

PAROLE RELEASE HEARINGS: THE FALLACY OF DISCRETION

*R. Kyle Alagood**

Despite nearly every U.S. state having created a parole system, incarcerated offenders do not have a constitutional right to early release on parole, and parole hearings do not automatically invoke due process. The resultant discretion afforded to parole decision-makers, coupled with the administrative regime’s relaxed evidentiary standards risks erroneous, vindictive, or politically motivated information tainting release decisions. Louisiana, the world’s prison capital, has recently initiated parole reforms that may provide a model for reforms nationally. This article details the evolution of Louisiana’s parole release structures, highlights problems with discretionary parole-release decision-making, and proposes Louisiana pilot reforms that may transfer to parole release systems nationally.

INTRODUCTION

I.	THE LOUISIANA BOARD OF PARDONS, COMMITTEE ON PAROLE	2
	<i>A. Appointment and Qualification</i>	2
	<i>B. Education and Training</i>	3
II.	PAROLE RELEASE HEARINGS AND DECISION-MAKING CRITERIA	4
	<i>A. Parole Committee Members and Release Criteria</i>	5
	<i>B. Victim Participation</i>	7
	<i>C. How Law Enforcement and Prosecution Participate</i>	8
	<i>D. The Offender’s Role</i>	12
	<i>E. Offender Counsel, If Any</i>	14
III.	REFORM CONSIDERATIONS	16
	<i>A. Allow Offenders to Access Information within a Reasonable Time Before Hearings</i>	16
	<i>B. Provide Offenders with Counsel (or Provide with Representation when Prosecution or Victim Opposition is Expected)</i>	17
	<i>C. Bifurcate Hearings at which Victims Appear to Oppose</i>	17

CONCLUSION

* M.Sc., 2009, University College London; J.D./D.C.L. Candidate, 2015, Louisiana State University Law Center. This article stems from the author’s observations as a student attorney representing indigent incarcerated felons in parole hearings, pursuant to Louisiana Supreme Court Rule XX.

INTRODUCTION

Louisiana's parole release system is typical of those in other states. Parole release decisions in Louisiana occur entirely within the executive branch. The Parole Committee of the Louisiana Board of Pardons hears parole release cases in an "administrative, not adversarial" proceeding, meaning the committee is inquisitorial and does not rely on parties jockeying to succeed in establishing legal facts.¹ As administrative proceedings, parole release hearings "do not automatically invoke due process."² According to the U.S. Supreme Court, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."³ That is, there is no constitutional right to parole release, and states are not obligated to create a parole system. Nevertheless, nearly every state provides for parole, and the Supreme Court has said states may create a due process interest in parole release.⁴ In *Bosworth v. Whitley*, however, the Louisiana state supreme court ruled that "Louisiana parole statutes do not create an expectancy of release or liberty interest in general," which severely limits due process in Louisiana parole release hearings.⁵

Whether an offender in Louisiana is eligible for parole consideration is generally determined by statute.⁶ If an offender is statutorily eligible for consideration, the Department of Public Safety and Corrections computes a parole eligibility date, which is the earliest date on which an offender can be released on parole, and schedules a parole release hearing, if appropriate.⁷ An offender's parole release hearing can occur up to six months before the parole eligibility date,⁸ which allows the committee to grant an offender's parole with special conditions, such as drug treatment, before the offender's parole eligibility date. The Parole Committee, however, suffers from seemingly arbitrary decision-making. Although its procedures and members' qualifications have improved substantially over the past four years, much more reform is required to promote fairness to offenders and ensure decisions are based on objective criteria. Part I discusses the evolution of the Parole Committee and its membership over the past quarter century. Part II explores the substance of parole hearings, key players, and issues arising from hearing procedures. Part III briefly proposes two reforms that would increase transparency and promote parole-hearing efficiency and fairness.

¹ *Young v. U.S. Parole Comm'n*, 662 F.2d 1105, 1111 (5th Cir. 1982).

² *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979).

³ *Greenholtz* at 7

⁴ *See Bd. of Pardons v. Allen*, 482 U.S. 369, 379 (1987) (finding state's mandatory language in parole legislation created liberty interest in parole release).

⁵ *Bosworth v. Whitley*, 627 So.2d 629, 633 (1993).

⁶ *See* La. Rev. Stat. § 15:574.4 (2012). An offender's eligibility may also be affected by the specific offense statute.

⁷ 22 La. Admin. Code, pt. XI, §§ 301(A), 303(A)-(C).

⁸ 22 La. Admin. Code, pt. XI, § 303(F).

I. THE LOUISIANA BOARD OF PARDONS, COMMITTEE ON PAROLE

In Louisiana, an offender's eligibility for parole consideration is set by statute.⁹ An offender's eligibility for parole release, however, is at the discretion of the Louisiana Board of Pardons, Committee on Parole.¹⁰ The Pardon Board is a five-member board appointed by the governor and confirmed by the senate. Members serve concurrently with the governor who appoints them.¹¹ The Parole Committee includes two additional members, who serve only for parole hearings.

A. *Appointment and Qualification*

Until 2012, the Louisiana governor appointed, with senate confirmation, a seven-member Board of Parole separate from the five-member Board of Pardons. Members of each board received a statutorily provided salary, and there historically have been no academic or experience requirements for board membership.¹² As a result, Parole Board membership was a coveted patronage position.¹³ The only check on the governor's patronage appointments was senate confirmation, which "furnish[ed] scant assurance of competent personnel."¹⁴ As a result, the Louisiana Board of Parole had a history of being "ill-prepared for the parole release function."¹⁵ In 1974, for example, only one Board member—a former probation officer—had any corrections training or experience.¹⁶

Two recent phases of legislation began to provide for minimum parole decision-maker qualifications. During the mid-to-late 1990s, the Louisiana legislature incorporated victims' rights into parole decision-making. As part of the victims' rights legislative package, the 1995 legislature created the first-ever qualification for Parole Board membership: "One of the seven members shall be appointed from a list of at least three names submitted by Victims and Citizens Against Crime, Inc.," a victims rights organization.¹⁷ More than a decade passed before the legislature added any other qualifications to Parole Board membership. In 2011, the legislature added an unpaid, non-

⁹ See *Holmes v. Louisiana Dept. of Public Safety and Corrections*, 93 So. 3d 761 (La. Ct. App. 1st Cir. 2012); La. Rev. Stat. Ann. 15:574.4 (Westlaw Next current through 2014 legislative session).

¹⁰ See *id.*; La. Rev. Stat. Ann. 15:574.4.1(B) (Westlaw Next current through 2014 legislative session) ("[P]arole shall be ordered only...upon determination by the committee that there is reasonable probability that the prisoner is able and willing to fulfill the obligations of a law-abiding citizen.").

¹¹ La. Const. Art. 4 § 5(E)(2).

¹² See La. Rev. Stat. Ann. § 15:574.2(A)(7) (Westlaw Next current through 2014 legislative session) (parole members' pay); Roy Moreland, *Model Penal Code: Sentencing, Probation and Parole*, 57 KY. L.J. 51, 76 (1968) (discussing patronage and parole membership).

¹³ See La. Rev. Stat. Ann. § 15:574.2(A)(7) (Westlaw Next current through 2014 legislative session) (parole members' pay); Moreland, *Model Penal Code*, *supra* note 12, at 76 (discussing patronage and parole membership).

¹⁴ J. Michael Veron, Comment, *Parole in Louisiana: Theory and Practice*, 48 TUL. L. REV. 332, 343 (1974).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Act 303, 1995 La. Acts 867-68 (codified as amended at La. Rev. Stat. § 15:574.2). The legislature amended § 574.2 in 2010 to allow nomination by any non-profit, non-political "victim's rights advocacy organization." See 2010 La. Sess. Law Serv. Act 961 (S.B. 436) (West).

voting seat to the Parole Board for the warden or deputy warden of the correctional facility at which an offender is incarcerated.¹⁸

Then in 2012, the legislature abolished Board of Parole and transferred parole responsibility to a newly created Committee on Parole within the Board of Pardons. The five Pardon Board members concurrently serve as Parole Committee members, but the Parole Committee includes two at-large appointees who have no pardon functions.¹⁹ The warden or deputy warden of an incarcerated offender's facility serves as an uncompensated, non-voting member of both boards. The 2012 restructuring also, for the first time, set minimum qualifications for the governor's pardon and parole appointees. Beginning with any member whose service commences after August 1, 2012, all Pardon Board appointees and the two at-large Parole Committee members are required to have at least five years of "actual experience in the field of penology, corrections, law enforcement, sociology, law, education, social work, medicine, or a combination thereof."²⁰ In 2014, the legislature again added qualifications to Parole Board and Pardon Committee membership. Beginning with appointments after August 1, 2014, all members, except the warden, must have either (1) seven years' experience in one or a combination of the listed fields, to which psychology and psychiatry were added, or (2) a bachelor's degree plus five years' experience in the listed subjects.²¹

B. Education and Training

Louisiana law's historical lack of minimum qualifications for Parole Board appointees contributed to the board's ill-preparedness. That Parole Board members for decades were not even required to undergo public safety or corrections training only exacerbated the problem.²² With no mandatory education, experience, or public safety or corrections training, the Parole Board was required to "consider all pertinent information...including the nature and circumstances of the prisoner's offense, his prison records, [and] the pre-sentence investigation report" to determine whether an offender statutorily eligible for parole would get a parole release hearing.²³ Then, once deciding an offender would get a hearing, the Parole Board had to determine whether release would be "for the best interest of society" and the "reasonable probability that the prisoner is able and willing to fulfill the obligations of a law-abiding citizen so that he can be released without

¹⁸ 2011 La. Sess. Law Serv. Act 153 (S.B. 202) (West) (codified as amended at La. Rev. Stat. § 15:574.2).

¹⁹ 2012 La. Sess. Law Serv. Act 714 (H.B. 518) (West) (codified as amended at La. Rev. Stat. §§ 15:572.1, 574.2).

²⁰ *Id.*

²¹ 2014 La. Sess. Law Serv. Act 305 (S.B. 472) (West) (codified as amended at La. Rev. Stat. Ann. 15:574.2(A)(3) (WestlawNext current through 2014 Regular Session)).

²² See Veron, *Parole in Louisiana*, *supra* note 14, at 343 ("As written [in 1976]...there is no provision requiring even minimal academic or vocational training in corrections."). See also 2011 La. Sess. Law Serv. Act 153 (S.B. 202) (West) (codified as amended at La. Rev. Stat. § 15:574.2) (adding paragraph (A)(5) (training)).

²³ La. Rev. Stat. § 15:574.4(C) (1981).

detriment to the community an to himself,” both statutorily mandated prerequisites to release.²⁴ Ultimately, the law traditionally required the Parole Board make a determination of recidivism likelihood but did not provide assurances that board members would have adequate education, experience, or training needed to consistently evaluate the probative value of the information presented to them.²⁵

The Louisiana legislature in 2011 added a new subsection to Revised Statute 15:574.2(A) to mandate Parole Board appointees within ninety days of appointment “complete a comprehensive training course” that comports with training offered by the National Institute of Corrections or the American Probation and Parole Association. The training must include classes on “elements of the decision making process, through the use of evidence-based practices for determining offender risk,” “security classifications” used by the Department of Corrections, “programming and disciplinary processes,” “the dynamics of criminal victimization,” and collaboration with stakeholders “to increase offender success and public safety.”²⁶ The new law further requires each member complete eight additional hours of annual training.²⁷

The adoption of requirements for members training and education will likely help curb some political patronage appointments in the future. The Louisiana Committee on Parole, going forward, will likely consist of some members who have experience in corrections and understand the rehabilitation process. Furthermore, committee members will all have at least a minimum level of critical-thinking skills sharpened by college education or long-time career experience. With such training and education, the Parole Committee’s decisions will likely become more uniform, and their inquiries better aimed at criteria related to the likelihood the offender will succeed on parole.

II. PAROLE RELEASE HEARINGS AND DECISION-MAKING CRITERIA

Although parole release hearings may be subject to limited due process rights, the Supreme Court in *Greenholtz* recognized that parole determinations generally require “very broad discretion,” because there is “[n]o ideal, error-free way to make parole-release decisions.”²⁸ Rather, the decision to grant early release “differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community.”²⁹ Such broad discretion

²⁴ La. Rev. Stat. § 15.574.4(E) (1981).

²⁵ See Veron, *Parole in Louisiana*, *supra* note 14, at 344-45.

²⁶ La. Rev. Stat. § 15.574.2(A)(5)(a) (2012).

²⁷ La. Rev. Stat. § 15.574.2(A)(5)(b) (2012).

²⁸ *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 13 (1979).

²⁹ *Greenholtz* at 8

results in parole release hearings that often focus on criteria unrelated to recidivism or rehabilitation.

A. Parole Committee Members and Release Criteria

Louisiana law retains parole decision-makers' discretion over whether to release offenders on parole, but lawmakers provide the Parole Committee with no discretion over an offender's eligibility for parole consideration. The lack of discretion over eligibility for parole dovetails with Louisiana law's general prescriptions for minimum and/or maximum sentences, which limits judicial discretion at criminal sentencing, to strongly suggest public policy favors uniformity in the state's sentencing and early release decisions. After all, when parole release determinations lack uniformity or consistency, offenders who will become eligible for parole consideration are likely to have a cynical outlook on the likelihood of actual release. As a result, some offenders may focus on appearing rehabilitated—telling the committee what the offender thinks it wants to hear—instead of actually embracing rehabilitation programming.³⁰

Per the legislature's parole reform, the Parole Committee promulgated new regulations that further promote uniform decision-making. The Parole Committee adopted a new mission statement and committed itself to “[u]sing evidence based research” in making release determinations.³¹ According to its mission statement, the committee “shall render just determination[s]” that “maximiz[e] the restoration of human potential while restraining the growth of the Louisiana prison population.”³² The committee's policy is “to give every offender meaningful consideration for parole” and make “decisions that promote fairness, objectivity, and public safety....”³³ The new regulations further provided specific criteria the Parole Committee “shall apply...as a basis” for parole release decisions: the nature and circumstances of the crime; the offender's prior criminal record; the offender's character, social background, and emotional and physical condition; the offender's institutional adjustment; police, judicial, and community attitudes toward the offender; the offender's parole plan; the offender's participation in rehabilitation programming; and the offender's risk assessment score.³⁴ Despite the statutory and regulatory policy of uniform decision-making, advancements in members' training, education, and

³⁰ See Note, *Observations on the Administration of Parole*, 79 Yale L.J. 698, 699 (1970) (discussing offenders' views of parole decision making as arbitrary).

³¹ 22 La. Admin. Code, pt. XI, § 108 (2013).

³² 22 La. Admin. Code, pt. XI, § 108(B)(1) (2013); La. Board of Pardons, Committee on Parole, *Mission Statement*, available at <http://www.doc.la.gov/wp-content/uploads/2009/10/Mission-Statement.pdf>.

³³ 22 La. Admin. Code, pt. XI, § 701(A).

³⁴ 22 La. Admin. Code, pt. XI, § 701(C).

experience, and the committee's commitment to evidence-based decision-making, Louisiana parole release hearings are often unpredictable and seemingly arbitrary.³⁵

Requiring the Parole Committee at least consider prescribed criteria in parole release hearings helps ensure decision-makers are consistent in the factors they evaluate; however, the regulation providing those criteria adds that the guidelines are "not...the exclusive criteria,"³⁶ ultimately leaving committee members' discretion fully intact and undermining the progress toward uniformity. The Parole Committee's decisions in two recent release hearings illustrate the unpredictability problem.³⁷ Both hearings occurred on the same morning in November 2014. The two offenders' charges were substantively similar, but the Parole Committee's release decisions are difficult to reconcile with objective factors. Offender A had been incarcerated for eight years for habitual possession of heroin, during which the offender had completed dozens of rehabilitation certificate programs, including drug treatment, worked as a trustee, and gotten a GED and associate's degree. Offender A had secured a job to begin upon release, and his parole eligibility date had passed, meaning he statutorily could be released immediately if the committee so decided. Offender B was a first-time offender who had been incarcerated eight months for possession of heroin and possession of a controlled dangerous substance in a school zone. Offender B was also a trustee, but he had completed only the statutorily mandated pre-release rehabilitation course. Offender B had a job plan but had not secured specific employment before the release hearing. Even if granted parole, Offender B's parole eligibility date was four months after the hearing, so he would have to remain incarcerated until that time passed.

Although the Parole Committee granted both offenders' parole, the conditions imposed on Offender A appeared inconsistent with Offender B's unconditional release. Offender A, whom the committee had commended for taking advantage of rehabilitation and whose parole eligibility date had passed was granted parole contingent upon working six months at a transitional work release program, despite the offender's having secured a full-time job immediately upon release. Offender B, who would not actually leave prison for another four months and who had completed only the mandatory minimum rehabilitation programming was granted unconditional release on his parole eligibility date. To an objective observer, the committee's decision appears inconsistent. The committee effectively set a higher bar for Offender A's release—to first participate in

³⁵ This assertion and many observations that follow are based on the author's participation in and observation of parole hearings while working at a student attorney under Louisiana Supreme Court Rule XX.

³⁶ 22 La. Admin. Code, pt. XI, § 701(C)

³⁷ The following narrative is based on the author's recollection of the hearings in question. Both offenders were clients of the LSU Law Center Parole and Reentry Clinic. The author represented one offender. Although the hearing is public record, clients' names have been anonymized for confidentiality.

transitional work release—despite his objective demonstration of rehabilitation. Meanwhile, Offender B, who had not completed drug treatment, secured post-incarceration employment, or pursued education courses was granted release contingent only upon his good behavior for the remaining four months until his parole eligibility date.³⁸

B. *Victim Participation*

Victims have a role in parole release hearings in all fifty states.³⁹ Everywhere except Pennsylvania allows victims to attend parole release hearings and make a statement, which parole boards consider when deciding whether to release an offender. In Pennsylvania, victims can only make a written or videotaped statement for the parole board's consideration.⁴⁰ At least three-quarters of the states do not allow offenders full access, if any, to victim input.⁴¹ The restriction on inmate access to victim impact statements in most states presumably extends to a represented offender's lawyer, as is the case in Louisiana for written victim impact statements.⁴²

Victim input has a significant impact on parole board decision-making.⁴³ In 1997, social scientists at the University of Alabama at Birmingham analyzed the parole release decision-making process and found that victim participation had a statistically significant relationship with parole hearing outcomes. Ultimately, the study found victim input had a greater effect on parole decisions than any other factor, including the seriousness of the offense, an offender's number of felonies, time served, disciplinary record, and number of completed rehabilitation programs.⁴⁴ Although other variables cannot be discounted as affecting parole-hearing outcomes, the only statistically significant factors were victim and offender input, with victim input having the greatest overall predictive value.⁴⁵ That study verified earlier studies' conclusions that victim participation in parole release hearings greatly affected the likelihood of an offender's release.⁴⁶ Then, in 2005, two of the scientists who conducted the earlier study reexamined Alabama's parole system and the

³⁸ Information relating to Offenders A and B is public record.

³⁹ Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 404 (2014); Oklahoma Board of Pardon and Parole, *Victim Services Guidelines*, http://www.ok.gov/ppb/Victim_Services/Guidelines/index.html (accessed Nov. 19, 2014); Indiana Parole Board, *Parole Board Hearings*, <http://www.in.gov/idoc/2324.htm> (accessed Nov. 19, 2014); Mississippi Parole Board, *Parole*, <http://mpb.state.ms.us/Parole%20Board%20Parole.htm> (accessed Nov. 19, 2014); Arizona Board of Executive Clemency, *Victim Information*, <https://boec.az.gov/content/information-victims> (accessed Nov. 19, 2014).

⁴⁰ Russell, *Review for Release*, *supra* note 39, at 404.

⁴¹ *Id.* at 405.

⁴² See La. Rev. Stat. Ann. § 574.2(C)(12) (Westlaw Next current through 2014 legislative session) (empowering the Parole Committee to exclude anyone to protect victim privacy).

⁴³ See, e.g., Parsonage, et al., *Victim Impact Testimony and Pennsylvania's Parole Decision Making Process: A Pilot Study*, 6 CRIM. J. POL'Y REV. 187 (1994) (finding victim participation was the strongest predictor for outcome in parole release decisions).

⁴⁴ Brent L. Smith, Erin Watkins & Kathryn Morgan, *The Effect of Victim Participation on Parole Decisions: Results from a Southeastern State*, 8 CRIM. J. POL'Y REV. 57, 68-69 (1997).

⁴⁵ *Id.*

⁴⁶ See Maureen McLeod, *Getting Free: Victim Participation in Parole Board Decisions*, 4 CRIM. J. 12-15, 41-43 (1989); Parsonage, et al., *Victim Impact Testimony*, *supra* note 43, at 187-206.

relationship of variables against one another. Once again, the analysis concluded that victim participation had a significant relationship to the parole release decision, with only the warden's recommendation having a greater effect.⁴⁷

The strong—nearly determinant—effect of victim opposition to parole release is heightened by confidentiality. In many states, including Louisiana, protest letters are kept completely confidential, thereby denying the offender a chance to access and prepare a response to the victim's opposition.⁴⁸ An offender in Louisiana may not even know there is victim opposition at all and is never given access to the contents of victim opposition. The Louisiana Committee on Parole also allows victims who make an in-person or telephone statement to request their statement be outside the presence of the offender, which only further limits the offender's ability to adequately present his or her case for release.⁴⁹ Of course, victim-opposition confidentiality has a rational basis: States recognize the vital role victims and survivors may have in the criminal justice system, and confidentiality helps reduce the possibility of retaliation against a victim who protests release.⁵⁰ Nevertheless, prohibiting offenders from accessing information provided by the victim—one of the most significant influences on parole release decisions—prevents the offender from rebutting the victim's descriptions of the crime and other adverse information the victim may present to the Parole Committee.⁵¹ By denying offenders a meaningful opportunity to rebut victim-provided information, the Parole Committee risks weighing erroneous, inaccurate, vindictive, or politically motivated victim-provided information in its release decision.⁵²

C. *How Law Enforcement and Prosecution Participate*

Nearly every parole decision-making body in the United States considers input from prosecutors in the release decision.⁵³ As a threshold matter, where state parole release decision-makers have access to and consider an offender's criminal history or offense record, law enforcement and prosecution information will necessarily impact the release determination. In Louisiana, for example, the Department of Public Safety and Corrections prepares a consolidated

⁴⁷ Kathryn Morgan & Brent L. Smith, Victims, Punishment, and Parole: The Effect of Victim Participation in Parole Hearings, 4 CRIMINOLOGY & PUB. POL'Y 333, 355-56 (2005).

⁴⁸ See Jennifer S. Bales, Equal Protection and the Use of Protest Letters in Parole Proceedings: A Particular Dilemma for Battered Women Inmates, 27 SETON HALL L. REV. 33, 41 (1996).

⁴⁹ La. Board of Pardons & Parole, "Victims-Parole Panel Hearings," Policy No. 05.509 (2012), available at <http://www.doc.la.gov/wp-content/uploads/2013/07/05-509-POL-VICTIMS-Parole-Panel-Hearings.pdf>.

⁵⁰ See generally La. Rev. Stat. § 46:1844 (victims' rights in Louisiana); U.S. Dep't of Justice, Office of the Attorney General, *Combating Violent Crime: 24 Recommendations to Strengthen Criminal Justice*, 55 (1992) (discussing victims fear of revictimization upon an offender's release); Bales, *Equal Protection and the Use of Protest Letters in Parole Proceedings*, *supra* note 48, at 40-41 (overviewing victim roles in parole release hearings).

⁵¹ Russell, *Review for Release*, *supra* note 39, at 424.

⁵² See Bales, *Equal Protection and the Use of Protest Letters in Parole Proceedings*, *supra* note 48, at 42.

⁵³ Russell, *Review for Release*, *supra* note 39, at 403 (noting that 43 of the 46 parole boards that responded to the survey allowed prosecution input).

summary record for each offender, which the Parole Committee considers in its release decision.⁵⁴ The consolidated summary record contains information a local parole officer prepares as part of a pre-parole investigation, which generally includes arrest records from every encounter the offender has had with law enforcement, and may include court records or pre-sentence investigations, if any.⁵⁵

The committee is supposed to use law enforcement information to “evaluate and consider the circumstances of the crime” and determine “whether the particular conditions that contributed to the commission of the crime are likely to reoccur.”⁵⁶ Additionally, state regulations require the committee “consider the seriousness of the offense, the offender’s role in the offense and the degree of his involvement.”⁵⁷ But the regulations do not prescribe the basis upon which the Parole Committee must evaluate the offense circumstances and offender’s culpability. As a result, particularly in cases that resulted in a guilty plea, the Parole Committee’s primary sources for evaluating the circumstances of the crime are the arrest record and other information prepared by the state in its pre-parole investigation. Because it almost always has access to the state’s version of events and exercises broad discretion in release decisions, the Parole Committee’s evaluation of the nature and circumstances of the crime, the offender’s role in the offense, and the offender’s culpability is effectively *de novo*.

Forty-three states also allow prosecutors a role in the parole release hearing itself. Thirteen of those states allow prosecutors to present in writing, by telephone, or through a video recording, but not in person.⁵⁸ Thirty states, including Louisiana, provide for in-person statements by prosecutors.⁵⁹ Unlike criminal court, where the offender would have access to the prosecutor’s evidence before trial and would have a chance to cross-examine, parole release hearings are administrative. Because they are administrative hearings, traditional evidence rules do not apply to parole release hearings, and the hearings are inquisitorial, not adversarial. These aspects of administrative hearings aid the Parole Committee’s goal of “consider[ing] all pertinent evidence,”⁶⁰ as they allow the committee to elicit whatever information it feels necessary to the instant hearing. However, the lack of evidence rules may allow legally irrelevant or inaccurate information, such as unverifiable hearsay, into the Parole Committee’s decision-making process;

⁵⁴ See 22 La. Admin. Code, pt. XI, § 701(B); Russell, *Review for Release*, *supra* note 39, at 404 (discussing case history and summary information).

⁵⁵ See LA. BOARD OF PARDONS & PAROLE, PAROLE IN LOUISIANA 2, available at <http://www.doc.la.gov/wp-content/uploads/2009/10/PAROLE-IN-LOUISIANA.pdf>.

⁵⁶ 22 La. Admin. Code, pt. XI, § 701(C)(1)(a).

⁵⁷ 22 La. Admin. Code, pt. XI, § 701(C)(1)(b).

⁵⁸ Russell, *Review for Release*, *supra* note 39, at 403.

⁵⁹ *Id.* at 403

⁶⁰ 22 La. Admin. Code, pt. XI, § 701(B)

and the inquisitorial system inhibits one party's ability to respond or rebut information provided by another party. Even if the offender is allowed to respond to a prosecutor's in-person presentation, Louisiana offenders are never allowed to access—and, therefore, rebut or respond to—written information provided by the prosecutor to the parole committee.⁶¹ Resultantly, the Parole Committee risks applying inaccurate or incorrect information when evaluating the offender for release.⁶²

A Louisiana parole release hearing in August 2014 for an offender convicted of attempted second-degree murder illustrates how inaccurate information may creep into Parole Committee decision-making. Offender M had served more than two decades in prison for attempted second-degree murder stemming from an altercation in which he brutally beat a female acquaintance to near death.⁶³ The victim survived the attack and testified at Offender M's trial. She later died of complications from Acquired Immune Deficiency Syndrome. When Offender M appeared before the Louisiana Parole Committee in August 2014, however, the Parole Committee focused its hearing from the outset on a crime Offender M did not commit—murder.⁶⁴ That single erroneous fact determined the scope of the entire parole release hearing.

Offender M had gone to trial and been convicted of attempted second-degree murder in 1991. He appealed to a state circuit court, and his conviction for attempted second-degree murder was affirmed.⁶⁵ Thus, facts about the offender's crime and conviction were clear, public, and available. State regulations require the Parole Committee "evaluate and consider the circumstances of the crime *based upon the official version of the offense*, as well as the victim's and offender's versions of the offense."⁶⁶ By leading with the "official" version and inserting the offender's and victim's versions in a clause, regulations imply the "official" version of the offense is prime. What regulations fail to do is clarify what version of an offense is "official" and what weight the committee should give law enforcement or prosecutor statements if they add to, conflict with, or are unsubstantiated by court records. In Offender M's case, that conflict surfaced.

According to the trial and appeals courts—sources of information one could argue are the most official of all "official" sources—Offender M's victim did not perish. Nevertheless, the Parole

⁶¹ Rusell, *Review for Release*, *supra* note 39, at 404

⁶² See Bales, *Equal Protection and the Use of Protest Letters in Parole Proceedings*, *supra* note 48, at 64 (discussing the inability to "verify, add to, or rebut" information if offenders are denied access).

⁶³ Although the facts of the case are public record and the offender's appeal of his conviction was reported, the offender is anonymized for privacy.

⁶⁴ Narrative of the August 2014 hearing is based on the author's recollection. The Louisiana Department of Public Safety and Corrections mistakenly deleted the record for Offender M's August hearing. As a result, the offender, this time represented by outside counsel, was able to successfully apply for a rehearing. Offender M's parole was granted in November 2014.

⁶⁵ State v. [Offender M], [__ So.2d __], 414 (La. App. 5th Cir. 1994).

⁶⁶ 22 La. Admin. Code, pt. XI, § 701(C)(1)(a) (emphasis added).

Committee panel's lead inquiries characterized the offender's crime as murder and sought details about the circumstances of murder, not attempt. Because the victim was deceased and court records clearly found Offender M guilty of attempt, the erroneous information likely came from documents provided by either a Department of Public Safety and Corrections officer who helped prepare the offender's record for the committee, or a statement from law enforcement or prosecution.

An Assistant District Attorney for Jefferson Parish testified at the hearing and focused on the crime scene and victim's injuries. His testimony ultimately implied the victim had perished.⁶⁷ The ADA described the crime scene as covered in blood from one end of the apartment to the other. He went on to discuss how Offender M had broken a vase and used its shards to slice the victim's face and body. The ADA even said Offender M pushed the victim from the second-floor-apartment balcony and onto a fence below, where the victim suffered severe injuries and lay motionless when paramedics arrived. He only obliquely noted the victim had survived, but that fact surfaced after the word picture was already painted. The committee honed in on the ADA's description of the crime scene, particularly his assertion that Offender M had definitively pushed Victim from the balcony onto a fence, and implication that the victim had perished. The Parole Committee then proceeded to quiz Offender M about the crime. One member asked the offender how he would feel if someone had beaten and cut a female family member of his, then shoved her off a balcony to her death. Another member repeatedly asked questions about how Offender M would feel if someone in his family had been killed by a drug addict and whether he thought about how the victim's family must have felt after learning the victim had been killed. Louisiana State Penitentiary Assistant Warden Angie Norwood, who testified at length in favor of Offender M's release and served as the *ex officio* panelist for Offender M's hearing, interjected and attempted to correct the committee's characterization of Offender M's crime as a completed murder, not an attempt. The committee appeared to brush off the distinction between a nearly killed and actually killed victim as unavailing and, with its broad discretion, in effect retried Offender M for the death of a victim who had died from AIDS years after Offender M was incarcerated.

Because the Parole Committee commenced its hearing with questions to Offender M about a completed murder, erroneous or inaccurate information must have been present in the materials provided to panelists in advance of parole hearings. The testimony by prosecution in opposition to Offender M's release did little to refute the committee's inaccurate understanding of the crime; in fact, prosecution's statement focused on the crime's brutality, which likely reaffirmed

⁶⁷ Author's recollection.

the committee's assumption that Offender M's victim had died. Whether the committee's initial inaccurate information relating to Offender M's crime came from a similar, written statement by prosecution is unverifiable, since prosecution statements are private. However, clear discrepancies between the prosecutor's verbal statement and the appeals court ruling affirming Offender M's conviction for attempted second degree murder circumstantially support a conclusion that prosecution either provided the inaccurate information to begin with or later took advantage of the committee's misunderstanding. While the prosecutor's description of the victim's injuries largely comported with the state appeals court's recital of facts in its decision affirming Offender M's conviction, the prosecutor's assertion that Offender M had pushed the victim from the balcony did not. According to the appeals court, the responding officer testified he did not observe Offender M on the apartment balcony with the victim, and the Victim appeared to have jumped from the balcony to escape Offender M. Nevertheless, the ADA's focus on crime-scene gore and his apparent embellishment with the details of the victim's fall left the parole committee and listeners to infer the victim's demise.

Offender M's case raises serious questions about Parole Committee release criteria: Do vague release criteria coupled with broad discretion actually inhibit the Parole Committee's mission to "make reasonable, relevant and evidence based decisions"?⁶⁸ Did the panel rely on a prosecutor's misleading-at-best, inaccurate, or overtly untruthful assertion that Offender M definitively pushed the victim over the balcony and the resultant inference that the victim died as a result? Is the prosecutor's statement the "official" version of the offense? Is the prosecutor's version more "official" than a court's statement of facts? How should the committee weigh different "official" versions of offenses?

Although Offender M's hearing is an outlier, where anything that could go wrong did, it illustrates how participation by prosecution in a non-adversarial hearing where participants are not allowed access to information provided to the decision-makers may lead to inaccuracies that are hard, if not impossible, to correct.

D. *The Offender's Role*

Offenders are allowed to participate in the parole release process in all but two states—Alabama and North Carolina.⁶⁹ Louisiana is one of eight states in which offenders' interaction

⁶⁸ See La. Board of Pardons & Parole, "Vision and Mission," Policy No. 01-101 (2013), available at <http://www.doc.la.gov/wp-content/uploads/2013/07/01-101-Vision-and-Mission-of-the-Board.pdf>.

⁶⁹ Russell, *Review for Release*, *supra* note 39, at 400

with parole decision-makers occurs exclusively by videoconference or telephone.⁷⁰ In Louisiana, offenders appear before the Parole Committee by videoconference.⁷¹

When offenders appear before the Louisiana Parole Committee, panelists generally expect total capitulation to authority. When considering “all pertinent information,” including “the circumstances of his offense...[and] conduct in prison,”⁷² the committee presumes the offender is guilty and poses questions to evaluate his or her willingness to accept responsibility and express repentance. The committee’s expectancy of full capitulation, however, may lead to confusion; and an offender’s honest answer may appear to the committee as obfuscatory. For example, a common question in parole hearings for drug offenders is, “What is your drug of choice?” The question itself is vague and may lead an offender to answer the implied specific question, “What drug did you most regularly use,” when the committee member, expecting full capitulation, actually wants the offender to air a laundry list of drugs the offender used and was involved with. Resultantly, an offender who only used marijuana but sold cocaine and was arrested for possession with the intent to distribute cocaine may fully and honestly answer the committee’s inquiry—that marijuana was his drug of choice—but get pinged as dishonest for not also including cocaine as a drug of choice.⁷³

Offender M’s case further illustrates the difficulty total capitulation creates for an offender when responding to committee inquiries. The Parole Committee will consider an offender’s description of events, but since parole hearings are inquisitorial, not adversarial, the Parole Committee is left to its own devices when determining the veracity of competing information. Offenders (and offenders’ counsel, if any) are not necessarily allowed to rebut, explain, or correct another party’s information. As a result, when confronted with a conflict between offender-provided data and information provided by “official sources,”⁷⁴ meaning the state’s version of events, the Parole Committee is likely to give greater weight to the state’s information, even if it is incorrect. And if given the opportunity to respond at all, offenders who persist in trying to correct the state’s information risk appearing to not accept responsibility or capitulate to authority, both of which negatively impact parole release decisions.

⁷⁰ *Id.*

⁷¹ 22 La. Admin. Code, pt. XI, § 511(C).

⁷² La. Rev. Stat. § 15:574.2(D)(6) (Supp. 2014).

⁷³ The author observed this scenario on more than one occasion.

⁷⁴ 22 La. Admin. Code, pt. XI, § 701(C)(1)(a).

E. Offender Counsel, If Any

One of Louisiana's prison-law experts and a regular advocate in parole hearings, Keith Nordyke, describes the role of counsel in parole hearings as four-fold.⁷⁵ First, the attorney preps clients. An attorney gets to meet with clients before their parole hearings and prepare them to answer the kinds of questions the Parole Committee is likely to ask. For the many offenders who have limited educations or mental disabilities, having an attorney is key to their ability to even articulate answers to the committee's questions. Furthermore, an experienced parole attorney will draw on his or her experience practicing before the committee to help clients understand what information the committee will be looking for at the release hearing. For example, the parole committee may look for signs of rehabilitation and drug treatment in a non-violent drug offender but may focus on indicators of successful reentry in the case of an armed-robber. Second, the attorney can gather facts and assemble them to cast the offender in a better light than the offender would be able to convincingly do without representation. An attorney's legal training and experience writing convincing arguments, coupled with the attorney's access to facts and witnesses, allows counsel to better build a case that convincingly portrays the client-offender as rehabilitated and safe to reenter society. Third, attorneys build records, and having an attorney representing an offender at a parole release hearing can mean the difference in preserving the offender's rights for appeal or waiving them. Fourth, an attorney's role in parole is also to be a watchdog and help move the parole system forward by observing and reporting systemic problems in parole release hearings or suggesting reforms to help advance parole.

Although attorneys may have important—even outcome determinant—roles in parole release decisions, an attorney's role in parole will vary by state. Based on a recent survey by a Quinnipiac University law professor, Louisiana appears more permissive than many states regarding the role of an offender's privately retained counsel. For example, six states do not consider attorney input at all. Of the thirty-nine state parole release authorities that at least consider attorney input, only thirty-two allow counsel to make an in person statement. And state procedures on attorney input vary: Some states only allow counsel input at a meeting separate from the offender's hearing. Other states only allow attorney input in writing, by phone, or via teleconference. In Florida and Alabama, the offender is not allowed to attend the parole release

⁷⁵ Discussion with author.

hearing, but counsel is allowed to appear and speak. Fourteen states, including twelve that otherwise consider counsel input, prohibit an offender's counsel from attending the hearing at all.⁷⁶

The Louisiana Committee on Parole is accommodating to offender's counsel and considers attorney input in the parole release decision. In advance of an offender's parole release hearing, an attorney can file a written statement and exhibits with the committee. The Parole Committee distributes the attorney's statement to members on the offender's hearing panel, which those members consider alongside the state's consolidated summary record and any other information provided, such as a victim impact statement or law enforcement opposition.

An offender's counsel is also allowed to be present at the parole release hearing, but regulations require counsel be present with the offender by video-conference from the penal institution. The Parole Committee allows counsel to make a statement, but procedures vary depending on which member is chairing the panel. Some members allow counsel to make a brief opening statement and a closing or summary statement. Other members prefer counsel only provide either an opening or a closing. Sometimes the panel will address a question directly to the attorney, usually for clarification. And in rare instances, counsel may politely interject to clarify or correct inaccurate information.

Despite Louisiana's cooperative approach to attorney input in parole hearings, hearings' non-adversarial nature often puts attorneys representing offenders at a disadvantage. First, attorneys who have not practiced before the Parole Committee regularly—and few in Louisiana have—may not fully understand that parole hearings are not trials. There are no cross-examinations, rules of evidence, or rebuttals. The attorney's fact-gathering and counter-facts role are primarily presented to the committee in the pre-hearing filing. Second, even an attorney who understands the Parole Committee's procedures is hindered from adequately preparing an offender's case for release, because procedures prohibit attorneys from accessing some of the most heavily weighted data upon which the committee relies. The Parole Committee does not automatically provide offenders' attorneys with any information before the hearing. The Louisiana Department of Public Safety and Corrections, upon request, provides attorneys representing offenders with the same information an unrepresented offender gets: the offender's Master Prison Record or "rap sheet" detailing the offender's classification, offense, sentence, time served, parole eligibility date, etc. Prosecutors are allowed, however, to access the offender's record since incarceration and has access to the offender's risk assessment score, a heavily-weighted criterion

⁷⁶ Russell, *Review for Release*, *supra* note 39, at 402. For the twelve states that consider attorney input but prohibit attorneys from attending parole release hearings, compare footnotes 189 and 190 (states that consider attorney input) with footnote 191 (states that do not allow the attorney to attend client-offender's hearing).

never shared with offenders or counsel.⁷⁷ An offender's attorney may request other public records and information, but defense attorneys, unlike prosecutors, are prohibited from accessing the file D.O.C. will provide the Parole Committee. Some information—virtually all of which is negative toward the offender—is never accessible to an offender's attorney. For example, an attorney may not even know about victim, law enforcement, or prosecutorial opposition at all, much less have access to the opposition statements' content. Attorneys in Louisiana are left to speculate about what information the Parole Committee has before it, and it is up to the attorney to attempt to locate and access the information that may be available in public records. Given most offenders' limited means, an attorney representing an offenders before the Louisiana Committee on Parole will likely have to rely primarily on the client's version of events and can only speculate as to what information, if any, will have been provided by law enforcement, prosecution, or victims. Resultantly, the attorney is incapable of adequately preparing to represent the offender.

III. REFORM CONSIDERATIONS

Although some potential reforms would require significant action by the Louisiana legislature, particularly those relating to greater access to information and representation, lawmakers' string of reforms over the past four years suggests reform is possible. Since state policy appears to favor uniformity in parole-release decisions, the following suggestions serve both fairness and outcome uniformity.

A. *Allow Offenders to Access Information within a Reasonable Time Before Hearings*

The Louisiana Committee on Parole should, at least a week in advance of a release hearing, automatically provide offenders and counsel with any information the committee receives that would be subject to a state public records request. Without access to such information, offenders and attorneys are unable to prepare to dispute, affirm, clarify, supplement, or rebut information that may be vital to the committee's decision. By providing such information, the committee would allow offenders and their attorneys to better prepare for parole hearings and reduce the likelihood of the Parole Committee's release decision being based on inaccurate or incorrect information. Furthermore, parity requires the Parole Committee provide defense counsel with the same information available to prosecutors in advance of the hearing—particularly the risk assessment score and offender's incarceration record.

For the same reasons, the Parole Committee should go further and provide offenders and counsel with some level of access to opposition statements. Protest letters, including those by victims, are generally not investigated or verified, which means inaccurate, vindictive, or politically

⁷⁷ See La. Board of Pardons & Parole, "Powers and Duties of the Parole Committee," Policy No. 01.102 (2014) § (A)(5)(a).

motivated information may enter the Parole Committee's decision.⁷⁸ Even sharing opposition statements in redacted form or as a summary would serve the ends of justice by allowing for preparation and ensuring the committee's information is accurate. Alternatively, if providing offenders with access to all information available to the Parole Committee is not feasible, the Committee should provide offenders with a summary of that information. Summarizing the information available to the Committee in its decision-making process would allow the Committee to, on a case-by-case basis, balance the offender's need to correct or prepare to mitigate potentially false or damaging information with victims' need for privacy and safety.

B. Provide Offenders with Counsel (or Provide with Representation when Prosecution or Victim Opposition is Expected)

The Sixth Amendment right to counsel does not reach state parole release hearings. Nevertheless, states can provide a right to counsel for indigent offenders. Ensuring all offenders have attorney representation at parole hearings will further the state's interest in uniform and predictable parole-release decisions. Having counsel perform the four functions Nordyke posited would promote procedural fairness for offenders, ensure parole release hearings are meaningful, and streamline parole. Given the Louisiana Public Defender Board's perennial budget problems, requiring a public defender represent offenders in release hearings is unlikely. To test the efficiency of appointed counsel in parole release hearings, the defense bar could take initiative and partner with civil rights foundations and organizations to pilot a representation program. Through partnerships with organizations like the Vera Institute, defense counsel could systematically represent Louisiana offenders and build statistics to support state or national funding for representation.

C. Bifurcate Hearings at which Victims Appear to Oppose

Victim opposition in the form of in-person testimony before the Parole Committee is often emotional. Victims explain to the Committee not only the crime but also how it has affected their lives. Currently, the Parole Committee hears victim opposition testimony, conducts the offender's hearing, and renders its decision in the same hearing. As a result, the Committee renders its decision in the presence of the victim, which risks unduly pressuring the Committee to deny release, even in cases where the Committee might otherwise grant.

The Parole Committee should bifurcate hearings at which victims will appear in opposition to release. At the preliminary hearing, the Parole Committee would hear testimony from victim and law enforcement opposition, if any. The bifurcated hearing would serve two

⁷⁸ See *Johnson v. Texas Dep't of Crim. Justice*, 910 F. Supp. 1208, 1219 (W.D. Tex. 1995), *rev'd in part, vacated in part* 110 F.3d 299 (5th Cir. 1997).

purposes. First, where the offender is represented, counsel will be able to hear victim or state opposition testimony and prepare the client to appropriately respond to the Committee's inquiry in light of the opposition. Second, the passage of time between opposition testimony and the release decision would allow the Committee to give sober consideration to the opposition testimony and the offender's achievements, free from the immediate emotional reaction to the victim's statement. If a two-hearing process proves unworkable, the Parole Committee could, at the least, conduct pre-hearings with offenders, at which Department of Corrections staff meet with offenders to explain parole hearing procedures, go over the offender's Master Prison Record, and orally share with the offender any expected victim or state opposition.

CONCLUSION

Louisiana has improved its parole release decision-making body significantly. Gone are the days when governors could hand out the paid positions to any supporter without regard to the person's qualifications. The Parole Committee has moved forward in its training and incorporated research-backed decision-making into parole release determinations. Nevertheless, Louisiana law, particularly as it relates to victim statements and confidentiality, is fundamentally unfair to many offenders and their counsel. Parole Committee determinations remain disorganized, and offenders and counsel face an uphill climb to gather information and appropriately prepare for release hearings. By providing offenders with greater access to information and appointing counsel to represent indigents, even if through a pilot program partnering with the defense bar and outside organizations, Louisiana can improve fairness and stream-line parole release hearings to the benefit of everyone involved. In doing so, the "world's prison capital" will serve as a nation-wide model for parole reform.⁷⁹

⁷⁹ Cindy Chang, *Louisiana is the World's Prison Capital*, TIMES-PICAYUNE, May 13, 2012, http://www.nola.com/crime/index.ssf/2012/05/louisiana_is_the_worlds_prison.html.