2006).

72. See Peter B. Hoffman, *Paroling Policy Feedback*, 9 J. RES. CRIME & DELINQ. 117, 124 (1972).

73. *Id.* at 120.

74. *Id.* at 131.

75. See, e.g., John S. Carroll & Pamela A. Burke, *Evaluation and Prediction in Expert Parole Decisions*, 17 CRIM. JUST. & BEHAV. 315, 325 (1990) (finding that Pennsylvania parole experts are “concerned” with an inmate’s prison conduct and program participation during the parole release decision); Michael R. Gottfredson, *Parole Board Decision Making: A Study of Disparity Reduction and the Impact of Institutional Behavior*, 70 J. CRIM. L. & CRIMINOLOGY 77, 87 (1979) (“The results of this study also suggest that parole boards do modify sentencing decisions on the basis of institutional behavior . . .”).

76. Mary West-Smith et al., *Denial of Parole: An Inmate Perspective*, FED. PROBATION, Dec. 2000, at 3, 5 (“Rather than good behavior being a major consideration for release, as inmates are told, only misbehavior is taken into account and serves as a reason to deny parole.”).

decisions, institutional behavior also plays an important role in parole deferral decisions.

B. *Evaluating the Severity of the Commitment Offense*

Several scholars have confirmed Hoffman's initial finding that the severity of the inmate's commitment offense is instrumental in parole decision-making.⁷⁷ Joseph Scott's 1974 study of one state's prison system analyzed twenty-five percent of the male parole hearing packets and all of the female packets given to commissioners before parole release hearings.⁷⁸ The hearing packets were the sole source of information given to commissioners about inmates; all interviews with inmates occurred only after commissioners had decided whether to grant or deny the inmates' release petitions. Each packet was coded for several potentially relevant pieces of information, such as the severity of the inmate's commitment offense (or the sentence length in months), his or her institutional behavior (including behavioral records, participation in programs, work and housing reports, and overall progress and cooperation), and his or her biographical information (including age, education level, IQ, marital status, socioeconomic background, race, and sex). Scott found that the severity of the commitment offense is the single best indicator of whether commissioners would grant or deny an inmate's petition.⁷⁹ Borrowing his finding, we also hypothesize that the severity of the commitment offense is an important factor for California commissioners in their parole deferral decisions.

C. *Evaluating Parole Readiness*

Third among the salient factors that we hypothesize influence the parole deferral decision is the inmate's parole readiness. In a 2006 study of sex offenders, Huebner and Bynum set out to identify the effect of a number of factors on an inmate's "time to parole," which was measured as the time in months between an inmate becoming eligible for parole and a positive parole decision permitting release.⁸⁰ One of the factors tested was an inmate's parole readiness, assessed through a score derived from an inmate's commitment offense, prior institutional record, institutional conduct, age, mental status, and institutional

77. See, e.g., Mark R. Pogrebin et al., *Parole Decision Making in Colorado*, 14 J. CRIM. JUST. 147, 154 (1986); Joseph E. Scott, *The Use of Discretion in Determining the Severity of Punishment for Incarcerated Offenders*, 65 J. CRIM. L. & CRIMINOLOGY 214, 217 (1974); Carolyn Turpin-Petrosino, *Are Limiting Enactments Effective? An Experimental Test of Decision Making in a Presumptive Parole State*, 27 J. CRIM. JUST. 321, 326-27 (1999).

78. See Scott, *supra* note 77, at 215.

79. *Id.* at 215 & n.7, 216-17.

80. Huebner & Bynum, *supra* note 71, at 967-70.

classification.⁸¹ Huebner and Bynum found that although parole readiness is a significant factor, it is no more significant than the inmate's institutional behavior, the inmate's age, or the age of the victim.⁸² We hypothesize that an inmate's parole readiness is also an important factor in determining the length of an inmate's deferral period under Marsy's Law.

D. *Parole Deferrals*

Although there are numerous empirical studies testing the discretion of commissioners in the context of the parole release decision, there remains a dearth of works analyzing the parole deferral decision—particularly after Marsy's Law. A couple of studies show that Marsy's Law increased the average deferral period received by lifers—meaning that inmates who are denied parole today face significantly longer deferral periods between their hearings than inmates under the former statute.⁸³ But that should come as no surprise given Marsy's Law's fifteen-year deferral presumption. Still, few studies have examined the implications of Marsy's Law beyond its impact on the initial parole suitability decision.⁸⁴ Our study aims to fill that gap and offer an empirical look into which factors underlie the application of Marsy's Law to the parole deferral decision.

III. METHODOLOGY

A. *Data Collection and Sample Selection*

Our study focuses on parole hearings conducted in 2011. There were 4014 parole hearings scheduled for California lifer inmates over these twelve months.⁸⁵ The CDCR reports that 396 of the hearings resulted in stipulations,⁸⁶

81. *Id.* app. A at 987.

82. *Id.* at 978.

83. See WEISBERG ET AL., *supra* note 23, at 13; Richardson, *supra* note 23 (assessing the impact of Marsy's Law on both the length of deferral periods received by lifers and victim participation in parole hearings).

84. *But see* Richardson, *supra* note 23 (examining the effect of victim participation rates on parole deferral decisions).

85. BD. OF PAROLE HEARINGS, CAL. DEP'T OF CORR. & REHAB., LIFER SCHEDULING AND TRACKING SYSTEM (2012), available at http://www.cdcr.ca.gov/BOPH/docs/LSTS_Workload_CY2011.pdf.

86. Stipulations are agreements between the Board and an inmate that the inmate is not suitable for parole. If an inmate enters a stipulation, no hearing is held and parole is denied for the amount of time stipulated. See OFFICE OF VICTIM & SURVIVOR RIGHTS & SERVS., CAL. DEP'T OF CORR. & REHAB., PAROLE SUITABILITY HEARING HANDBOOK: INFORMATION FOR

985 resulted in voluntary waivers,⁸⁷ 642 were postponed, 126 were cancelled, and 21 were continued after the hearing had begun.⁸⁸ Thus, though 4014 hearings were originally scheduled, the Board heard only 1844. Of those 1844 inmates who had hearings, 25% (463) were found suitable for parole.⁸⁹

For the purposes of our research, the CDCR shared with us all of the transcripts from hearings where fifteen-year, ten-year, and seven-year deferrals were awarded in 2011 and a random sample of around 20% of all other 2011 hearing transcripts for a total of 302 transcripts. We received additional data about these inmates from the CDCR that may not have always been included in each transcript—including the age and gender of the inmate, whether the inmate’s attorney was public or private, the inmate’s housing assignment, the inmate’s CDCR risk and security levels,⁹⁰ and the inmate’s mental health and disability classifications. We refer to this larger dataset of 302 transcripts as the “control dataset” because it was populated only with objective, natural controls obtained from the CDCR. No coded data from transcripts were added to this dataset.

From the control dataset, we took a randomized sample of one-third (103) of the transcripts to form what we refer to as the “coded dataset”—a sample that is both large enough to engage in meaningful analysis but also reasonable enough for the limited resources of our small coding operation. The distribution of the three-, five-, seven-, ten-, and fifteen-year deferrals for both the control dataset and the coded dataset mapped closely to the distribution of the overall population.

B. *Coding Methods*

Parole hearings were held at any one of thirty CDCR facilities across the state. Generally, transcripts were organized into three components: (1) a title page identifying the proceeding, location, and parties present; (2) the actual suitability proceeding, which typically takes the form of an extended interview run by the commissioners with input, if present, from the inmate, the inmate’s

VICTIMS AND THEIR FAMILIES 17 (2010), available at http://www.cdcr.ca.gov/Victim_Services/docs/BPHHandbook.pdf.

87. Like stipulations, voluntary waivers are designed to allow inmates to waive their rights to a hearing. For murder cases, the inmate may waive a hearing for one, two, three, four, or five years. *Id.* at 18.

88. *BD. OF PAROLE HEARINGS*, *supra* note 85.

89. *Id.*

90. Lifers in our sample were assigned one of four CDCR risk designations: low, moderate, high property, or high violent. They were also assigned to facilities, or sections of facilities, with one of three security levels. Listed from least to most restrictive, the security levels are: II, III, and IV. Several inmates were also classified in other levels that did not necessarily correlate with their security risk.

attorney, a district attorney, and witnesses; and (3) both the decision outlining the opinion of the commissioners as to why parole is granted or denied and the commissioners' decision with regards to the number of years the inmate must wait until his next parole hearing. During coding, largely for reasons of efficiency, our team coded only the title page and the decision sections of transcripts.

In reading these decisions, we coded for dozens of factors, all of which are listed in Appendix B, that we hypothesized might affect the length of parole deferrals. These factors fall into two conceptually distinct categories: "public safety" factors and "extralegal" factors. Public safety factors are those that, in the words of the California Code of Regulations, "tend to indicate" either "suitability" or "unsuitability for release."⁹¹ These include factors such as institutional behavior, parole plans, and attitude about the commitment offense.⁹² As indicated above, Marsy's Law directs commissioners to utilize these factors when considering the length of an inmate's deferral period. In contrast, extralegal factors are those that are not related to suitability for release, and are accordingly not listed in the California Code of Regulations as relevant. These include factors such as the inmate's race, the identity of the parole commissioner presiding over the hearing, and the type of lawyer representing the inmate. The term extralegal, thus, has two different connotations in the context of our study. On the one hand, it refers to factors that commissioners, by law, are not allowed to consider when determining the length of an inmate's deferral period.⁹³ On the other hand, it refers to some factors, such as race or gender, the use of which may implicate constitutional concerns.⁹⁴

A team of Stanford University students—comprised of two law students and two undergraduates—was assembled to read and code the transcripts for these factors. All of the coders were given a coding instruction sheet that contained a list of the factors to be coded and detailed descriptions of how to code for each particular factor. They were also given a spreadsheet with a random

91. CAL. CODE REGS. tit. 15, § 2281 (2013).

92. *Id.*

93. Interestingly, commissioners' consideration of an inmate's race, gender, or type of lawyer would not, strictly speaking, be extralegal in this sense of the word, since commissioners are permitted to consider all "information which bears on the prisoner's suitability for release." *Id.* It strikes us, however, as uncontroversial to say that no rational commissioner would conclude that these types of factors are relevant in any way to, and thus "bear[]" on, an inmate's "suitability for release."

94. Inmates around the country routinely allege that they were denied parole or early release because of their race or gender. *See, e.g.,* *Greene v. Ga. Pardons & Parole Bd.*, 807 F. Supp. 748 (N.D. Ga. 1992) (considering a claim that an inmate was denied an earlier parole release date on account of his gender and race in violation of 42 U.S.C. § 1983); *Mangum v. Miss. Parole Bd.*, 76 So. 3d 762 (Miss. Ct. App. 2011) (considering a claim that an inmate was denied parole because of his race in violation of the Equal Protection Clause).

sample of the inmates from our coded dataset. Within the spreadsheet, each factor had two entries: one to be used for recording mentions of that factor as suggesting a shorter deferral period and one to be used for recording mentions of that factor as suggesting a longer deferral period. When a factor was mentioned in a decision, coders were directed to record a "1" or "-1," based on whether it was a positive or negative mention, in addition to the page number of the mention. In limited cases, certain elements could only be scored negatively, such as whether there were multiple victims or a firearm involved in the commitment of the offense. Moreover, subsequent mentions of the same factor were not recorded.

C. *Control Indices*

After coding for individual factors, we created a number of indices that helped more comprehensively measure certain categories of inmate characteristics, such as readiness for parole and institutional behavior. The five indices we created were: (1) the insight index; (2) the institutional behavioral index; (3) the social history index; (4) the parole readiness index; and (5) the crime enhancement index. For each index, we employed the same technique: we summed the results of a group of related factors that had been coded positively as "1" and negatively as "-1." For example, the parole readiness index is the sum of an inmate's positive and negative marks on each of the following factors: (1) the inmate's support network as it relates to parole; (2) the inmate's job prospects; (3) the inmate's housing prospects; (4) the inmate's postrelease educational opportunities; and (5) the inmate's relapse plan, or often absence of a relapse plan. As with all the indices, the parole readiness index also incorporates a final catchall category that embraces mentions of any other positive or negative factors related to parole readiness that do not fall into one of the five categories above.

A brief overview of the other indices follows: The insight index includes such factors as the inmate's attitude towards her crime, remorse for her victims, and understanding of the underlying causes of her commitment offense. The institutional behavior index consists of factors relating to the inmate's involvement in rehabilitative and vocational programming in prison, her institutional infractions, and any behavior exhibited during incarceration indicating an enhanced ability to function within society. The social history index includes such factors as history of violence or gang involvement, history of substance abuse issues, and history of mental or emotional illnesses. And finally, the crime enhancement index includes factors that mitigate or enhance the severity of the commitment offense, including the inmate's motive, whether there were multiple victims, and whether the crime was committed in a callous manner.⁹⁵

95. For a detailed list of the factors coded in each index, see *infra* Appendix B.

D. *Methods of Analysis*

Our study focuses on the analysis of our coded dataset. To address our first inquiry into what factors commissioners use to determine deferral lengths, we began by examining the impact of extralegal factors on the deferral decision. This process involved running ordinary least squares regressions of these factors against the length of deferral period received by inmates. In these regressions, the control indices described above were included to ferret out spurious results based upon differential inmate characteristics. That is, we wanted to make sure, for example, that we weren't finding a gender disparity simply because the women in our dataset had much better institutional records and parole plans on average than the men in our dataset. In this way, we measured the impact that these extralegal factors had on the length of deferral period received by similarly situated inmates. In this context, we also calculated R-squared values to determine the amount of variation explained by these indices.

We also examined our control dataset to confirm the results concerning extralegal factors derived from the earlier analysis of our coded dataset. The analysis of the control dataset helped us achieve this goal by both expanding the number of data points available and replacing the control indices, which are subject to coder bias or error, with objective controls provided by the CDCR. In particular, we relied upon prison assignment, housing security level, and risk level as effective proxies for the inmate characteristics measured by the control indices. The actual analysis, once again, took the form of regressions of the extralegal factors against the length of deferral period received by inmates.

E. *Limitations*

Though we report on a number of significant results in Part IV of this Note, we are aware of at least three limitations to our findings. First, the size of our sample presents numerous challenges and limits our depth of analysis. In some cases, we are unable to report on otherwise compelling results for subpopulation groups such as females, inmates that committed nonmurder offenses, inmates from specific CDCR institutions, and inmates with mental health problems due to the small sample sizes of these subpopulations. Moreover, the small sample size may also bias our findings. Though we cross-checked the statistical profile of our sample against the profile of the population of inmates who had parole hearings in 2011, there remain some minor inconsistencies. As an example, the frequencies of deferral periods in our sample are not identical to those of the general population, but they are close enough to draw reliable conclusions.

A second limitation is the difficulty in drawing out the causal relationships between our dependent and independent variables. In many cases, we easily found strong correlations between two or more sets of variables, but explaining the causal link is not as easy. The clearest example involves our analysis of in-

mate presence at parole hearings and its effect on the length of deferral periods. Although we found a strong link between the two variables, a causal link is not obvious. Commissioners may penalize inmates who do not show up for their hearings by giving those inmates longer deferrals, but an expectation of parole denial may actually dissuade them from attending the hearing in the first place.

A third limitation results from our coding methodology. During coding, our team took note of factors that were present in the transcripts only the first time that each factor was mentioned. If commissioners mentioned one factor twenty times and another factor only once, both factors would be given the same weight in our coding sheet. A second coding bias arose from using a team of four coders with their own independent analyses of parole transcripts. And a third coding bias resulted from the reality that some qualitative aspects of transcripts cannot be transcribed into quantitative data in our coding sheets. For example, a reader could likely read the first paragraph of a few transcripts and quickly have a good sense of how long of a deferral the Board is going to give an inmate based on the commissioner's tone, attitude towards the inmate, word choice, and so on. It is difficult, however, to quantitatively measure much of this information.

Although these three limitations may negatively impact the reliability of some of our data and findings, we are confident that our relatively robust results are representative of the larger population of 2011 hearings and adhere to academic standards of empirical research.

IV. FINDINGS

A. *Analysis of the Coded Dataset*

As discussed in Part III, we examined a number of different extralegal and public safety factors that we hypothesized based upon past research might have an impact on the deferral decision. We begin this Subpart by presenting the results of our regression of these factors on our coded dataset. We then discuss each of the factors in more detail.

TABLE 2
Regression of Coded Dataset

Factor	Deferral Period	Factor	Deferral Period
Race of Inmate		Commitment Offense	
Black	-0.814 (0.764)	Robbery	-3.213 (2.431)
Other	-1.548* (0.846)	Kidnapping	-1.106 (1.020)
Hispanic	-0.102 (0.727)	Second Degree Murder	-1.060** (0.526)
Female Inmate	1.487* (0.872)	Assault	-0.803 (1.035)
Commissioner A	-1.915** (0.838)	Lewd Act with a Child	-2.094 (2.517)
Commissioner B	-0.0819 (0.800)	Rape	3.109 (2.531)
Commissioner C	-1.471 (0.943)	Mental Health Problem	-0.156 (0.926)
Commissioner D	1.254 (0.792)	Age	-0.0182 (0.026)
Commissioner E	0.702 (1.145)	Indices	
Commissioner F	-1.724** (0.849)	Social History	-0.416** (0.161)
Presence at Hearing		Crime Enhancement	-0.290 (0.298)
Inmate	-4.886*** (1.012)	Insight	-0.508** (0.193)
Inmate's Attorney	2.992 (2.359)	Institutional Behavior	-0.330*** (0.075)
District Attorney	-0.820 (0.679)	Parole Readiness	-0.234 (0.162)
Victim	-0.780 (0.815)	Private Attorney	-1.075 (0.674)
Observations	103	Pro Se Representation	6.100** 2.575
R-squared	0.789	Constant	9.378*** (3.172)

* Significant at 10% level ** Significant at 5% level *** Significant at 1% level
 Deferral period = length in years of deferral period, all other factors held equal.
 Standard errors in parentheses.

1. *Extralegal factors*

This Subpart will focus on the implications of our coded regression for the extralegal factors that we hypothesized might impact the deferral decision.

a. *Race*

Using racial data provided by the CDCR, we were able to classify the inmates in our sample into one of four categories: black, Hispanic, white, and other. Our sample had the following racial breakdown:

TABLE 3
Racial Composition of Sample

Race	Frequency	Percentage
Black	30	29.1%
Hispanic	38	36.9%
White	23	22.3%
Other	12	11.7%

In the end, as is evident in Table 2, we found no evidence that racial discrimination was impacting the deferral decision. If anything, we found that those in the “other” racial category received slightly shorter deferral periods on average.

b. *Gender*

As an initial matter, we found that the women in our coded dataset had a lower average deferral period length (4.78 years) than men (5.94 years). We were able to confirm this result through our regression, although this finding was only significant at the 10% level.

c. *Attorney type*

Most of the inmates in our sample were represented by state-appointed counsel. This makes sense, as private attorneys often charge as much as \$5000 for representation before the parole board.⁹⁶ The full breakdown was as follows:

96. WEISBERG ET AL., *supra* note 23, at 8.

TABLE 4
Type of Attorney Representing Inmate

Type	Frequency	Percentage
Pro Se	7	6.8%
Private	20	19.4%
State-Appointed	76	73.8%

Our regression results indicate that, all else being equal, those who were represented private counsel received, on average, a deferral period that was one year shorter than those who were represented by a state-appointed attorney. This result, however, was not very significant. Conversely, inmates who represented themselves received deferral periods that were, all things being equal, 6.1 years longer than those who were represented by a state-appointed attorney. This may be symptomatic of the fact that many inmates who proceed without an attorney often fail to take the parole hearing seriously, or even show up at all.

d. *Identity of commissioner*

We first looked at the average deferral periods given out by the various commissioners to see if there were any obvious differences. We restricted the scope of our inquiry to the six most active commissioners, who combined chaired over 50% of the hearings in our sample.

TABLE 5
Average Deferral Period by Commissioner

Commissioner	Average Deferral Period
A	3.73
B	8.23
C	7.20
D	7.00
E	7.00
F	4.78

As the Table above demonstrates, certain commissioners tended to give out, on average, markedly shorter or longer deferral periods. Since certain facilities house more hardened inmates and have fewer rehabilitative programs, and

commissioners are assigned to specific facilities,⁹⁷ these initial results were tested by our regression that controlled for inmate characteristics.

The regression confirmed the direction of the findings above. Only the coefficients for Commissioners *A* and *F*, however, had an acceptable level of significance. This could indicate either that our sample size was simply too small, which is entirely possible given the number of cases examined, or that the identity of the commissioner really does not have an impact on the length of deferral period. At the very least, the results suggest that inmates going before Commissioner *A*, all else being equal, can expect to receive, on average, a deferral period that is around two years shorter than their similarly situated peers.

e. *Presence at hearing*

This Table summarizes the frequency with which the members of four different categories of individuals attended the parole hearings in our sample.

TABLE 6
Presence of Key Parties at Hearings

Party	Percentage of Hearings Present
Inmate	89.3%
Inmate's Attorney	92.2%
District Attorney	86.4%
Victim	8.7%

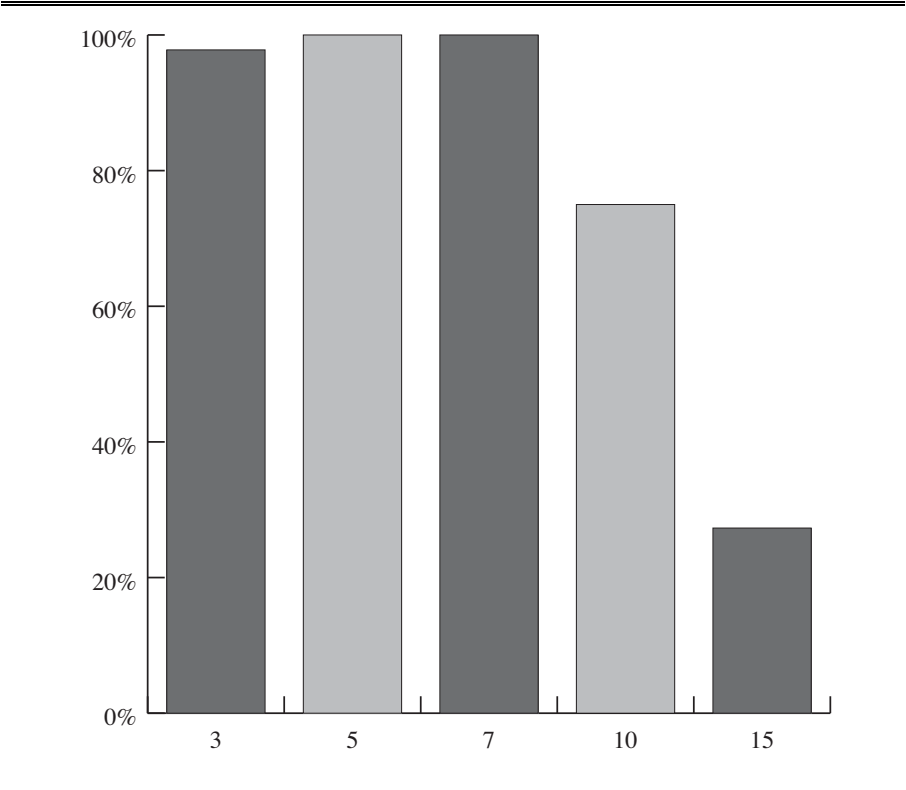
These results demonstrate some interesting trends. Notably, though the major goals of Marsy's Law included both encouraging victim participation at parole hearings and expanding the class of victims allowed to participate, it would seem that victims infrequently attend parole hearings. District attorneys, however, do seem to be taking full advantage of their opportunity to weigh in on suitability decisions. In fact, they do so almost as frequently as the inmates themselves. Our regression controlling for inmate characteristics demonstrates the relevance of these trends to the length of deferral period.

97. *Id.* at 22. Robert Weisberg, Debbie A. Mukamal, and Jordan D. Segall found in their study of the suitability decision that "grant rates differ dramatically by facility." *Id.* As such, it would be unfair to assume, without controlling for inmate characteristics, that certain commissioners are harsher than others simply because they are assigned to facilities with inmates who are, on average, unlikely to be rehabilitated as soon as others in different facilities.

Although the coefficients vary in significance, the presence of each category of individuals seems to have some effect on the average length of deferral periods. The direction of these effects for district attorneys and victims are somewhat unexpected. One possible explanation for this puzzling disparity is that district attorneys and victims are more likely to show up when inmates are closer to being released. Unfortunately, this theory likely cannot be confirmed or denied given the limited amount of information available to us.

The huge effect of inmate presence on the deferral decision is perhaps the most noteworthy result of the four. Nevertheless, it is not even clear if inmate presence should be considered an extralegal factor. If an inmate does not even bother to show up to her own parole hearing, it may indicate that she has a bad attitude, and thus is not close to being suitable for parole. On the other hand, this may not be true if the inmate has some sort of mental illness or developmental disability that keeps her from attending. Regardless, parole commissioners often explicitly say in transcripts that they do not, and legally cannot, penalize inmates for not attending their own hearings. Some further analysis seems to indicate that this is not true.

FIGURE 1
Percentage of Inmates Present by Denial Period Received



This Figure demonstrates that inmates are generally present when they receive deferral periods on the shorter end of the spectrum. Only around a quarter are present, however, when fifteen-year deferral periods are awarded. These results are also susceptible to two interpretations. They may suggest that there is, in fact, some sort of penalty for not attending your parole hearing, despite the assurances of commissioners. This, in turn, would raise broader concerns about the possibility that commissioners are not articulating the actual factors that they are using to determine deferral periods. Alternatively, as suggested above, inmates who do not attend their own hearings may be especially obstructionist and violent, and thus, on average, will need a longer period of time before they will be suitable for parole.

2. *Public safety factors*

This Subpart will focus on the implications of our coded regression for the public safety factors that we hypothesized might prove relevant to the deferral decision.

a. *Individual factors*

i. *Commitment offense*

We found that commitment offense did not bear a strong relationship to the length of the deferral periods received by inmates in our dataset.

TABLE 7
Average Deferral Period by Commitment Offense

Commitment Offense	Average Deferral Period
First Degree Murder	6.37
Second Degree Murder	5.58
Assault/Battery	5.67
Kidnapping	4.67
Lewd Act with a Child	3.00
Rape	5.00
Robbery	10.00

As the Table demonstrates, inmates convicted of robbery were given, on average, longer deferral periods than those convicted of murder. Moreover, sex offenders were generally treated quite leniently. Controlling for inmate characteristics and behavior through our regression altered these findings to some

extent, especially with respect to sex offenders. The only result that was significant, however, was the finding that those convicted of second-degree murder can expect a deferral period that is one year shorter than would typically be given to a similarly situated inmate convicted of first-degree murder.

ii. *Age*

We began by breaking our sample into age cohorts and calculating the average deferral period for each group.

TABLE 8
Average Deferral Period by Age

Age	Average Deferral Period	Number of Inmates	Percentage of Inmates
30-39	4.75	12	11.7%
40-49	6.08	40	38.8%
50-59	5.49	35	34.0%
60-69	8.08	12	11.7%
70+	3.00	4	3.8%

Somewhat surprisingly, we found that inmates in their thirties tended to receive shorter deferral periods than inmates in their forties, fifties, and sixties. One plausible explanation for this finding is that only extremely hardened inmates are not released prior to reaching their sixties. Another is that younger inmates commit less serious offenses, yet this was not the case with our particular sample. Nevertheless, it should be noted that our regression controlling for inmate characteristics confirmed that age is essentially irrelevant to the length of an inmate’s deferral period. In light of the literature mentioned in Part II, and the explicit enumeration of age as a factor to be considered in title 15.⁹⁸ This is a curious result that should be the subject of future research.

iii. *Mental health status*

As a descriptive matter, 13 of the 103 inmates in our coded dataset were labeled by the CDCR as currently having some sort of mental illness. This fact in itself is significant, as it seems to confirm the results of previous studies that have documented the high incidence of mental illness behind bars.⁹⁹ A regres-

98. CAL. CODE REGS. tit. 15, § 2281(d)(7) (2013).

99. See DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 2 (2006), available at

sion that controlled for inmate behavior and characteristics did not find that these inmates receive higher deferral periods on average. This coefficient, however, was not very significant.

b. *Indices*

As explained in our methodology, we compiled the many different factors that we considered into five different indices: the insight index, the crime enhancement index, the social history index, the parole readiness index, and the institutional behavior index. Several of the indices themselves proved to be highly predictive at a statistically significant level.

Of this group, the institutional behavior, the social behavior, and the insight indices stand out. For all three of these measures, a one-point positive increase, on average, translates into the subtraction of a little less than half a year from the inmate's deferral period. This intuitively makes sense in the case of the institutional behavior and insight indices, as one would expect inmates who both have insight into their crimes and have positive institutional records to be adjudged more suitable for parole. Moreover, the importance of the social history index is likely a reflection of the commissioners' heightened reluctance to release anyone with a history of substance abuse or gang affiliation.¹⁰⁰

The other two results are more complicated to unpack, as an inmate's readiness for parole and the details of his crime do seem immediately relevant to his dangerousness. One explanation of the latter anomaly may be that the crime enhancement index lacks the variation of something like the institutional behavior index, since parole commissioners essentially always cite the viciousness of an inmate's crime as a reason militating against his suitability for parole. This conclusion seems to at least partially be borne out by the data.¹⁰¹ The lack of significance regarding the parole readiness index is harder to explain, although the coefficient does at least point in the intuitively correct direction.

B. *Analysis of Control Dataset*

As with the coded dataset, we begin by presenting our regression of the various factors that we examined on the control dataset. We then discuss each factor in more detail.

<http://www.bjs.gov/content/pub/pdf/mhppji.pdf> ("About 24% of state prisoners had a recent history of a mental health problem, followed by 21% of jail inmates, and 14% of Federal prisoners.").

100. See *supra* Part III.C.

101. See *infra* Appendix C.

TABLE 9
Regression of Control Dataset

Factor	Deferral Period	Factor	Deferral Period
Race of Inmate		Commitment Offense	
Black	-0.614 (0.466)	Robbery	-0.657 (3.103)
Hispanic	-0.392 (0.478)	Kidnapping	0.212 (0.712)
Other	-0.147 (0.677)	Second Degree Murder	-0.310 (0.370)
Female Inmate	-4.462*** (1.413)	Assault	-0.642 (0.727)
Private Attorney	-1.448*** (0.477)	Lewd Act with a Child	-3.507 (2.954)
Pro Se Representation	4.942*** (0.802)	Rape	1.077 (1.696)
Commissioner A	-0.272 (0.600)	Mental Health Problem	2.272*** (0.486)
Commissioner B	1.565*** (0.567)	Housing Security Level	
Commissioner C	0.987* (0.585)	II	-3.895*** (0.885)
Commissioner D	1.429** (0.723)	III	-3.362*** (0.827)
Commissioner E	0.500 (0.676)	IV	-0.892 (0.912)
Commissioner F	0.263 (0.591)	Risk Level	
Age	-0.006 (0.012)	Low	3.497*** (1.147)
Prison Assignment	†	Moderate	2.325 (1.787)
		High Property	0.842 (3.277)
Observations	302	Constant	5.480*** (1.994)
R-squared	0.568		

* Significant at 10% level ** Significant at 5% level *** Significant at 1% level

† Prison assignment is not a significant factor for 27 of 30 prisons.

Deferral period = length in years of deferral period, all other factors held equal.

Standard errors in parentheses.

1. *Race*

The analysis of the control dataset confirmed our earlier conclusions about the irrelevance of race to the deferral decision. The means for all four racial groups were very close to the average. The regression also failed to find any racial disparities.

TABLE 10
Average Deferral Period by Race

Race	Average Deferral Period
Black	5.09
Hispanic	5.98
White	6.10
Other	6.92

2. *Gender*

This process was particularly helpful in the case of gender because of the issues with sample size that plagued our earlier analysis. Using the control dataset, we expanded the scope of our analysis from nine to twenty-eight women. Our regression returned a result that was highly significant and large in magnitude.

This regression suggests, all things being equal, women should expect a deferral period that is almost 4.5 years shorter than would be awarded to a comparable male inmate. This would seem to confirm much of the literature detailing the lenient treatment of women within the criminal justice system.¹⁰² Nevertheless, as with factors such as mental health status and commitment offense, it must be remembered that there is an argument cutting the other way that women are generally less dangerous than men, thus reducing the need for their extended incarceration.¹⁰³ In a similar vein, many women likely have less violent institutional records than the average male inmate.

102. See, e.g., Jill K. Doerner & Stephen Demuth, *Gender and Sentencing in the Federal Courts: Are Women Treated More Leniently?*, CRIM. JUST. POL'Y REV. (forthcoming) (manuscript at 20), available at <http://cjp.sagepub.com/content/early/2012/11/26/0887403412466877.full.pdf> (finding that, holding constant for "legal factors," women receive more lenient sentences on average than men).

103. See Ann Martin Stacey & Cassia Spohn, *Gender and the Social Costs of Sentencing: An Analysis of Sentences Imposed on Male and Female Offenders in Three U.S. District*

3. *Attorney type*

The analysis of the control dataset confirmed the importance of counsel to the parole hearing process. The regression performed using objective controls similarly found that those with private attorneys, all things being equal, could expect on average a deferral period that is 1.4 years shorter. This result was also highly significant.

4. *Identity of commissioner*

The analysis of the control dataset also confirmed the importance of the commissioner to the parole hearing process. In fact, as demonstrated by Table 9, the magnitude of the effects were larger and more significant for some of the commissioners.

5. *Commitment offense*

The analysis of the control dataset also confirmed that commitment offense does not seem to play a significant role in determining the length of deferral periods. In this regression, not even the result for those convicted of second-degree murder was significant.

6. *Age*

The analysis of the control dataset confirmed that age seems to be largely irrelevant to the determination of the deferral decision. Our regression with objective controls placed the magnitude of the effect of a one-year increase in age on the length of the deferral period at very close to zero.

7. *Mental health status*

Overall, the percentage of inmates in the control dataset with a mental illness was about the same, approximately 19%, as that found in the coded dataset. The analysis of the control dataset, however, found that mental health status does seem to be relevant to the deferral decision. In fact, it found, on average, that those with a mental illness can expect to receive a deferral period almost three years longer than their similarly situated peers.

Building on the literature discussed in Part II, it is unclear whether giving those with mental illnesses longer deferral periods is either fair or wise. This

Courts, 11 BERKELEY J. CRIM. L. 43, 50 (2006) (“The more common argument is that women have more forms of informal social control in their lives than men; as a result, they are less in need of the formal social control provided by the criminal justice system.”).

question is even more complex in the context of our study, given the CDCR's history of providing poor mental health care.¹⁰⁴ Against this particular historical background, it seems unfair to punish inmates with mental illnesses when the CDCR may be directly responsible for either the development or exacerbation of these maladies. On the other hand, the Board does have a duty to keep dangerous offenders behind bars, regardless of their circumstances. As such, this may be another topic of fruitful research in the future.

V. DISCUSSION

The results above paint the picture of an imperfect system. Much of the variation in the length of inmate deferral periods can be explained by our five indices that measure public safety factors.¹⁰⁵ In particular, commissioners seem to pay close attention to an inmate's institutional behavior, insight into her crime, and social history when making the deferral decision. However, several of the extralegal factors we explored also had a role to play in determining the outcome of these hearings. Factors like attorney type and commissioner identity, which have nothing to do with inmate suitability for parole or public safety, seem to have a significant impact on the length of deferral periods received by similar inmates. Other factors that border the line between extralegal and related to public safety, such as inmate presence and gender, had similarly large effects. And other factors clearly relevant to the proper length of deferral period, most notably parole readiness, seem to have little effect on the deferral decision.

These findings seem to confirm our hypothesis that Marsy's Law is not being applied in a consistent manner, as some similarly situated inmates are receiving different deferral periods while others who are not similarly situated are receiving the same deferral periods. There are several plausible explanations for this lack of consistency. One is that, as we hypothesized, some commissioners recognize that Marsy's Law improperly changed the touchstone of the deferral decision to public safety, and thus commissioners are effectively using a different standard of their own choice for that decision. In coding transcripts, this was borne out at times by the specific language that was used by different commissioners in explaining their reasoning for giving a specific

104. *See* *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) ("For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs.").

105. A regression of the five indices run alone against the length of deferral period returned an R-squared value of 0.504. This indicates that approximately 50% of the variation in the distribution of deferral period length can be explained solely by looking at these five indices.

deferral period.¹⁰⁶ Some viewed the suitability and deferral decisions as effectively the same and expressed this through statements such as: “[A]nd on balance the circumstances that make you unsuitable for parole . . . outweigh these positive aspects of your case and . . . require at least an additional five years of incarceration.” Others viewed the decisions as distinct and seemed to exclusively rely on factors such as behavior and attitude, as opposed to public safety, when making their decision. They typically made statements such as: “[W]e looked at 15 years, . . . and we found that that was not an appropriate [length]—as you, as you believe that you can work this out and you can change And then we looked at ten years, and by . . . those [same] reasons, we found that . . . was not needed”¹⁰⁷

Another equally plausible theory is that the lack of guidelines for this difficult decision has resulted in inconsistency in application. Given the range of choices among the statutory deferral periods, the deferral decision may be less straightforward than the suitability decision. Moreover, the incentives and natural intuition are much more uncertain. In the suitability context, every commissioner understands that lifers should only be released when public safety is assured. In the deferral decision context, the intuitive touchstone of the decision is simply less clear. Is it actually public safety? Should we be concerned that if a hearing date is set too early the parole board might accidentally let someone dangerous out? Is it victim emotional health? What if all the victims have died or are uninterested in participating? Is it simply administrative efficiency? Should all of these things be considered? How should they be weighed? The deferral decision is further muddled by the inclusion of the “clear and convincing evidence” standard, a term of art that may have little meaning to commissioners without legal backgrounds. This uncertainty may increase the importance of the quality of the inmate’s lawyer, as the commissioner may rely on him or her for guidance to an extent. In addition, the overall lack of clear standards may also provide a more significant opportunity for intuitive, yet illegal, factors such as the inmate’s gender or presence at the hearing to unconsciously influence the deferral decision.

Regardless of the real reason for this inconsistency, in our view, this finding is not terribly surprising. The enactment of Marsy’s Law represented a truly dramatic shift in the way California deals with the largest lifer population in the country. Its presumption that all inmates should be given a fifteen-year deferral period is unprecedented in its harshness and, perhaps, cynicism regarding the

106. We realize that this intuition is merely anecdotal, as we did not systematically try to separate the factors used to justify the suitability decision from those used to justify the deferral decision. This, however, is an area that is clearly ripe for future research.

107. Both of these quotations are taken from transcripts in our dataset. We have chosen to not include any identifying information to protect the confidentiality of all parties involved.

promise of rehabilitation. In many ways, it effectively turns the California Penal Code's presumption that lifers are suitable for parole after serving their base terms completely on its head.

Nevertheless, despite the importance of these issues, the implementation of Marsy's Law was achieved in remarkably sloppy fashion. Unlike typical legislation, the "findings and declarations" supporting Marsy's Law, as presented on the ballot, consisted solely of a few anecdotal stories about the frequency with which certain murderers continue to be considered for release and some general statements about the toll on victims of going to parole hearings.¹⁰⁸ This is especially striking given the fact that the California Senate held five separate hearings on this topic over the course of two years as part of the legislative process during the 1990s that eventually gave the Board the option of giving certain murderers deferral periods of only five years.¹⁰⁹

The implementation was also sloppy as a technical matter. Nowhere is "clear and convincing evidence" defined for the sake of the commissioners, a group largely comprised of individuals without law degrees. Nowhere is it explained why clear and convincing evidence is needed to move from a fifteen-year to a ten-year deferral period and from a ten-year deferral period to a seven-year deferral period, but not from a seven-year deferral period to a five-year or three-year deferral period.¹¹⁰ And most troubling, nowhere is it explained why the same set of factors should be used to evaluate both whether someone should be paroled now and when their suitability should be evaluated again in the future.

The suitability decision and the deferral decision involve different considerations. The suitability decision considers, in a very direct manner, whether

108. See CAL. SEC'Y OF STATE, *supra* note 57, at 129 (highlighting the fact that "'Helter Skelter' inmates Bruce Davis and Leslie Van Houghton, two followers of Charles Manson convicted of multiple brutal murders, have had 38 parole hearings during the past 30 years" and promising to protect "the rights of families of homicide victims to be spared the ordeal of prolonged and unnecessary suffering . . . by eliminating parole hearings in which there is no likelihood a murderer will be paroled"). Ironically, Bruce Davis, who is supposedly wasting taxpayer resources and hurting victims by needlessly appearing before the Board, has been found suitable for parole *twice* since the passage of Marsy's Law. See Debra J. Saunders, *Odds Are Manson Killer Bruce Goes Free*, SFGATE (Oct. 5, 2011, 11:13 PDT), <http://blog.sfgate.com/djsaunders/2012/10/05/odds-are-manson-killer-bruce-davis-goes-free>. On both occasions, however, the Governor reversed the Board's decision. See Paige St. John, *Gov. Brown Blocks Parole of Manson Family Follower Bruce Davis*, L.A. TIMES (Mar. 1, 2013), <http://articles.latimes.com/2013/mar/01/local/la-me-manson-20130302>.

109. See, e.g., *Should Prisoners Who Were Convicted of Murder and Have Been Denied Parole Be Limited to Further Parole Hearings Once Every Five Years?: Hearing on S.B. 826 Before the Assemb. Comm. on Pub. Safety*, 1994 Leg., Reg. Sess. (Cal. 1994). A Westlaw search reveals that five different hearings with this same title were held on July 13, 1993, August 24, 1993, May 3, 1994, June 28, 1994, and July 5, 1994.

110. CAL. PENAL CODE § 3041.5(b)(3)(A)-(C) (West 2013).

the inmate currently before the commissioner represents an unreasonable risk to public safety. This decision involves looking at her present mental state, her prior efforts to rehabilitate herself, and her current parole plans. The ultimate touchstone is the magnitude of the threat posed to the public by the inmate today.

Once the decision that the inmate is not suitable for parole has been made, the question of the appropriate deferral period is different. When deciding whether to give someone a fifteen-year or a three-year deferral period, commissioners must contemplate the inmate's current attitude toward rehabilitation, her future plans for improving herself in prison, and the likelihood that age or some other factor may change her attitude in the future. The ultimate touchstone is the inmate's likelihood of rehabilitation, not public safety. Though the two are related, they are not the same. If a commissioner makes the wrong decision and an inmate appears again before the Board prior to being fully rehabilitated, the public is in no way endangered, beyond any potential trauma to victims inherent in going through the process again. As long as the Board recognizes in the future that the inmate is not suitable for parole, it simply has suffered the administrative inconvenience of having to hold an unnecessary hearing.

The supporters of Marsy's Law themselves seem to understand this conceptual difference. In justifying this new measure, they noted that lengthier deferral periods are intended to spare victims the "ordeal of prolonged and unnecessary suffering" and to "stop the waste of millions of taxpayer dollars" by "eliminating parole hearings in which there is no likelihood a murderer will be paroled."¹¹¹ These two considerations are distinct from the concern for public safety that colors the suitability decision.

The California legislature and the California Supreme Court have also recognized that the suitability and the deferral decisions are distinct. Prior to Marsy's Law, the statute directed the Board to deny parole for up to five years if it found that "it [was] not reasonable to expect that parole would be granted at a hearing during the following year."¹¹² The pertinent question was not the potential effect of the inmate's release on the public and victim's safety, but rather the likelihood of the inmate to be fit for her next hearing. Moreover, as mentioned earlier, it also specifically directed the Board to "adopt procedures that relate to the criteria for setting the hearing between two and five years."¹¹³

Addressing an even earlier version of the statute that allowed commissioners to sometimes give two-year deferral periods, as opposed to the presumptive one-year period, the California Supreme Court similarly held that the decisions were distinct:

111. CAL. SEC'Y OF STATE, *supra* note 57, at 129.

112. PENAL § 3041.5(b)(2)(A) (West 1994), *amended by id.* § 3041.5(b)(3) (West 2008).

113. *Id.* § 3041.5(b)(2)(B).

A finding that an inmate is unsuitable for parole requires the Board to find that “consideration of the public safety requires a more lengthy period of incarceration” The postponement provision [or deferral decision], on the other hand, requires a finding that “it is not reasonable to expect that parole would be granted at a hearing during the following year” The first determination attempts to predict the risk to the public safety, while the second attempts to predict that the risk is likely to continue for at least as long as the period of the postponement. Although they are related, they are not identical.

....

. . . The latter decision involves a prediction that at least during the period of the postponement, an inmate will not likely become suitable for parole. That prediction may involve some of the same facts on which the unsuitability determination is based.¹¹⁴

California’s neighbor to the north, Oregon, also agrees that the two decisions are different. Oregon has risen as a beacon of hope for state prison systems around the country, as it was recently acknowledged as the state with the lowest rates of recidivism nationwide.¹¹⁵ In the context of the deferral decision, Oregon has adopted a set of twelve factors that govern the decision to extend the deferral period beyond a year. These factors are similar to but distinct from the eight factors that govern the suitability decision.¹¹⁶ And the pertinent in-

114. *In re Jackson*, 703 P.2d 100, 109-10 (Cal. 1985) (en banc) (first and second ellipses in original) (citations omitted) (quoting PENAL § 3041(b); *id.* § 3041.5(b)).

115. PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS 10-11, 13 (2011), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolutioning_Door_America_Prisons%20.pdf (“Oregon had the lowest rate of recidivism in the country for prisoners released in 2004—22.8 percent.”).

116. *Compare* OR. ADMIN. R. 255-062-0016 (2013) (enumerating “[f]actors to be [c]onsidered in [e]stablishing a [d]eferral [p]eriod [l]onger [t]han [t]wo [y]ears”), with *id.* R. 255-035-0013 (enumerating “[f]actors [w]hich [d]etermine an [i]nitial [p]arole [r]elease [d]ate”). The fourteen factors to be considered in the deferral decision are: (1) mental or emotional condition(s) predisposing her to violent crime; (2) institutional infractions; (3) postconviction offenses; (4) failure to demonstrate insight into her offense; (5) lack of effort to address emotional or psychological problems; (6) lack of effort to address drug abuse; (7) failure to receive work or training; (8) failure to seek out rehabilitative programming; (9) failure to show remorse; (10) demonstrated poor foresight or planning; (11) demonstrated impulsivity; (12) demonstrated lack of concern for others, including the crime victim(s); (13) refusal to participate in board hearings or psychological evaluations; and (14) inmate is serving a concurrent sentence over which the parole board does not have release authority. *Id.* R. 255-062-0016. Compare those factors with the eight factors to consider in the suitability decision: (1) date that the prison term began; (2) severity of the crime; (3) inmate’s risk assessment score; (4) the range of sentences defined by the matrix; (5) reasons for variations from the matrix range; (6) aggravation; (7) mitigation; and (8) minimum sentences. *Id.* R. 255-035-0013. The deferral decision factors here relate more to the success of the inmate in her rehabilitation efforts, with a small consideration of the impact on the victim, whereas the suitability decision factors relate almost entirely to matters of public safety.

quiry there is whether it is “not reasonable to expect that the inmate would be granted a firm release date before the end of a specified deferral period.”¹¹⁷

Most telling, though, are the Board guidelines that govern the “parole consideration date” for California juvenile offenders. In this context, the Board has a separate regulation that delineates a set of factors to be used specifically in determining the appropriate length of deferral periods.¹¹⁸ The touchstone of this inquiry is when “a ward may reasonably and realistically be expected to achieve readiness for parole,” not public safety.¹¹⁹ On the contrary, the regulation that determines when a juvenile should be released on parole simply states, “Referrals to parole shall be made when the Board determines that a ward . . . is likely to present no significant danger to the public.”¹²⁰

RECOMMENDATIONS & CONCLUSION

In light of the discussion above, we offer several policy recommendations. We recommend that the State of California create separate guidelines to specifically govern the process of determining the length of an inmate’s deferral period. Though public safety may represent one or more factors within those guidelines, the thrust of the guidelines should center on enabling commissioners to better predict the future parole readiness of inmates at distant parole hearing dates. In the words of the California Supreme Court, these guidelines should assist in “a prediction that at least during the period of the postponement, an inmate will not likely become suitable for parole.”¹²¹

In creating the guidelines, we encourage the state to engage in extensive research on the nature of the deferral decision, to borrow from the contours of the deferral decision as practiced by the Oregon Board of Parole and Post-Prison Supervision and the Board itself in the context of youth parole. The guidelines should also provide clear examples of which factors suggest that an inmate should be given a shorter or longer deferral period. Given the complexities in the law discussed above, we do not doubt that this process may be long and difficult. However, as long as the law remains on the books, commissioners should at least consider clearly defined and appropriate factors when making extremely consequential deferral decisions. The proposed guidelines would provide more robust protocols for commissioners, deter the consideration of extralegal factors in the decisionmaking process, increase the consideration of relevant factors, and likely increase commissioners’ uniformity in adhering to the text of Marsy’s Law.

117. *Id.* R. 255-062-0016.

118. CAL. CODE REGS. tit. 15, § 4945(i)-(j) (2013).

119. *Id.* § 4945(a).

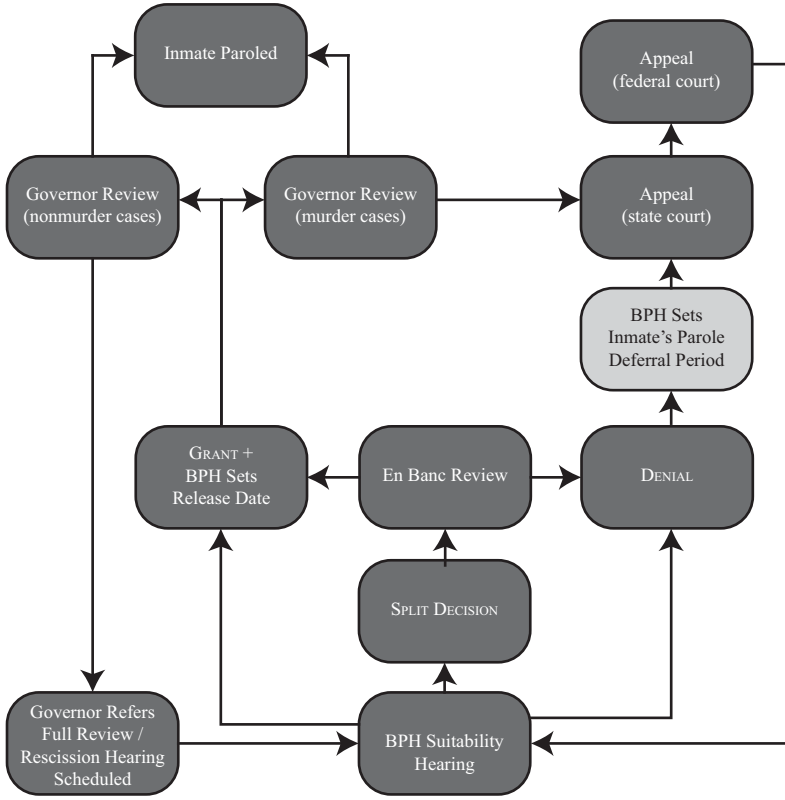
120. *Id.* § 4966.

121. *In re Jackson*, 703 P.2d 100, 110 (Cal. 1985) (en banc).

Researchers will have a key role to play in this process.¹²² Though we uncovered numerous interesting anomalies, our results are very preliminary in nature and need to be both scrutinized and confirmed by others. In the end, only through further empirical analysis will the robust results needed to form the backbone of a concrete legislative proposal to reform Marsy's Law be realized.

122. This is especially true in light of the recent decision in *In re Vicks*, 295 P.3d 863 (Cal. 2013). In *Vicks*, the California Supreme Court considered a lifer's challenge to Marsy's Law as a violation of the Ex Post Facto Clause. *See id.* at 873. Showing great deference to the Board, the Court ultimately upheld Marsy's Law in a unanimous opinion. *Id.* at 894. However, a six-judge concurrence was careful to note that the court had not been presented with any facts regarding the actual application of Marsy's Law. *Id.* at 894-95 (Liu, J., concurring). This seems to indicate that researchers may have a key role in any subsequent ex post facto challenge.

APPENDIX A
 Diagram of California Lifer Parole Hearing Process¹²³



123. This flowchart was adapted from WEISBERG ET AL., *supra* note 23, at 8.

APPENDIX B
The Factors

INSTITUTIONAL BEHAVIOR INDEX	INSIGHT INDEX	CRIME ENHANCEMENT INDEX
Participation in: Cognitive Therapy Programs Anger Management Programs Lifer-Specific Programs Victim Support Programs Health Programming Youth Outreach Educational Programming Vocational Programming Religious Programming Rehabilitation Programming Self-Help Programming 12 Steps Programming Recent Infraction History Past Infraction History Adherence to Past Parole Board Recommendations Gang Involvement	Attitude Towards Crime Insight to Victims Understanding of Underlying Causes	Multiple Victims Particularly Callous Firearm Involved Weapon Involved Not Heinous Motive Batter Woman Syndrome
	SOCIAL HISTORY INDEX	PAROLE READINESS INDEX
	Prior Record of Violence Prior Juvenile Record Lack of Criminal History Stability of Social History Psychological Factors Education Level Veteran Status Gang Involvement Outcome of Prior Terms of Parole and Probation Drug Use	Support Network Job Prospects Housing Plans Educational Plans Relapse Plan

APPENDIX C
The Indices

	Insight Index	Crime Enhancement Index	Parole Readiness Index	Social History Index	Institutional Behavior Index
Minimum	-3	-1	-6	-6	-8
Maximum	3	4	4	2	8
Mean	-1.214	1.252	-0.243	-1.631	0.340
Median	-1	1	0	-1	1
Standard Deviation	1.333	0.926	1.746	1.615	3.618

