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Parole, Victim Impact Evidence, and Race

Alexis Karteron[†]

INTRODUCTION

Parole is a longstanding, but often overlooked, part of the American criminal legal system that has great potential as a tool for decarceration. The American mass incarceration crisis is undeniable. With roughly two million people locked up in our prisons and jails, the United States has “the dubious distinction of having the highest incarceration rate in the world.”¹ The United States is also exceptional in the harshness of its sentencing practices. As of 2016, over 206,000 people were serving life sentences in American prisons, constituting 40 percent of the people serving life sentences across the world.² There appears to be growing consensus that the United States should move away from holding the title of the world’s largest jailer.³ Parole could

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¹ WENDY SAWYER & PETER WAGNER, MASS INCARCERATION: THE WHOLE PIE 2020 (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/V4CX-E52D>].

² See *People Serving Life Exceeds Entire Prison Population of 1970*, SENTENCING PROJECT (Feb. 2010), <https://www.sentencingproject.org/wp-content/uploads/2020/02/People-Serving-Life-Exceeds-Entire-Prison-Population-of-1970.pdf> [<https://perma.cc/4ZC4-KDNY>]. In stark contrast, some countries, like Norway, do not utilize life sentences at all. Jessica Benko, *The Radical Humaneness of Norway’s Halden Prison*, N.Y. TIMES (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html> [<https://perma.cc/LH35-6GYW>]. And consecutive sentences only became available in Canada within the last decade. Andrew Cohen, *The American Punisher’s Brain*, BRENNAN CTR. FOR JUST. (May 17, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/american-punishers-brain> [<https://perma.cc/JH26-VUNR>].

³ Some hold a conviction that mass incarceration is a manifestation of continued racial subordination and a moral outrage. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing that mass incarceration of Black men is a continuation of systemic racial discrimination); *End the War on Black People*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/end-the-war-on-black-people/> [<https://perma.cc/R6BS-EUNC>] (framing mass incarceration as part of a larger systematic war against Black communities). Others are concerned about budgetary constraints. See, e.g., DAVID DAGAN & STEVEN TELES, *PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION* (2016) (explaining that a primary justification given for the conservative

play an important role in reducing the outsized footprint of the carceral state on American life, but requires reform.

The use of victim impact statements in parole release hearings is an area that is ripe for scrutiny—and reform.⁴ Victim impact statements became a regular part of criminal sentencing in the 1980s.⁵ They are also ubiquitous in parole release proceedings. Nearly every state allows victims to offer statements in such proceedings.⁶ In California, the right to do so is even enshrined in the state constitution.⁷

The impact of victim participation in the parole decision-making process is unclear. Some research indicates there is great reason for concern on this front.⁸ But there is a serious lack of clarity concerning the appropriate role of victim input in applying those standards.⁹ In some jurisdictions, state law strictly limits the criteria that may be considered in parole release proceedings, while there are no constraints in others.¹⁰

Some parole decision-makers in one study reported that they attempted to cabin the role of victim input in accordance with the relevant legal standard,¹¹ but there is no reason to believe that such faithfulness to the law is universal, let alone possible. Empirical research about the role of victim input in other parts of the criminal legal system also begs the question of

movement to curb prison growth is the high costs of the prison system); Wesley Lowery, *The Bipartisan Push for Criminal Justice Gets a Koch-funded Boost*, WASH. POST (Feb. 19, 2015, 4:51 PM), <https://www.washingtonpost.com/news/post-politics/wp/2015/02/19/the-bipartisan-push-for-criminal-justice-gets-a-koch-funded-boost/> [https://perma.cc/97DT-APWX] (discussing bipartisan coalition's \$5 million plan for criminal justice reform). Some simply recognize the damage done to people who are incarcerated, as well as their families and communities, making efforts to reduce the number of people kept in cages essential. See *Families Against Mandatory Minimums*, SECOND CHANCES AGENDA, <https://famm.org/secondchances/> [https://perma.cc/TP2L-R66C] (describing advocacy efforts “to create as many mechanisms as possible to give people second chances, reunite families, and reduce mass incarceration”).

⁴ As used in this essay, the term “victim impact statements” refers to all forms of victim impact evidence, such as written and oral statements or testimony.

⁵ Hugh M. Mundy, *Forgiven, Forgotten? Rethinking Victim Impact Statements for an Era of Decarceration*, 68 UCLA L. REV. DISCOURSE 302, 310–14 (2020) (describing rise of victims' rights movement and widespread use of victim impact statements).

⁶ JOAN PETERSILIA, *WHEN PRISONERS COME HOME* 160 (2003) (noting that forty-six states allow victims to submit statements regarding parole in person and forty-two states permit statements in writing); Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME & JUST. 347, 396–97 (2009) (collecting studies).

⁷ CAL. CONST. art. I, § 28(10).

⁸ See *infra* Part I for a discussion of research on this point.

⁹ For critical analyses of potential rationales for victim participation in parole proceedings, see generally Roberts, *supra* note 6; and Noah Epstein, Note, *An Uncertain Participant: Victim Input and the Black Box of Discretionary Parole Release*, 90 FORDHAM L. REV. 789 (2021).

¹⁰ Epstein, *supra* note 9, at 809–19.

¹¹ Kathryn M. Young, *Parole Hearings and Victims' Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 431, 472 (2016).

whether victim input is likely to give rise to racial disparities in the parole decision-making process. Particularly, in the death penalty context, research suggests that a victim's race plays a pernicious role in the imposition of criminal punishment. Specifically, white victimhood is more likely to result in a more punitive response, i.e., the imposition of a death sentence.¹² Given that victim impact statements are similarly ubiquitous in the parole release context, questions surrounding the role of victim input and race deserve careful attention. In particular, researchers should devote attention to the possibility that victim input creates racial divides in parole grants.

While the use of victim impact statements in criminal trials has been debated extensively,¹³ similar issues related to parole have largely been excluded from these conversations. Indeed, parole lives in the shadow of criminal adjudication process in academic discussion. Legal scholars have devoted little attention to the parole release process.¹⁴ But given the mass incarceration crisis and widespread racial disparities within the criminal legal system,¹⁵ advocates should devote careful

¹² See *infra* Section II.B for a discussion of this research.

¹³ For prominent examples from a rich literature, see Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996) [hereinafter Bandes, *Empathy, Narrative*] (arguing that victim impact statements evoke emotions that are inappropriate for criminal sentencings); Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545 (1999) [hereinafter Bandes, *Reply to Paul Cassell*] (refuting the assertions that victim impact statements increase victim satisfaction and that they will juries in understanding the harm defendants inflicted); Paul Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009) (offering therapeutic benefits for the victim as one of the four primary justifications for victim impact statements); and Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 CRIM. L. REV. 545, 550–54 (outlining therapeutic and other benefits that victims impact statements offer victims).

¹⁴ There are several notable exceptions. Some legal scholars have argued that parole authorities use inappropriate standards to make release decisions and that release decisions require greater procedural protection. See, e.g., W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893 (2009) (arguing to extend protections afforded at initial sentencing under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to discretionary parole release decisions); Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of Miller v. Alabama and Graham v. Florida*, 35 CARDOZO L. REV. 1031 (2014) (advocating for reforms, *inter alia*, in parole process for adolescents convicted of serious offenses); Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567 (1994) (advocating parole release guidelines for rational and fair decision-making); Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373 (2014) (arguing some states may need to reform existing parole practices for juvenile offenders serving longer sentences); Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protection for Parole*, 107 J. CRIM. L. & CRIMINOLOGY 213 (2017) (arguing the liberty interest in parole should be recognized and granted protections similar to those afforded at sentencing).

¹⁵ See Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA EVIDENCE BRIEF (Vera Inst. of

attention to the possibility that victim input stands in the way of parole functioning as a decarceration tool along racial lines.

This essay proceeds in three parts. Part I describes the parole function, focusing on the purpose and aims of parole. This Part also provides examples of the guidelines and standards, to the extent they exist, that typically underlie the parole decision-making process. Part II lays out research on the relationship between emotion and the law that suggests potential for differential treatment in the parole process on the basis of a victim's race. Lastly, Part III calls for further data collection and research into the role of race in parole decision-making. It further suggests that eliminating victim participation in parole release proceedings may be warranted given the limited relevance of victim participation in this context and the fact that such participation likely operates to disadvantage certain people seeking parole on the basis of race.

Further research into the role of victim impact statements in parole proceedings could help shed light on whether such statements interfere with parole as a potential tool for decarceration and exacerbate racial disparities in the criminal legal system. Such research would also help inform efforts to standardize use of victim impact statements in the parole decision-making process.

I. PAROLE AND THE ROLE OF VICTIMS

Parole occupies a dark corner of the criminal legal system that is subject to little scrutiny. Although parole no longer exists in the federal criminal legal system,¹⁶ it is a longstanding and essential component of the sentencing system in most American states.¹⁷ Parole results in so many people cycling in and out of

Just., New York, N.Y.), May 2018, at 1. *See generally* BIAS IN THE LAW: A DEFINITIVE LOOK AT RACIAL PREJUDICE IN THE U.S. CRIMINAL JUSTICE SYSTEM (Joseph Avery & Joel Cooper eds., 2020) (examining racial bias throughout criminal justice system); Angela J. Davis, *Prosecutors, Democracy & Race*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 195, 202–06 (Langer & Sklansky eds., 2017) (identifying racial disparities throughout criminal legal system).

¹⁶ The Sentencing Reform Act of 1984 abolished federal parole beginning November 1, 1987. Federal parole proceedings continue for individuals incarcerated for offenses predating November 1, 1987, and for offenders under certain other narrow categories. *See* CHARLES DOYLE, CONG. RSCH. SERV. RL31653, SUPERVISED RELEASE (PAROLE): AN OVERVIEW OF FEDERAL LAW 1 & n.5 (2021). For a description of federal sentencing practices and the reforms that led to the elimination of federal parole, see Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 995–97 (2013).

¹⁷ As of 2016, roughly 875,000 people were on parole or some form of post-release supervision in the United States. Danielle Kaebler, *Probation and Parole in the United States, 2016*, BJS BULL. (Apr. 2018), <https://bjs.ojp.gov/content/pub/pdf/ppus16.pdf>

prison that it is frequently dubbed “back-end sentencing.”¹⁸ But because it usually involves decision-making by administrative agencies years or decades after the criminal offense that led to conviction, it rarely garners the attention that criminal sentencing does.¹⁹

At least forty states use discretionary parole systems for some segment of their incarcerated populations.²⁰ When released on parole, a person lives in their community while subject to oversight and conditions that touch on numerous areas of life.²¹ Parole typically offers the only reasonable opportunity to regain freedom for incarcerated people who face decades-long sentences.²² Given the variety of sentencing schemes throughout the United States, it is difficult to identify precisely how many incarcerated people are eligible for discretionary parole. Still, over 100,000 people were serving life sentences with the possibility of parole in 2016,²³ and more are serving indeterminate prison sentences.²⁴

The standards used by releasing authorities vary. In California, the parole board must consider whether an

[<https://perma.cc/HEH5-4HYP>]. For a brief historical overview of the use of parole in the United States, see Cohen, *supra* note 14, at 1066–69.

¹⁸ Jeffrey Lin et al., “Back-End Sentencing” and Reimprisonment: Individual, Organization, and Community Predictors of Parole Sanctioning Decisions, 48 CRIMINOLOGY 759, 759–60 (2010).

¹⁹ It is worth noting that parole release decisions sometimes garner headlines, especially when elected politicians play a role in making them. See, e.g., Rory Kennedy, Opinion, *Robert Kennedy Was My Dad. His Assassin Doesn't Deserve Parole*, N.Y. TIMES (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/opinion/sirhan-sirhan-parole-kennedy.html> [<https://perma.cc/CHS8-NXT9>] (calling on Governor Gavin Newsom of California to deny parole to Sirhan, the person who killed the author’s father, Robert F. Kennedy); Sharon Pruitt-Young, *He’s in Prison for Killing a Trooper. Now Some Black Police Groups Want Him Released*, NPR (Aug. 26, 2021, 7:00 AM), <https://www.npr.org/2021/08/26/1031001005/sundiata-acoli-new-jersey-black-panther-parole> [<https://perma.cc/c5B2U-MNGF>].

²⁰ See EBONY L. RUHLAND ET AL., ROBINA INST. OF CRIM. L. & JUST., THE CONTINUING LEVERAGE OF RELEASING AUTHORITIES: FINDINGS FROM A NATIONAL SURVEY 13–14 (2017), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/final_national_parole_survey_2017.pdf [<https://perma.cc/P7G3-5RCH>].

²¹ PETERSILIA, *supra* note 6, at 81–82.

²² Clemency and commutations are other tools that can be used for early release. See generally Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015) (arguing that recent presidents have underused clemency as a tool to address unjust sentences and suggested structural changes to the federal clemency system).

²³ See Ashley Nellis, *Still Life: America’s Increasing Use of Life and Long-Term Sentences*, SENT’G PROJECT (May 3, 2017), <https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/> [<https://perma.cc/QJ4D-LY7Q>] (reporting that as of 2016, roughly 106,000 people were serving life sentences with the possibility of parole); RUHLAND ET AL., *supra* note 20, at 13–14 (identifying jurisdictions that utilize indeterminate prison sentences that do not provide certain release dates).

²⁴ Edward E. Rhine et al., *The Future of Parole Release*, 46 CRIME & JUST. 279, 280–81 (2016) (describing widespread use of indeterminate sentences).

incarcerated person “will pose an unreasonable risk of danger to society if released from prison.”²⁵ New Jersey uses a similar standard for most people: “whether . . . by a preponderance of the evidence . . . there is a substantial likelihood that the inmate will commit a crime . . . if released on parole.”²⁶ With this standard, there is a presumption of release unless the state can “prove that the prisoner is a recidivist and should not be released.”²⁷ Georgia and Texas require their respective parole boards to consider the seriousness of the offense.²⁸ There are other variations across the states.²⁹ But it is fair to say that parole release standards focus on understanding an incarcerated person’s likely behavior after release.³⁰

There is greater variation in how parole boards conduct hearings and the information they consider. For example, in some states, incarcerated people are permitted to compile a variety of materials in support of their efforts to win their freedom.³¹ Family members, friends, and other supporters are allowed to submit statements for the parole board’s consideration.³² An incarcerated person himself may also be allowed to submit a written statement or offer testimony at a board hearing or interview.³³ In some states, attorneys are allowed to present on their clients’ behalf.³⁴ But because there is typically no right to counsel in the parole release process, it is rare for an incarcerated person to be represented by counsel.³⁵ In some states, even if an attorney is available to an

²⁵ CAL. CODE REGS. tit. 15, § 2281(a) (West, Westlaw through 3/18/22 Register 2022).

²⁶ This standard applies to people whose offenses predate August 19, 1997. *See* N.J. ADMIN. CODE § 10A:71-3.10(a) (Lexis Advance through the N.J. Register, vol. 54 no. 6, Mar. 21, 2022).

²⁷ *Trantino v. N.J. State Parole Bd.*, 764 A.2d 940, 990 (2001).

²⁸ GA. CODE ANN. § 42-9-40(a) (West, Westlaw through Act 518 of the 2022 Reg. Sess. of the Ga. Gen. Assemb.); TEX. GOV’T CODE ANN. § 508.144(a)(2) (West, Westlaw through the end of the 2021 Reg. and Called Sess. of the 87th Leg.).

²⁹ RUHLAND ET AL., *supra* note 20, at 26 (describing survey results to forty states regarding release criteria).

³⁰ *See* Epstein, *supra* note 9, at 10–11 (describing release standards used by numerous states and noting “there is overwhelming consensus on the release criteria considered by states”); RUHLAND ET AL., *supra* note 20, at 25 (describing criteria used to determine release per results of survey issued to parole releasing authorities in forty states); Young, *supra* note 11, at 438 n.25 (noting that there are outliers, such as Alabama, which “considers the ‘community attitude toward the offender’”).

³¹ Russell, *supra* note 14, at 405; Cohen, *supra* note 14, at 1069.

³² Russell, *supra* note 14, at 405.

³³ *Id.* at 400–01.

³⁴ *Id.* at 402–03.

³⁵ A few states require the appointment of counsel for people seeking parole by statute. *See* NEIL P. COHEN, THE LAW OF PROBATION & PAROLE § 6:21 (2d ed.), Westlaw (database updated Sept. 2021). Whether there is a constitutional right to counsel in parole release proceedings turns on the applicable level of due process protection. In *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 10–11

incarcerated person, legal counsel is not permitted to participate in parole release proceedings.³⁶

As indicated above, crime victims are permitted to submit written statements or testify before parole boards in almost every state.³⁷ However, the frequency with which crime victims participate in parole proceedings is unclear. Some research indicates that it occurs in a relatively small proportion of cases.³⁸

Studies of the effect of victim impact statements during parole release proceedings reveal mixed results. One study of parole hearings in Alabama found that a victim's participation in the parole process was strongly predictive of whether parole would be granted.³⁹ Another study of parole decision-making in Pennsylvania reached similar results.⁴⁰ Parole board members also seem to attach great weight to victim participation in parole release hearings. In one study, 40 percent of releasing authorities (parole board members or members of similar entities) indicated that victim statements were "very influential" in their decision-making.⁴¹ In another, over 90 percent of survey respondents indicated that victim input "had some kind of impact on conditional release decision-making."⁴² Professor Kathryn Young's recent study on the role of victims in California's parole release decision-making process found that some parole commissioners "believed that a victim's presence might subconsciously affect their decision,"⁴³ while others asserted that victim input did not affect their decision-making on parole.⁴⁴ Some of the interviewees placed great faith in their ability to ensure that victim input did not influence their decision, saying they felt empathy for victims who had appeared before them at release hearings, and "reported difficulty ensuring that a victim's presence did not influence their evaluation, but described exercising sheer

(1979), the Supreme Court held there was no liberty interest in the possibility of parole where the parole decision was entirely discretionary. Accordingly, due process standards did not require appointment of counsel. *Id.* at 16.

³⁶ Russell, *supra* note 14, at 402–03.

³⁷ See *supra* note 6 and accompanying text; see also Russell, *supra* note 14, at 404–05.

³⁸ Young, *supra* note 11, at 431.

³⁹ Kathryn Morgan & Brent L. Smith, *Victims, Punishment, and Parole: The Effect of Victim Participation on Parole Hearings*, 4 CRIMINOLOGY & PUB. POL'Y 333, 355–56 (2005).

⁴⁰ William H. Parsonage et al., *Victim Impact Testimony and Pennsylvania's Parole Decision Making Process: A Pilot Study*, 6 CRIM. J. POL'Y REV. 187, 194–202 (1992) (finding higher parole refusal rates with victim testimony).

⁴¹ Rhine et al., *supra* note 24, at 317.

⁴² Kim Polowek, *Victim Participatory Rights in Parole: Their Role and the Dynamics of Victim Influence as Seen by Board Members 131* (Fall 2005) (Ph.D dissertation, Simon Fraser University), <http://summit.sfu.ca/item/10276> [<https://perma.cc/JPK2-7S9E>].

⁴³ Young, *supra* note 11, at 472.

⁴⁴ *Id.*

will in order to do so, out of a moral obligation to their decision-making duties.”⁴⁵

The claim by some California parole decision-makers that they “exercise sheer will” to put aside victim input in their minds is unquestionably laudable. But, as explained in Part II, psychological research on emotion calls the accuracy of the claim into question. In addition, there can be no presumption that all parole decision-makers share this dedication to setting aside victim input.

Given that studies of death penalty cases suggest a heightened empathy for white victims and a drive for retribution when white people are victims, there is reason for concern that victim participation in the parole release process reinforces racial disparities within the criminal legal system. Researchers have found this “race-of-victim” effect, which results in more punitive sentences, time and again, across the United States.⁴⁶ Use of victim impact statements in death penalty cases has become routine since the Supreme Court’s decision in *Payne v. Tennessee*, which held that prosecutors could not be barred from introducing victim impact evidence during the penalty phase in death penalty cases.⁴⁷ The role of emotion in creating the race of victim effect is described below. Of particular note, anger may exacerbate a desire to punish. Accordingly, it is plausible that the use of victim impact statements in the parole context triggers a greater desire to punish and withhold parole, just as victim impact statements are theorized to lead to a greater inclination to impose the harsher punishment in the death penalty context.

II. EMOTION, VICTIM INPUT, AND LEGAL DECISION-MAKING

The influence of emotion in legal decisions has troubling implications for the parole release process, particularly if parole is to be used as a tool for decarceration. This Part provides an overview of the connection between emotion and legal decision-making, and describes how emotion may influence legal decision-making in the context of victim impact evidence. It also highlights how race and emotion interact, and thus create a risk of more punitive responses to some incarcerated people who seek parole.

⁴⁵ *Id.* at 473.

⁴⁶ See *infra* note 74 for collection of studies documenting race-of-victim effects.

⁴⁷ *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

A. *The Role of Emotion in Decision-Making*

Emotion can influence legal decisions in ways both large and small. As Professors Susan Bandes and Jessica Salerno have explained, emotion “affects not only how we react to evidence, but also how we encode and process the evidence in the first place.”⁴⁸ In a thorough research review, Professors Neal Feigenson and Jaihyun Park identify multiple potential “relationships between decision makers’ emotions and their attributions of legal responsibility and blame.”⁴⁹ Several stand out as potentially relevant to the parole release decision-making process and the influence of victim input.

First, emotions may affect “decision makers’ information processing strategies.”⁵⁰ For example, anger leads to decision-makers engaging in “less systematic information processing,” and instead relying more heavily on heuristics.⁵¹ “The more certain people feel, the less inclined they are to process information systematically, because they are more confident that they already know what they need to know to address the task at hand.”⁵² As Professors Bandes and Salerno have explained, “[a]nger . . . results in shallower processing and more reliance on shortcuts and stereotypes.”⁵³

Another connection between emotion and decision-making that may be especially relevant in the parole release context is the “*mood-congruency* effect,” through which a decision-maker’s mood can lead to a decision reflective of their mood.⁵⁴ Put another way, “negative emotions resulting from seeing or hearing emotional evidence may initiate negatively biased information processing, which in turn focuses attention more on the emotion-congruent aspects of the case.”⁵⁵ Multiple studies have demonstrated this effect with regard to anger.⁵⁶

Finally, emotions may create information effects that influence attribution of responsibility and blame. This occurs both directly and indirectly. For example, Professors Feigenson and Park suggest that “incidental emotion affects the way people

⁴⁸ Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1044–46 (2014).

⁴⁹ Neal Feigenson & Jaihyun Park, *Emotions and Attributions of Legal Responsibility and Blame: A Research Review*, 390 LAW & HUM. BEHAV. 143, 149 (2006).

⁵⁰ *Id.* at 147.

⁵¹ *Id.*

⁵² *Id.* at 148.

⁵³ Bandes & Salerno, *supra* note 48, at 1045.

⁵⁴ Feigenson & Park, *supra* note 49, at 148.

⁵⁵ Bandes & Salerno, *supra* note 48, at 1047.

⁵⁶ Feigenson & Park, *supra* note 49, at 149.

construe the relevant features of the target, which in turn affects their subsequent judgments.”⁵⁷ Similarly, when emotions are “integral to the judgment task,” they may serve “as an *informational cue* regarding the judgment target.”⁵⁸ In particular, anger can enhance a decision-maker’s desire to apportion blame.⁵⁹ In the context of jury deliberations, Professors Bandes and Salerno explain that “this theory would predict that the reason a victim’s emotional statement increases jurors’ anger and makes them react more punitively is that the statement induced an immediate visceral response that biased or overwhelmed subsequent deliberation.”⁶⁰

All of these pathways for emotion to influence legal decision-making are particularly salient in the context of considering victim impact evidence.⁶¹ Victim impact evidence can be extremely powerful and may trigger a range of reactions, particularly anger and empathy.⁶² Thus, there appears to be a significant risk that victim impact evidence influences parole release decisions in ways that do not accord with the legal standards that are supposed to govern parole release decisions. As described above, parole release proceedings typically arise in the context of indeterminate sentences.⁶³ Such sentences are sometimes very long and associated with convictions for serious crimes, including violent ones.⁶⁴ There is a virtual guarantee that in many cases, victim impact statements trigger anger at the incarcerated person who is under consideration for parole on one hand, and empathy for the victim on the other. As explained above, a decision-maker’s feelings of anger, which can be compounded by empathy for victims, can lead to negative outcomes for the incarcerated person. In the parole context, this translates into a reduced likelihood that parole decision-makers will exercise their discretion to grant parole.

⁵⁷ *Id.* at 150.

⁵⁸ *Id.* at 152.

⁵⁹ *Id.* (“[B]ecause the cognitive or appraisal structure of anger is ‘disapproving of someone else’s blameworthy action and being displeased about the related event[,]’ being angry sends a signal to the person that the target of judgment has behaved in a blameworthy fashion and, therefore, deserves to be blamed.” (citations omitted)).

⁶⁰ Bandes & Salerno, *supra* note 48, at 1048.

⁶¹ Susan Bandes has explored the role of emotion and victim impact evidence in criminal sentencing proceedings extensively. See Bandes, *Empathy, Narrative*, *supra* note 13 (arguing that victim impact statements evoke emotions that are inappropriate for criminal sentencings); Bandes, *Reply to Paul Cassell*, *supra* note 13 (refuting the assertions that victim impact statements increase victim satisfaction and that they will injure in understanding the harm defendants inflicted).

⁶² Bandes & Salerno, *supra* note 48, at 1029.

⁶³ Rhine et al., *supra* note 24, at 280–81.

⁶⁴ See Nellis, *supra* note 23 (documenting widespread use of sentences condemning people to prison for life, sometimes with the opportunity for parole).

The death penalty context provides a helpful point of comparison. Since the Supreme Court's 1991 decision in *Payne*, victim testimony has become a regular feature of the penalty phase in death penalty cases, at which point a jury determines whether a death sentence should be imposed.⁶⁵ The Court reasoned that banning such evidence "deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder."⁶⁶ In contrast, allowing it provides information about "each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."⁶⁷

In death penalty cases, victim impact statements clearly leads to more punitive outcomes, i.e., death sentences.⁶⁸ Psychological research has revealed this finding both by using mock jurors, and in one study, potential jurors from an actual juror registration list.⁶⁹ For the reasons described above, anger triggered by victim impact evidence may provide a partial explanation for that increased punitiveness. The anger triggered by victim impact statements may also be connected to race, as described below.

B. *The Role of Race in the Criminal Legal System*

Victim impact statements in death penalty cases likely evokes empathy for certain victims—particularly "worthy" ones. In accordance with the aims discussed in *Payne*, the "identifiable victim effect" results in empathy and sympathy for victims who are humanized as individuals.⁷⁰ Empathy is amplified for victims considered to have "good character," or otherwise considered worthy,⁷¹ as is sympathy for a victim's family.⁷² These

⁶⁵ *Payne v. Tennessee*, 501 U.S. 808 (1991). It is worth noting that judicial overrides of jury determinations were available in four states until 2017, when Alabama finally abandoned the practice. Michael L. Radelet & G. Ben Cohen, *The Decline of the Judicial Override*, 15 ANN. REV. L. & SOC. SCI. 539, 545 (2019).

⁶⁶ *Payne*, 501 U.S. at 825.

⁶⁷ *Id.* at 823.

⁶⁸ Susan Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161, 167–68 (2012) (collecting studies and observing as follows: "Studies consistently, though not invariably, show that hearing these statements increases the probability of mock jurors rendering a death sentence, at times more than doubling the likelihood.")

⁶⁹ *See id.* (collecting studies); Raymond Paternoster & Jerome Deise, *A Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Capital Decision Making*, 49 CRIMINOLOGY 129, 141 (2011).

⁷⁰ Paternoster & Deise, *supra* note 69, at 138.

⁷¹ Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 358–70, 374–75 (2003).

⁷² Paternoster & Deise, *supra* note 69, at 153.

feelings may activate a decision-maker's desire to help that victim or their family by abiding by their wishes, whether explicit or implied, to impose a death sentence.

Race appears to play a role in generating sympathy and empathy—or not. Research has consistently shown that in cases where the death penalty is on the table, white victimhood more frequently results in imposition of the death penalty.⁷³ Researchers often refer to this as the “race-of-victim” effect.⁷⁴ The Supreme Court considered a major study on this topic in 1987 in *McCleskey v. Kemp*,⁷⁵ which prompted it to declare that racial disparities in the criminal legal system are inevitable.⁷⁶ In more recent years, studies have documented variations of the race-of-victim effect; it does not occur everywhere, but remains remarkably consistent.⁷⁷ One study documented that death sentences are more likely when victims are white women.⁷⁸ Although this phenomenon takes multiple shapes,

⁷³ See, e.g., Justin D. Levinson et al., *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 857 & n.64 (2019) (collecting studies that demonstrate that those convicted of murdering white victims are more likely to be sentenced to death than those who murder Black victims).

⁷⁴ For a sampling of the numerous studies that have documented this impact across the United States, see David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1711–15 (1998) (Philadelphia, Pennsylvania); Frank R. Baumgartner & Tim Lyman, *Race-of-Victim Discrepancies in Homicides and Executions, Louisiana 1976-2015*, 7 LOY. J. PUB. INT. L. 129 (2015) (Louisiana statewide); Jack Boger & Isaac Unah, *Race and the Death Penalty in North Carolina—An Empirical Analysis: 1993-1997*, DEATH PENALTY INFO. CTR. (2001) (North Carolina statewide); Sheri Lynn Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925 (2012) (Delaware statewide); Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 HOUSTON L. REV. 131, 135 (2012) (Harris County, Texas); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina: 1980-2007*, 89 N.C. L. REV. 2119, 2123 (2011) (North Carolina statewide); Michael L. Radelet et al., *Race and Death Sentencing for Oklahoma Homicides Committed Between 1990 and 2012*, 107 J. CRIM. L. & CRIMINOLOGY 733, 746–50 (2017) (Oklahoma statewide); Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 90 (2004) (Maryland statewide); Sherod Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging*, 45 AM. J. CRIM. L. 95 (2018) (Georgia statewide); and JOHN KRAMER ET AL., CAPITAL PUNISHMENT DECISIONS IN PENNSYLVANIA: 2000-2010 IMPLICATIONS FOR RACIAL, ETHNIC AND OTHER DISPARATE IMPACTS (2017), <https://justicecenter.la.psu.edu/wp-content/uploads/sites/21/2020/10/Pennsylvania-Death-Penalty-Disparity-Final-Report-September-2017-Penn-State-University-Kramer-Ulmer-Zajac-Final.pdf> [<https://perma.cc/L22E-Y4M5>] (Pennsylvania statewide). See also David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment*, 53 DEPAUL L. REV. 1411 (2004) (summarizing evidence of race-of-victim discrimination in death penalty cases).

⁷⁵ *McCleskey v. Kemp*, 481 U.S. 279, 286–88 (1987) (describing study by Professor David Baldus, which found that Black criminal defendants accused of killing white victims faced the highest likelihood of receiving the death penalty).

⁷⁶ *Id.* at 312.

⁷⁷ See *supra* note 74.

⁷⁸ See, e.g., Scott Phillips & Trent Steidley, *A Systematic Lottery: The Texas Death Penalty, 1976 to 2016*, 51 COLUM. HUM. RTS. L. REV. 1043, 1061–63 (2020) (finding

there is a consistent theme: when white people are victims, decision-makers impose the death penalty more frequently.⁷⁹

The reasons for these disparities are unclear. But the consistent disparities in sentencing based on the race of the victim beg the question of whether juries tend to measure the loss of some as greater than others on the basis of race. In a similar vein, the race-of-victim disparities may support the theory that the criminal legal system's retributive purpose⁸⁰ is more strongly activated when white victimhood is at issue.⁸¹

C. *The Questionable Need for Victim Impact Evidence in the Parole Release Context*

The lessons of death penalty cases raise very troubling questions about the use of victim impact statements and other victim input in the parole release context. As numerous commentators have observed, the weak relevance of victim impact evidence in the criminal sentencing context raises an existential question about whether its use is appropriate.⁸² This concern is amplified in the parole release context.

The relevance of victim testimony to the parole release decision is highly questionable. As Professor Julian Roberts has argued, if the parole release standard focuses on the likely (future) conduct of an incarcerated person upon release, a crime victim is unlikely to be able to shed light on that inquiry.⁸³ To the extent that the parole process is largely available to people who are serving long sentences, there may be a significant time lag between the underlying crime—the event in the incarcerated person's life with which the victim is most familiar—and the person's request for parole.⁸⁴

that from 1976 through 2016, Texas was 2.8 times more likely to impose the death penalty for murder of white females than death-sentence eligible murders of other victims).

⁷⁹ A recent study also indicates cases involving white victims are more likely to result in actual execution, rather than just a death sentence. Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585, 615–19 (2020). A similar dynamic exists even before criminal cases reach courtrooms. Police are more likely to clear, i.e., make arrests, in murder investigations involving white victims than in others. Jeffrey Fagan & Amanda Geller, *Police, Race, and the Production of Capital Homicides*, 23 BERKELEY J. CRIM. L. 261, 266–67 (2018).

⁸⁰ “Retribution holds that punishment should be in proportion to the severity of the offense, the culpability of the offender, or both. . . . [R]etribution ‘reflects society’s and the victim’s interests in seeing that the offender is repaid for the hurt he caused.’” Levinson et al., *supra* note 73, at 846 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008)).

⁸¹ *See id.* at 857–59.

⁸² *See, e.g.*, Bandes, *Empathy, Narrative*, *supra* note 13 (arguing that victim impact statements are not appropriate for sentencing hearings in death penalty cases).

⁸³ Roberts, *supra* note 6, at 352. Of course, exceptions to this proposition may exist. As Kathryn Young has pointed out, a victim may have information relevant to rehabilitation or relevant events that postdate sentencing. Young, *supra* note 11, at 438 n.25.

⁸⁴ Noah Epstein has made similar arguments. *See Epstein, supra* note 9, at 811, 814.

One arguable justification for victim participation in the parole release process is its expressive function. For example, Professors Joan Petersilia and Young have explored whether victims feel more supported by the criminal legal system as a whole if they are able to participate in parole proceedings.⁸⁵ This perspective echoes the standard arguments offered in support of victims playing a role in sentencing.⁸⁶ But the death penalty experience spurs serious questions about whether victim impact statements introduce information to the parole decision process that is not only largely legally irrelevant, but also exacerbates racial disparities in the criminal legal system. Given that the use of victim impact statements is ubiquitous in parole release proceedings, with some states protecting the right of victims to offer these statements by law,⁸⁷ they will remain for some time. But their effects require further study.

III. QUESTIONS FOR FURTHER STUDY

Some of the most elementary questions about the role of victims in the parole release context lack answers. This Part identifies some of these questions and calls for further study.

The most basic question about the frequency with which victims participate in parole release proceedings does not have a clear answer. States that allow victim participation should collect data about this phenomenon, and devote attention to the varying roles that victims play. Do they provide formal statements, in writing or orally? Do they attend parole release proceedings without offering statements? While some researchers have conducted helpful studies on the general practices regarding the roles of victims,⁸⁸ it is difficult or impossible to access data about how the proceedings actually unfold unless state devote attention and resources to this question. As recounted above, there are few studies that have explored this question directly.⁸⁹

It is also essential to collect race data about parole release decisions and victims. Is there a race-of-victim effect in the parole

⁸⁵ PETERSILIA, *supra* note 6, at 155–69; Young, *supra* note 11, at 481–82.

⁸⁶ See, e.g., Cassell, *supra* note 13 (arguing that the therapeutic benefits for the victim is one of the four primary justifications for the use of victim impact statements); Erez, *supra* note 13, at 550–54 (outlining therapeutic and other benefits that victims impact statements offer victims).

⁸⁷ See *supra* text accompanying notes 5–7.

⁸⁸ See, e.g., RUHLAND ET AL., *supra* note 20, at 26–29 (reporting survey findings on process for and significance of victim participation in parole release decisions); Russell, *supra* note 14, at 404–05 (finding that all but one of the parole boards surveyed across forty-five states allowed for in-person victim statements at parole interviews or hearings).

⁸⁹ See *supra* notes 37–45 and accompanying text.

release context that results in more punitive outcomes when crime victims are white? Is a parole grant less likely when a victim is white and the potential parolee nonwhite than when both victim and offender share a racial identity? If this dynamic exists, is it amplified when white victims provide victim impact evidence? Answering these questions will require careful statistical analysis similar to that undertaken in the death penalty context.

CONCLUSION

Given that racial disparities are rife throughout the criminal legal system,⁹⁰ there is no reason to believe that parole decision-making is exempt from this dynamic. Importantly for the purposes of this project, the use of victim impact statements in parole decision-making may amplify such disparities. Research into the death penalty experience gives rise to serious questions about whether the troubling racial dynamics surrounding race and victimhood exist in the parole release context as well. Additional research is essential to understand whether that is the case and whether victim impact statements stand in the way of parole functioning as a valuable tool for decarceration.

As several researchers observed, “[a]n optimist might hope that discretionary prison release will be a critical tool in the nation’s ‘decarceration’ agenda in coming decades.”⁹¹ A deeper understanding of the role of victim impact statements will help elucidate the path forward.

⁹⁰ See *supra* note 15.

⁹¹ Rhine et al., *supra* note 24, at 280.