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## NOTES

# PROPOSITION 9, MARSY'S LAW: AN ILL-SUITED BALLOT INITIATIVE AND THE (PREDICTABLY) UNSATISFACTORY RESULTS

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### I. INTRODUCTION

On November 4, 2008, California residents voted on twelve statewide ballot initiatives.<sup>1</sup> Seven initiatives were approved, including Proposition 9: the “Victims’ Bill of Rights Act of 2008: Marsy’s Law.”<sup>2</sup> It received the fourth fewest total votes of the twelve ballot initiatives,<sup>3</sup> and was dwarfed in total spending compared to other bills such as Proposition 8, the “California Marriage Protection Act.”<sup>4</sup> Despite passing without significant

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1. CAL. SEC’Y OF STATE DEBRA BOWEN, STATEMENT OF VOTE NOVEMBER 4, 2008, GENERAL ELECTION 6 (2008) [hereinafter STATEMENT OF VOTE], available at [http://uselectionatlas.org/WIKI/images/6/60/CAStatement\\_of\\_Vote2008GE.pdf](http://uselectionatlas.org/WIKI/images/6/60/CAStatement_of_Vote2008GE.pdf).

2. CAL. SEC’Y OF STATE DEBRA BOWEN, PROPOSITION 9, VICTIMS’ BILL OF RIGHTS ACT OF 2008: MARSY’S LAW 129–32 (Aug. 11, 2008) [hereinafter MARSY’S LAW], available at <http://voter.guide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop9> (codified at CAL. CONST. art. I, § 28; CAL. PENAL CODE §§ 679.026, 3041.5, 3043, 3044 (Deering 2011)).

3. Marsy’s Law received 12,411,433 total votes as compared to Proposition 8, the top vote recipient, at 13,402,566. STATEMENT OF VOTE, *supra* note 1, at 7.

4. Proponents and opponents of Marsy’s Law spent just above \$7.5 million. This number is inflated slightly since opponents to Marsy’s Law also opposed Proposition 6 with the same pool of funding. *California Proposition 9, Marsy’s Law (2008)*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/California\\_Proposition\\_9,\\_Marsy%27s\\_Law\\_%282008%29#cite\\_note-6](http://ballotpedia.org/wiki/index.php/California_Proposition_9,_Marsy%27s_Law_%282008%29#cite_note-6) (last modified Sept.

publicity, Marsy's Law instituted broad legal reforms. It altered the California Constitution,<sup>5</sup> added two sections to the California Penal Code,<sup>6</sup> and amended two sections of the California Penal Code.<sup>7</sup> The Proposition added a Victims' Bill of Rights to the California Constitution;<sup>8</sup> expanded the role of victims at every stage of prosecution, conviction and postconviction; modified the process of parole hearings; sought to increase prison sentences; and altered the procedure for parole revocation.<sup>9</sup>

Marsy's Law was passed via ballot initiative, a form of direct democracy guaranteed by California's Constitution.<sup>10</sup> The initiative power has existed since 1911,<sup>11</sup> when the California Constitution was amended to provide that "the people reserve to themselves the powers of initiative and referendum."<sup>12</sup> It was sparked by a backlash against a corrupt legislature bowing to the demands of monopolistic railroad owners.<sup>13</sup> Direct democracy appealed to the populist movement of the early twentieth century and sought to curb corrupt government, reduce the influence of money in politics, and restore democracy for the people.<sup>14</sup>

Since 1911, there has been significant debate about the merits and operation of direct democracy. Most scholars agree that some form of direct democracy is beneficial to the American and Californian political systems. John Matsusaka argues that direct democracy works and improves the efficiency of government.<sup>15</sup> He believes the recent revolution in

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20, 2012). Proposition 8, on the other hand, cost proponents and opponents nearly \$83 million. *California Proposition 8, the "Eliminates Rights of Same-Sex Couples to Marry" Initiative (2008)*, BALLOTEDIA, [http://ballotpedia.org/wiki/index.php/California\\_Proposition\\_8\\_the\\_%22Eliminates\\_Right\\_of\\_Same-Sex\\_Couples\\_to\\_Marry%22\\_Initiative\\_%282008%29](http://ballotpedia.org/wiki/index.php/California_Proposition_8_the_%22Eliminates_Right_of_Same-Sex_Couples_to_Marry%22_Initiative_%282008%29) (last modified May 17, 2012).

5. MARSY'S LAW, *supra* note 2, § 4.1.

6. *Id.* §§ 5.3, 6.1 (adding sections 3044 and 679.026 to the California Penal Code).

7. *Id.* §§ 5.1–5.2 (amending sections 3041.5 and 3043 of the California Penal Code).

8. Notably, a *statutory* Victims' Bill of Rights already existed, Proposition 8, passed in 1982. *See infra* notes 259–62 and accompanying text.

9. *See generally* MARSY'S LAW, *supra* note 2 (discussing the effects of Proposition 9 on the California Constitution).

10. CAL. CONST. art. II, § 8.

11. James E. Castello, Comment, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 CAL. L. REV. 491, 492 (1986).

12. *Id.*; CAL. CONST. art. IV, § 1.

13. John Laird & Clyde Macdonald, *A.B. 1245 of 2003—An Attempt at Modest Reform of California's Initiative Process*, 47 CAL. W. L. REV. 301, 302–03 (2011) (explaining how the reform was made possible only after California voters elected a new legislature and Governor Hiram Johnson).

14. Karl Manheim, John S. Caragozian & Donald Warner, *Rebooting California—Initiatives, Conventions and Government Reform: Symposium Introduction*, 44 LOY. L.A. L. REV. 393, 402 (2011).

15. John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSP. 185, 186 (2005). John Matsusaka's extensive research on the benefits of direct democracy is available on his website, John G. Matsusaka, U.S.C. MARSHALL SCH. OF BUS., *Research*, <http://www-bcf.usc.edu/~matsusak/>

communications technology facilitates direct democracy and that as information becomes more accessible, voters are better qualified to determine the passage of laws, are able to make community-based determinations, and are better able to hold legislators accountable.<sup>16</sup> Furthermore, he believes that direct democracy increases the passage of resolutions voters would accept and helps “unbundle specific issues.”<sup>17</sup> Others find that the process can serve as a “majoritarian escape valve.”<sup>18</sup> At a minimum, two kinds of issues appear particularly suitable for initiatives: “pure binary questions and issues of governmental reform.”<sup>19</sup>

Most scholars grant that elimination of the initiative process is unlikely and undesirable, given its strong voter support<sup>20</sup> and its role in a functioning democracy.<sup>21</sup> However, there is extensive literature advocating for reform. The reasons for reform are as varied as the proposed solutions. This Note will place the main critiques in three broad categories. First, the initiative process bypasses the protections guaranteed to minority groups by a republican (representative) democracy.<sup>22</sup> Second, the initiative process avoids the rigorous legislative process and allows voters to unilaterally enact law without any legislative debate or revision.<sup>23</sup> Third, the initiative process is subject to certain inherent flaws that run counter to public policy and the populist movement’s goals for direct democracy. These flaws are

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research.htm (last updated Aug. 2012). For example, in the first chapter of his book, *For the Many or the Few*, he argues that direct democracy does not respond merely to special interests as critics argue, but instead does reflect the will of the majority of people. JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW* 3 (2004).

16. Matsusaka, *Direct Democracy Works*, *supra* note 15, at 186, 195–202.

17. *Id.* at 194 (discussing how the ballot initiative process curbs logrolling, reduces overspending by legislators, and forces candidates to take positions on individual issues).

18. Elizabeth Garrett & Mathew D. McCubbins, *The Dual Path Initiative Framework*, 80 S. CAL. L. REV. 299, 311 (2007) (explaining that the initiative process can counter a legislative process captured by special interests and reduce the influence of minority interests).

19. Robert Henry, *Deliberations About Democracy: Revolutions, Republicanism, and Reform*, 34 WILLAMETTE L. REV. 533, 567 (1998). Robert Henry explains that though few binary questions exist, some do. They are issues that require nothing more than a yes or no vote without debate. Issues regarding government reform are appropriate because legislatures do not tend to check themselves. The ballot initiative process allows voters to pass laws reflective of the will of the people despite a stubborn legislature. *Id.* at 567–68.

20. Garrett & McCubbins, *supra* note 18, at 310 n.31.

21. *Supra* notes 15–19 and accompanying text.

22. Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 402–03 (2003).

23. Garrett and McCubbins explain that though legislatures occasionally draft laws with errors and unexpected consequences, the legislative process is designed to protect against this. Because the initiative process circumvents the legislative process and requires voters to make binary choices, it can be expected that voters will frequently pass laws with errors and unexpected consequences. Garrett & McCubbins, *supra* note 18, at 304–06.

highlighted by the purpose of the single-subject rule: to limit voter confusion,<sup>24</sup> voter misleading, and the influence of special interests.<sup>25</sup>

The purpose of this Note is not to argue the overall merits of the ballot initiative system or to offer possible reforms. Instead, this Note argues that based on the above critiques, Marsy's Law was a particularly ill-suited proposal for the ballot initiative system<sup>26</sup> and, as a result, suffers numerous flaws.

Part II examines how Marsy's Law reflects the initiative process's potential to suppress minority groups that may have otherwise been protected under a republican democracy. California's inmates are a particularly at-risk minority group because they have minimal access to public forums of communication, have scarce financial resources, and are disenfranchised.

Part III explains how Marsy's Law avoided the typically rigorous legislative process and was not afforded the opportunity to be debated and amended. As a result, this Note argues, Marsy's Law was especially prone to judicial review and invalidation. In particular, this Note examines three current constitutional challenges to Marsy's Law: (1) parole revocation provisions held to violate the due process clause of the Fourteenth Amendment;<sup>27</sup> (2) conflicts with a U.S. Supreme Court order to reduce prison population pursuant to the Eighth Amendment;<sup>28</sup> and (3) potential ex post violations.<sup>29</sup>

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24. Steven W. Ray, Comment, *The California Initiative Process: The Demise of the Single-Subject Rule*, 14 PAC. L.J. 1095, 1104 (1983) (providing five potential reasons a proposal could confuse the voter).

25. See generally Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845 (1999) (discussing the importance and influence of wealthy individuals, groups, and companies on every part of the ballot initiative process).

26. This Note argues only that Marsy's Law was an ill-suited ballot initiative. Other proposals may be well suited for direct democracy. For example, Proposition 8: Eliminates Right of Same-Sex Couples to Marry, was better suited for direct democracy. Though there are certainly concerns with bypassing a republican form of democracy, Proposition 8 at least offered a binary choice: yes on same-sex marriage or no on same-sex marriage. The issue was hotly debated in the public sphere and therefore, voters were better informed on Proposition 8 than Proposition 9. Furthermore, Proposition 8 did not require any special knowledge or understanding of complex legal doctrine.

27. See *Valdivia v. Brown*, No. Civ. S-94-671 LKK/GGH, 2012 U.S. Dist. LEXIS 8092, at \*34 (E.D. Cal. Jan. 24, 2012) (holding that section 3044 of Proposition 9, which limits the procedural rights of those on parole, violates the Constitution).

28. See *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011) (holding that California must obey an order to reduce its prison populations to avoid violation of prisoners' constitutional rights).

29. See *In re Vicks*, 125 Cal. Rptr. 3d 627, 649-50 (Ct. App.) (finding Marsy's Law violates the ex post facto clauses of both the California and U.S. Constitutions), *review granted and opinion superseded by* 255 P.3d 952, 952 (Cal. 2011).

Part IV examines how Marsy's Law exposes potential public policy flaws of the initiative system. This part discusses how the proposal could be liberally interpreted to violate the single-subject rule, likely caused voter confusion, was misleading with respect to the fiscal impact, and was heavily influenced by the wealth of its main proponent. Part V concludes.

## II. MARSY'S LAW EXEMPLIFIES MAJORITY RULE CONCERNS INHERENT TO DIRECT DEMOCRACY

The U.S. Constitution provides, "The United States shall guarantee to every State in this Union a Republican Form of Government."<sup>30</sup> Academics are divided on whether direct democracy, including ballot initiatives like Marsy's Law, violates the guarantee clause.<sup>31</sup> The Supreme Court has long held that the issue of whether a state has ceased to be republican in form due to implementation of direct democracy is a nonjusticiable political question solely for Congress.<sup>32</sup> Regardless, the critique of direct democracy remains valid. Since Madison's *Federalist 10*, the American form of government has sought to protect "the rules of justice and the rights of the minor party" against "the superior force of an . . . overbearing majority."<sup>33</sup> Direct democracy may fail to protect minority groups from the "majority's impatient, heated, or foolish will."<sup>34</sup> As a result, we should be particularly leery of the initiative power when minority rights are at issue.<sup>35</sup> Unfortunately, the majority of people are generally disinterested, unable, or unwilling to protect minority interests. Part IV discusses how voter confusion and misleading contribute to this problem.<sup>36</sup>

### A. WHO IS THE IMPACTED MINORITY GROUP OF MARSY'S LAW?

Marsy's Law alters the rights of victims,<sup>37</sup> the accused,<sup>38</sup> and the

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30. U.S. CONST. art. IV, § 4.

31. Compare Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 856–57 (2002) (arguing that it does not), with Anya J. Stein, Note, *The Guarantee Clause in the States: Structural Protections for Minority Rights and Necessary Limits on the Initiative Power*, 37 HASTINGS CONST. L.Q. 343, 349 (2010) (arguing that it does).

32. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912).

33. See THE FEDERALIST NO. 10 (James Madison).

34. Eric Lane, *Men Are Not Angels: The Realpolitik of Direct Democracy and What We Can Do About It*, 34 WILLAMETTE L. REV. 579, 580 (1998).

35. Stein, *supra* note 31, at 349.

36. *Supra* Part IV.

37. The term "victim" is defined very broadly in Marsy's Law as "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act" and includes "the person's spouse, parents, children, siblings,

convicted generally.<sup>39</sup> However, its most dramatic changes affect inmates serving indeterminate life sentences.<sup>40</sup> Currently, approximately 20 percent of California's prison population is serving a term-to-life sentence.<sup>41</sup> This percentage is the highest of any prison system in the country and is double that of twenty years ago.<sup>42</sup> The California Supreme Court stated in *People v. Felix*, "[I]ndeterminate sentences are generally reserved for more serious crimes than those subject to determinate sentences."<sup>43</sup> Examples of crimes qualifying for indeterminate sentences include first- and second-degree murder,<sup>44</sup> aggravated mayhem,<sup>45</sup> and felony murder.<sup>46</sup> California's voters can directly expand the list of qualifying crimes via the ballot initiative process. For example, Proposition 184 added California Penal Code section 1170.12, which proscribes an indeterminate sentence for those convicted of a third felony.<sup>47</sup> As California continues to expand the list of crimes warranting indeterminate sentencing, the general inmate population and the percentage of term-to-life inmates could continue to rise.<sup>48</sup>

The Stanford Criminal Justice Center recently determined that approximately 32,000 inmates are serving indeterminate sentences<sup>49</sup> for a

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or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated." MARSY'S LAW, *supra* note 2, § 4.1 (codified at CAL. CONST. art. I, § 28(e)).

38. Marsy's law contains provisions that indirectly affect a defendant's bail conditions, ability to plea bargain, and the conviction process generally. *Id.* § 4.1 (codified at CAL. CONST. art. I, §§ 28(b)(2)–(12)).

39. *Id.* (codified at CAL. CONST. art. I, § 28(b)(13)) (altering the requirements of restitution for all convicts).

40. The entirety of Marsy's Law affects inmates serving term-to-life sentences. The most significant section for this group is section 5, "Victims' Rights in Parole Proceedings," which alters the procedure of parole hearings, potentially increases prison sentences, and attempted to alter the procedure for parole revocation. *Id.* § 5. Section 5 is discussed in detail *infra* Part III.

41. ROBERT WEISBERG, DEBBIE A. MUKAMAL & JORDAN D. SEGALL, STANFORD CRIM. JUSTICE CTR., LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA 4 (2011), available at <http://media.law.stanford.edu/publications/archive/pdf/SCJC%20Lifer%20Parole%20Release%20Sept%202011.pdf>.

42. *Id.*

43. *People v. Felix*, 995 P.2d 186, 189 (Cal. 2000).

44. CAL. PENAL CODE § 190(a) (Deering 2011) (proscribing terms of twenty-five years to life and fifteen years to life, respectively).

45. *Id.* § 205 (proscribing life with the possibility of parole).

46. *Id.* § 190 (proscribing various indeterminate sentences).

47. CAL. SEC'Y OF STATE, CALIFORNIA BALLOT PAMPHLET: PROPOSITION 184: TEXT OF PROPOSED LAW 64 (1994), available at [http://library.uchastings.edu/ballot\\_pdf/1994g.pdf](http://library.uchastings.edu/ballot_pdf/1994g.pdf) (codified at CAL. PENAL CODE § 1170.12 (Deering 2008)).

48. See WEISBERG, MUKAMAL & SEGALL, *supra* note 41, at 6 (discussing the impact inmates convicted to three strikes could have on the overall prison population).

49. *Id.* at 4.

variety of crimes.<sup>50</sup> Of those serving term-to-life sentences, 96 percent are male and 69 percent are either African American or Hispanic.<sup>51</sup> As a result of lengthy prison sentences, the term-to-life inmate population is significantly older than the general prison population.<sup>52</sup> Furthermore, the general prison population consists of socioeconomically disadvantaged and poorly educated people as compared to the general population.<sup>53</sup> As a result of incarceration, inmates are limited in their ability to communicate publicly and to access information.

In addition to the above disparities, term-to-life inmates are especially prone to “tyranny of the majority”<sup>54</sup> because they are disenfranchised.<sup>55</sup> Though the disenfranchisement of felons has been held to be constitutional, the Supreme Court has long been split on whether and to what extent this should remain the case.<sup>56</sup> In California, felon parolees are not permitted to vote<sup>57</sup> and parole can last for a former inmate’s entire life.<sup>58</sup> Thus, former term-to-life inmates, living postincarceration for several years, were mostly unable to vote against Marsy’s Law despite its effect on such prisoners.

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50. *Id.* at 15. Eighty-one percent were convicted of some form of murder. Of the 81 percent convicted of murder, 35 percent were convicted of first-degree, 36 percent of second-degree, and 10 percent of attempted murder. These numbers include people convicted via felony murder, accomplice, or aiding and abetting theories. Furthermore, 6 percent of current lifers were convicted of rape and other sexual offenses, and 4 percent were convicted of kidnapping. Notably, with the exception of attempted murder, all lifers on average spend approximately seventeen to twenty years incarcerated despite committing different crimes with vastly different minimum eligible parole dates. For example, the average number of years served by a person convicted of kidnapping for robbery or rape is 17.13 years despite the California Penal Code’s proscription of a punishment of seven years to life. *Id.*

51. *Id.* at 16.

52. *Id.* For example, 38 percent of the term-to-life inmate population is above forty-five years old, as compared to 24 percent of the overall prison population. *Id.*

53. See generally Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151 (2004) (discussing class inequality in the prison system).

54. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 239 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. Chicago Press 2000) (1835) (coining the phrase “tyranny of the majority”).

55. CAL. CONST. art. II, § 4 (providing that “electors . . . imprisoned or on parole for the conviction of a felony” are not qualified to vote).

56. Compare *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (holding that California can constitutionally “exclude from the franchise convicted felons who have completed their sentences and paroles”), with *id.* at 85–86 (Marshall, J., dissenting) (arguing that disenfranchisement statutes are outdated and infringe on the spirit of democracy, and that a blanket disenfranchisement on ex-felons cannot stand).

57. See *supra* note 55 and accompanying text.

58. CAL. PENAL CODE § 3000.1 (Deering 2011) (“[T]he period of parole, if parole is granted, shall be the remainder of the inmate’s life.”).

B. COULD THE REPRESENTATIVE LEGISLATIVE PROCESS HAVE BETTER PROTECTED THE MINORITY INTERESTS OF TERM-TO-LIFE INMATES?

According to Alexander Hamilton, a key function of a representative legislature is to prevent an “unqualified complaisance to every sudden breeze of passion” of the majority.<sup>59</sup> That is, the legislature must occasionally ignore the will of the majority to protect important minority interests. If, in the case of Marsy’s Law, the California legislature would have been similarly unsympathetic to the interests of term-to-life inmates, Marsy’s Law does not reflect fears of abandoning a republican form of democracy.

Though it is difficult to predict, there is reason to believe that the California legislature would have been more concerned with the minority interests at stake in Marsy’s Law than the general electorate. Postponing a discussion of the safeguards guaranteed by a rigorous legislative process,<sup>60</sup> this section argues (1) the interests of the majority of voters do not necessarily reflect the interests of the majority of the people, and (2) the interests of the California legislature and the term-to-life inmate minority group align.<sup>61</sup>

There is a legitimate question as to whether the full citizenry shares the preferences of those who vote on ballot initiatives.<sup>62</sup> At the time of Julian Eule’s research in 1990, less than 50 percent of the adult American population regularly voted at all, and 40 percent of the population was entirely outside the political process.<sup>63</sup> Research shows that people who vote on propositions are “disproportionately well-educated, affluent, and white.”<sup>64</sup> Minorities, the poor, and the uneducated “are both less likely to turn out and less likely to vote on propositions if they do.”<sup>65</sup>

Voters with similar socioeconomic backgrounds to term-to-life inmates and parolees are likely to have different desires and needs for California’s legal system than the average ballot initiative voter. However,

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59. THE FEDERALIST NO. 71 (Alexander Hamilton).

60. *Infra* Part III.

61. This idea is premised on the changes made by Marsy’s Law discussed *infra* Part III. For purposes of this section, the important feature is that Marsy’s Law seeks to increase sentences and may in fact do so. This section argues that the California legislature, like the term-to-life inmate population, may not have desired to increase the potential length of prison sentences.

62. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1514–15 (1990).

63. *Id.* at 1514 & n.41.

64. *Id.* at 1515.

65. *Id.* (explaining how many voters “drop-off” for ballot measure voting, instead voting only for the elected officials).

due to poor education and the complexity of ballot initiatives, they often fail to vote.<sup>66</sup> According to Eule's research, 68 percent of voters who feel ignorant about a ballot initiative do not vote.<sup>67</sup> Furthermore, confused voters often vote contrary to their interests due to misleading ad campaigns funded by special interests.<sup>68</sup> Because the legislators are charged with representing everyone within their constituency, and are less likely to be confused by proposals due to increased resources, education, and time, it is possible the California legislature would have been more sympathetic to term-to-life inmate interests than the majority of ballot initiative voters would be.

In addition, the interests of California's term-to-life inmates and a self-interested legislature may have aligned. The legislature may have been further motivated by the fiscal consequences of Marsy's Law than the general electorate.<sup>69</sup> In fact, there is some scholarship indicating that California's worsening budget crisis may be the direct result of the initiative process, suggesting voters of ballot initiatives inadequately consider fiscal consequences.<sup>70</sup> Furthermore, significant and prolonged budget deficits have been linked to negative election results for incumbent legislators.<sup>71</sup>

Marsy's Law seeks to "impose actual and just punishment upon [victims'] wrongdoers"<sup>72</sup> and prevent sentencing orders from being "substantially diminished by early release policies intended to alleviate overcrowding in custodial facilities."<sup>73</sup> Though there may be justifications for increased sentencing, the change does require significant spending. According to California's Legislative Analyst's Office, it costs \$47,000 to

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66. *Id.*

67. *Id.* at 1518 n.54.

68. *Infra* Part IV.B.

69. Even if the electorate was concerned with the budgetary impact, the electorate may have been confused or deceived with respect to Marsy's Law's projected impact. *Infra* Part IV.

70. Compare William R. Leinen, Note, *Preserving Republican Governance: An Essential Government Functions Exception to Direct Democratic Measures*, 52 WM. & MARY L. REV. 997, 1000-03 (2010) (discussing various budget initiatives restraining the California legislature's ability to levy taxes and arguing for a restriction on ballot initiatives to nonessential government functions), with John G. Matsusaka, *Direct Democracy and Fiscal Gridlock: Have Voter Initiatives Paralyzed the California Budget?*, 5 ST. POL. & POL'Y Q. 3, 248-64 (2005) (concluding that voter initiatives are not a significant obstacle to balancing California's budget).

71. Adi Brender & Allan Drazen, *How Do Budget Deficits and Economic Growth Affect Reelection Prospects? Evidence from a Large Cross-Section of Countries* 11-14 (Nat'l Bureau of Econ. Research, Working Paper No. 11862, 2005).

72. MARSY'S LAW, *supra* note 2, § 2.

73. *Id.* § 4.1.

incarcerate a person for one year.<sup>74</sup> This estimate is conservative as compared to the inmates most affected by Marsy's Law: older term-to-life inmates requiring significant medical outlays.<sup>75</sup> Research suggests that term-to-life inmates may face approximately two additional years of incarceration as a result of Marsy's Law,<sup>76</sup> leading to significant additional costs. In addition, Marsy's Law's impact was projected by the legislative analyst to potentially cost the state "hundreds of millions of dollars annually" due to restrictions on enacting early release programs.<sup>77</sup> Furthermore, it was projected to potentially increase county jail populations and costs.<sup>78</sup>

In addition to the obvious costs associated with Marsy's Law, the Legislative Analyst's Office did identify some potential state savings. By reducing the number of parole hearings term-to-life inmates can receive,<sup>79</sup> Marsy's Law was projected to potentially save the state "millions of dollars annually."<sup>80</sup> In addition, the changes made to parole revocation procedures, "such as by limiting when counsel would be provided by the state" could result in "additional savings in the low tens of millions of dollars."<sup>81</sup> However, the Legislative Analyst's Office warned that these savings were dependent on whether the federal courts would allow the new procedures and prison overcrowding to persist.<sup>82</sup> Based on the costs, limited savings, and potential for federal court intervention, the California legislature may have feared voter discontent should the hundreds of millions of dollars in costs come to fruition. These fears, though self-motivated, would have

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74. *How Much Does It Cost to Incarcerate an Inmate?*, LEGISLATIVE ANALYST'S OFFICE, [http://www.lao.ca.gov/laoapp/laomenus/sections/crim\\_justice/6\\_cj\\_inmatecost.aspx?catid=3](http://www.lao.ca.gov/laoapp/laomenus/sections/crim_justice/6_cj_inmatecost.aspx?catid=3) (last visited Dec. 12, 2012). Note that this cost estimation was for the years 2008 and 2009.

75. California's percentage of inmates older than fifty more than quadrupled from 1990 to 2010. These inmates often require significant medical attention due to chronic disease. Because California lacks prison hospitals, California has contracted with private inpatient caretakers at a cost of \$850,000 per inmate per year. Timothy Williams, *Number of Older Inmates Grows, Stressing Prisons*, N.Y. TIMES, Jan. 26, 2012, at A19.

76. *Infra* Part III.C.2.d.

77. CAL. ATT'Y GEN., OFFICIAL VOTER INFORMATION GUIDE: PROPOSITION 9 OFFICIAL TITLE AND SUMMARY 58 (2008) [hereinafter VOTER INFORMATION GUIDE], available at <http://vig.cdn.sos.ca.gov/2008/general/analysis/pdf/prop9-analysis.pdf#analysis>.

78. *Id.*

79. Marsy's Law changes the frequency of parole hearings in a number of ways, discussed *infra* Part III.C.1.

80. VOTER INFORMATION GUIDE, *supra* note 77, at 58.

81. *Id.* at 61.

82. *Id.* See *infra* Part III. Per *Brown v. Plata*, California is mandated to reduce its prison population to 137.5 percent capacity, rather than the 200 percent capacity it was found to be operating at. *Brown v. Valdivia* held the revocation procedures of Marsy's Law violate the due process clause of the Fourteenth Amendment. *Id.*

directly aligned with the minority term-to-life inmate population's interest in more proximate and permanent parole. Ironically, the republican form of government may have protected the minority group by appealing to majority concerns for a fiscally sound budget.

Notably, "tough-on-crime" positions have always been a useful tool for appealing to voters.<sup>83</sup> As a result, it is possible that the legislature would have been able to pass Marsy's Law despite the potentially significant fiscal impact. However, given the gravity of California's budget crisis at the time of Marsy's Law,<sup>84</sup> the potential for modification through the legislative process,<sup>85</sup> and the necessity for two-thirds of the legislature to agree to amend the California Constitution,<sup>86</sup> there is reason to believe that a republican form of democracy would have better protected the interests of California's term-to-life inmates.

### III. MARSY'S LAW REFLECTS THE NECESSITY FOR A RIGOROUS LEGISLATIVE PROCESS

"The legislative process is complicated, cumbersome, and quintessentially political."<sup>87</sup> Montesquieu, a chief influence on the framers, warned against concentrated power, arguing that "[w]hen the legislative and executive powers are united in the same person . . . there can be no liberty."<sup>88</sup> Despite this, California's "initiative process has the fewest checks and balances of any of the states."<sup>89</sup> Contrary to the constitutional framework, it fails to "allow time for fact-finding and deliberation, provide opportunities to correct mistakes, and encourage compromise and change

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83. See generally Harry A. Chernoff, Christopher M. Kelly & John R. Kroger, *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527 (1996) (documenting various federal "tough-on-crime" examples especially through the 1980s and 1990s).

84. Martin Zimmerman, Marc Lifsher & Andrea Chang, *California Budget Crisis Could Bring Lasting Economic Harm*, L.A. TIMES (May 23, 2009), <http://articles.latimes.com/2009/may/23/business/fi-cal-econ23>; Claire Suddath, *Spotlight: California's Budget Crisis*, TIME (July 27, 2009), <http://www.time.com/time/magazine/article/0,9171,1910985,00.html>. Former Chief Justice of the California Supreme Court, Ronald M. George, blames many of California's budget problems on the "fiscal straitjacket" imposed by ballot initiatives requiring a supermajority by both the Assembly and Senate to raise taxes and to pass a budget. Leinen, *supra* note 70, at 999–1000.

85. *Infra* Part III.

86. CAL. CONST. art. XVIII.

87. Robert S. Leach, Comment, *House Rule XXI and an Argument Against a Constitutional Requirement for Majority Rule in Congress*, 44 UCLA L. REV. 1253, 1272 (1997).

88. Elliot L. Richardson, *Checks and Balances in Foreign Relations*, 83 AM. J. INT'L L. 736, 737 (1989) (citing CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 649 (P. Freund et al. eds., 4th ed. 1977)).

89. Garrett & McCubbins, *supra* note 18, at 303.

in legislative proposals to secure passage.”<sup>90</sup> Furthermore, it eliminates the executive’s veto power, granting legislative and executive power to the will of the majority.<sup>91</sup> Finally, if a law “proves unworkable or unwise in practice,”<sup>92</sup> ballot initiatives often impose difficult procedures for amendment or repeal.<sup>93</sup>

As a result, the judiciary remains the only restraint on invalid initiatives.<sup>94</sup> Due to the lack of other restraints, it is unsurprising that enacted ballot initiatives are frequently subjected to judicial review and often invalidated in part or entirely. For example, between 1960 and 1999, thirty-six of fifty-five California voter-approved initiatives were challenged in court (65 percent).<sup>95</sup> As of September 1999, thirty-two initiatives had received final judgment and eighteen were invalidated in part or entirely (56 percent).<sup>96</sup>

Consistent with the turbulent history of ballot initiatives, Marsy’s Law is constitutionally suspect for at least three reasons. First, a federal district court has already held Marsy’s Law’s parole revocation provisions to be constitutionally invalid, violating the due process clause of the U.S. Constitution.<sup>97</sup> Second, Marsy’s Law appears to directly conflict with the U.S. Supreme Court’s order to reduce California’s prison population.<sup>98</sup> Third, Marsy’s Law may violate the ex post facto clause of both the U.S. and California Constitutions.<sup>99</sup>

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90. *Id.* at 304.

91. *Id.*

92. *Id.*

93. For example, Marsy’s Law requires “three-fourths of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters.” MARSY’S LAW, *supra* note 2, § 9 (emphasis added).

94. This power is limited to initiatives violating the U.S. or California Constitutions. The judiciary cannot strike down laws found to be “unworkable or unwise” unless there is a constitutional basis for doing so. Garrett & McCubbins, *supra* note 18, at 304–05.

95. *Id.* at 305 n.17.

96. *Id.* Additional research makes similar findings. *E.g.*, Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239, 1254 (1998) (finding that from the 1990 through 1996 California general elections, nine of fifteen approved initiatives were contested and only four were upheld).

97. *Valdivia v. Brown*, No. Civ. S-94-671 LKK/GGH, 2012 U.S. Dist. LEXIS 8092, at \*34 (E.D. Cal. Jan. 24, 2012).

98. *Compare* *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011) (holding that California must obey an order to reduce its prison population to avoid violation of prisoners’ constitutional rights), *with* MARSY’S LAW, *supra* note 2, § 2 (adding a number of provisions arguably designed to reduce grants of parole and increase length of incarceration).

99. *See generally In re Vicks*, 125 Cal. Rptr. 3d 627 (Ct. App.) (finding Marsy’s Law violates the ex post facto clause of both the California and United States Constitutions), *review granted and opinion superseded by* 255 P.3d 952, 952 (Cal. 2011).

## A. PAROLE REVOCATION

Section 5.3 of Marsy's Law added section 3044 to the California Penal Code in order "to protect a victim from harassment and abuse during the parole process."<sup>100</sup> It limited the procedural rights of parolees in parole revocation hearings to a short and finite list.<sup>101</sup> Prior to its passage, the Legislative Analyst's Office warned that section 3044 might directly conflict with a federal injunction issued in *Valdivia v. Schwarzenegger*.<sup>102</sup> The *Valdivia* injunction stemmed from a parolee class action suit in 2002, alleging that then-existing parole revocation procedures violated due process.<sup>103</sup> The District Court for the Eastern District of California agreed, and in 2004 issued an injunction mandating certain procedural

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100. MARSY'S LAW, *supra* note 2, § 5.3 (codified at CAL. PENAL CODE § 3044 (Deering 2011)).

101. As proposed and enacted by Marsy's Law section 5.3:

SECTION 5.3. Section 3044 is added to the Penal Code, to read:

3044. (a) Notwithstanding any other law, the Board of Parole Hearings or its successor in interest shall be the state's parole authority and shall be responsible for protecting victims' rights in the parole process. Accordingly, to protect a victim from harassment and abuse during the parole process, no person paroled from a California correctional facility following incarceration for an offense committed on or after the effective date of this act shall, in the event his or her parole is revoked, be entitled to procedural rights other than the following:

(1) A parolee shall be entitled to a probable cause hearing no later than 15 days following his or her arrest for violation of parole.

(2) A parolee shall be entitled to an evidentiary revocation hearing no later than 45 days following his or her arrest for violation of parole.

(3) A parolee shall, upon request, be entitled to counsel at state expense only if, considering the request on a case-by-case basis, the board or its hearing officers determine:

(A) The parolee is indigent; and

(B) Considering the complexity of the charges, the defense, or because the parolee's mental or educational capacity, he or she appears incapable of speaking effectively in his or her own defense.

(4) In the event the parolee's request for counsel, which shall be considered on a case-by-case basis, is denied, the grounds for denial shall be stated succinctly in the record.

(5) Parole revocation determinations shall be based upon a preponderance of evidence admitted at hearings including documentary evidence, direct testimony, or hearsay evidence offered by parole agents, peace officers, or a victim.

(6) Admission of the recorded or hearsay statement of a victim or percipient witness shall not be construed to create a right to confront the witness at the hearing.

(b) The board is entrusted with the safety of victims and the public and shall make its determination fairly, independently, and without bias and shall not be influenced by or weigh the state cost or burden associated with just decisions. The board must accordingly enjoy sufficient autonomy to conduct unbiased hearings, and maintain an independent legal and administrative staff. The board shall report to the Governor.

*Id.* § 5.3.

102. Stipulated Order of Permanent Injunctive Relief, *Valdivia v. Schwarzenegger*, No. S-94-0671 LKK/GGH (E.D. Cal. Mar. 9, 2004) [hereinafter *Valdivia* Order], available at <http://www.prisonlaw.com/pdfs/Val.pdf>. See VOTER INFORMATION GUIDE, *supra* note 77, at 60 (noting that because Proposition 9 "does not provide for counsel at all parole revocation hearings, . . . it may conflict with the *Valdivia* court order, which requires that all parolees be provided legal counsel").

103. *Valdivia v. Davis*, 206 F. Supp. 2d 1068 (E.D. Cal. 2002). See 2008 California Criminal Law Ballot Initiatives, 14 BERKELEY J. CRIM. L. 173, 177-78 (2009).

safeguards.<sup>104</sup> Marsy's Law sought to change every aspect of the injunction.<sup>105</sup> Table 1 below highlights the conflicts.

TABLE 1. Conflicts Between Marsy's Law and the *Valdivia* Injunction

<i>Procedural Right</i>	<i>Valdivia Injunction</i> <sup>a</sup>	<i>Marsy's Law</i> <sup>b</sup>
Duration Between Arrest & Probable Cause Hearing	10 Days	15 Days
Duration Between Arrest & Revocation Resolution	35 Days	45 Days
Unlimited Use of Hearsay Evidence	No	Yes
Right to Have an Attorney Present	Yes	Conditional on Parolee's Indigence & Other Circumstances <sup>c</sup>
Determination Considers the Cost & Burdens to the State of Reincarceration	Yes	No, Consider the Safety of the Victims & Public Only

<sup>a</sup>*Valdivia* Order, *supra* note 102, at 3–7

<sup>b</sup>MARSY'S LAW, *supra* note 2.

<sup>c</sup>*Id.* § 5.3 (codified at CAL. PENAL CODE § 3044(a)(3) (Deering 2011)).

As a result of the above conflicts, the parolees in *Valdivia* filed a motion challenging these provisions of Marsy's Law a mere ten days after its passage.<sup>106</sup>

Following remand from the Ninth Circuit, Judge Karlton reaffirmed his 2004 injunction and held that the enumerated list of procedural rights "fall short of what is required by federal due process."<sup>107</sup> Despite the different time frames set by the injunction and Marsy's Law,<sup>108</sup> the court held that sections 3044(a)(1) and 3044(a)(2) were unconstitutional because both sections failed to provide the minimum due process set forth by

104. *Valdivia* Order, *supra* note 102, at 3–7.

105. *2008 California Criminal Law Ballot Initiatives*, *supra* note 103, at 178, 189.

106. *2008 California Criminal Law Ballot Initiatives*, *supra* note 103, at 189.

107. *Valdivia v. Brown*, No. Civ. S-94-671 LKK/GGH, 2012 U.S. Dist. LEXIS 8092, at \*17 (E.D. Cal. Jan. 24, 2012).

108. *Id.* at \*18–19.

*Morrissey*.<sup>109</sup> For example, Marsy's Law does not provide for "notice, a written summary of the proceedings and of the revocation decision, the opportunity to present documentary evidence and witnesses, and disclosure to the parolee of the evidence against him."<sup>110</sup>

The court continued by holding that section 3044(a)(3) unconstitutionally restricts a parolee's right to counsel.<sup>111</sup> The court determined that it conflicted with the U.S. Supreme Court's *Gagnon v. Scarpelli*<sup>112</sup> decision for three reasons: (1) it restricts the discretion of the responsible agency (the Board of Parole Hearings); (2) it does not contain a requirement that a parolee be informed of his right to request counsel; (3) it eliminates the "presumptive right to counsel when the parolee makes a colorable claim that he has not committed the alleged violations or claims colorable mitigation."<sup>113</sup>

Section 3044(b) was also held unconstitutional for failing to provide a "neutral and detached" hearing, and instead, favoring parole revocation and incarceration.<sup>114</sup> Marsy's Law only required that the public's and victim's safety be considered.<sup>115</sup> The court held that Marsy's Law could have maintained balance by considering the costs and burdens to the state associated with incarcerating parole violators as the 2004 injunction required.<sup>116</sup>

The court held that while section 3044(a)(6) did pass constitutional muster, section 3044(a)(5) did not. By allowing for the unlimited and unconditional use of hearsay evidence, section 3044(a)(5) violated the "guaranteed parolees' 'right to confront and cross-examine adverse witnesses at a revocation hearing, unless the government shows good cause for not producing the witnesses."<sup>117</sup>

After ruling the above sections unconstitutional, the court considered whether the remaining text of section 3044 could be severed.<sup>118</sup> The court

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109. *Id.*; *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

110. *Valdivia*, 2012 U.S. Dist. LEXIS 8092, at \*19.

111. *Id.* at \*24–26.

112. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (affirming *Morrissey* and holding that a presumptive right to counsel exists).

113. *Valdivia*, 2012 U.S. Dist. LEXIS 8092, at \*26.

114. *Id.* at \*18–19.

115. *Id.*

116. *Id.*

117. *Id.* at \*34 (quoting *United States v. Comito*, 177 F.3d 1166, 1170 (9th Cir. 1999)).

118. *Id.* at \*38 ("If these provisions are severed, the only remaining text of § 3044 would read: (4) In the event the parolee's request for counsel, which shall be considered on a case-by-case basis, is denied, the grounds for denial shall be stated succinctly in the record. (6) Admission of the recorded or

determined that the remaining text would not have been adopted alone by voters and by itself was meaningless.<sup>119</sup> As a result, the court found that no portion of the statute could be preserved and the entire section 3044 was held constitutionally invalid.<sup>120</sup>

B. MARSY'S LAW CONTRADICTS EFFORTS TO COMPLY WITH *BROWN V. PLATA*

California's prison population has been a concern of the federal courts for over a decade. Since 2000, the federal government has monitored California's prison system due to substandard medical conditions.<sup>121</sup> In May 2011, the Supreme Court determined that California's prisons continue to fall "below the standard of decency that inheres in the Eighth Amendment."<sup>122</sup> The Court ordered that California reduce its overcrowded state prison system, operating at approximately 200 percent capacity, to 137.5 percent capacity.<sup>123</sup>

Despite the Supreme Court order, Marsy's Law states prison sentences "shall not be substantially diminished by early release policies intended to alleviate overcrowding in custodial facilities."<sup>124</sup> In its "Findings and Declarations," Marsy's Law seeks to address California's failure to "impose actual and just punishment upon . . . wrongdoers."<sup>125</sup> If the ex post facto challenge fails, all term-to-life inmates will most likely serve lengthier sentences as a result of Marsy's Law.<sup>126</sup> Alternatively, if the ex

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hearsay statement of a victim or percipient witness shall not be construed to create a right to confront the witness at the hearing.").

119. *Id.* at \*38–39

120. *Id.*

121. *Brown v. Plata*, 131 S. Ct. 1910, 1926–27 (2011) (discussing *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995) and the early proceedings of *Brown v. Plata*).

122. *Id.* at 1947. In addition to massive overcrowding, the Court discussed California's failure to provide even the minimal standards of health care. For example: "A psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had 'no place to put him.' Other inmates awaiting care may be held for months in administrative segregation, where they endure harsh and isolated conditions and receive only limited mental health services. Wait times for mental health care range as high as 12 months. In 2006, the suicide rate in California's prisons was nearly 80% higher than the national average for prison populations; and a court-appointed Special Master found that 72.1% of suicides involved 'some measure of inadequate assessment, treatment, or intervention, and were therefore most probably foreseeable and/or preventable.'" *Id.* at 1924–25 (internal citations omitted).

123. *Id.* at 1944–45, 1947.

124. MARSY'S LAW, *supra* note 2, § 4.1 (codified at CAL. CONST. art. I, § 28(f)(5)).

125. *Id.* § 2(9).

126. *Infra* Part III.C.

post facto challenge succeeds, inmates who committed offenses after December 2008 will still likely serve lengthier sentences than possible before Marsy's Law's enactment.<sup>127</sup> In both cases, Marsy's Law will likely contribute to continued high state prison populations.

In light of Marsy's stated goals and its potential effects, it seems difficult for California to reduce its population by 31 percent, or 46,000 inmates,<sup>128</sup> in accordance with *Plata*.<sup>129</sup> Justice Kennedy did instruct that the order does not require California to release any prisoners. Instead, "[t]he State may comply by raising the design capacity of its prisons or by transferring prisoners to county facilities or facilities in other States."<sup>130</sup> California has begun relocating state inmates to county jails<sup>131</sup> and newly built prisons.<sup>132</sup> While that solution ignores budgetary concerns, it appears to bring California into compliance with the *Plata* order.<sup>133</sup> However, while protecting itself from further litigation, California may be subjecting local counties to significant budgetary and public safety strains,<sup>134</sup> or even similar Eighth Amendment litigation.<sup>135</sup>

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127. *Id.*

128. James Oliphant, *Supreme Court Upholds Order for California to Release 46,000 Inmates*, L.A. TIMES (May 23, 2011), <http://articles.latimes.com/2011/may/23/nation/la-na-california-inmate-release-20110524>.

129. *Supra* notes 121–26 and accompanying text.

130. *Brown v. Plata*, 131 S. Ct. 1910, 1929 (2011).

131. Don Thompson & Greg Risling, *Inmate Shift Quickly Filling Some California Jails*, UT SAN DIEGO (Nov. 30, 2011, 12:36 PM), <http://www.signonsandiego.com/news/2011/nov/30/inmate-shift-quickly-filling-some-california-jails/?page=3> (discussing the inevitable overcrowding local jails will face as a result of the realignment).

132. Marisa Lagos, *California Spending Billions to Build New Prisons*, SF GATE (Aug. 14, 2011, 4:00 AM), <http://www.sfgate.com/politics/article/California-spending-billions-to-build-new-prisons-2335352.php> (comparing California to thirteen other states seeing declining prison populations, including Texas, which began shutting down prisons).

133. Doug Sovern, *State Prison Realignment Shifts 11 Thousand Inmates*, CBS (S.F.) (Jan. 7, 2012, 10:38 AM), <http://sanfrancisco.cbslocal.com/2012/01/07/state-prison-realignment-shifts-11-thousand-inmates/>.

134. Jennifer Medina, *California Begins Moving Prisoners*, N.Y. TIMES (Oct. 8, 2011), <http://www.nytimes.com/2011/10/09/us/california-begins-moving-prisoners.html> (mentioning Los Angeles's Mayor Antonio Villaraigosa's concern that Los Angeles will have to reassign 150 police officers to help monitor the former inmates); Frank Stoltze, *California Prison Realignment Mostly Going as Planned, but More Tracking Needed*, S. CAL. PUB. RADIO (Feb. 22, 2012, 4:50 PM), <http://www.scpr.org/news/2012/02/22/31351/realignment-mostly-going-planned-more-tracking-nee/> (noting that after inmates are released from county prisons as a result of the realignment plan, there are no systems in place to determine rates of recidivism and thus, the success of the plan); Richard Winton & Andrew Blankstein, *California's County Jails Struggle to House Influx of State Prisoners*, L.A. TIMES (Dec. 10, 2011), available at <http://articles.latimes.com/2011/dec/10/local/la-me-jails-20111210> (explaining how rather than state prisons releasing inmates, the county jails have been forced to release inmates after 50 percent time served).

135. See generally SARAH LIEBOWITZ ET. AL, ACLU, CRUEL AND UNUSUAL PUNISHMENT: HOW

Whether California will continue to comply with the *Plata* order is difficult to predict. Marsy's Law's stated purpose is to increase the length of incarceration for all inmates, which at best makes *Plata* compliance difficult.

### C. POTENTIAL EX POST FACTO CLAUSE VIOLATION

The U.S. Constitution and the California Constitution provide that “[n]o . . . ex post facto Law shall be passed.”<sup>136</sup> Madison explained that ex post facto laws “are contrary to the first principles of the social compact, and to every principle of sound legislation.”<sup>137</sup> His contemporaries feared “the violent acts which might grow out of the feelings of the moment” and thus implemented the ex post facto clause to “shield [the people] . . . from the effects of those sudden and strong passions to which men are exposed.”<sup>138</sup> In 1798, the Supreme Court determined that four types of laws violate the ex post facto clause:

- 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
- 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed.
- 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.
- 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.<sup>139</sup>

Justice Chase explained that ex post facto laws are distinct because they are “manifestly unjust and oppressive”<sup>140</sup> and most often “stimulated by ambition, or personal resentment, and vindictive malice.”<sup>141</sup>

The Supreme Court has made two key rulings on whether parole law modifications violate the ex post facto clause of the U.S. Constitution.<sup>142</sup> The *Morales* decision concerned 1981 changes California made to its

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A SAVAGE GANG OF DEPUTIES CONTROLS LA COUNTY JAILS (2011) (discussing allegations of severe prison beatings throughout Los Angeles county prisons).

136. U.S. CONST. art. I, § 9, cl. 3. The California Constitution specifically provides that “[A]n . . . ex post facto law . . . may not be passed.” CAL. CONST. art I, § 9. California courts have held that the California ex post facto clause is to be interpreted exactly the same as its federal counterpart. *Armijo v. Miles*, 26 Cal. Rptr. 3d 623, 634 (Ct. App. 2005).

137. THE FEDERALIST NO. 44 (James Madison).

138. *Fletcher v. Peck*, 10 U.S. 87, 138 (1810).

139. *Calder v. Bull*, 3 U.S. 386, 390 (1798).

140. *Id.* at 391.

141. *Id.* at 389.

142. Under the *Calder* framework, parole law modifications are challenged for fitting into the third category of laws: inflicting greater punishment than possible at the time of committing the crime.

parole law.<sup>143</sup> Prior to 1981, California term-to-life inmates were universally entitled to annual parole hearings.<sup>144</sup> After 1981, inmates convicted of more than one offense involving the taking of life could be given a deferral of up to three years if the Board found that it was not reasonable to expect that parole would be granted before that time and stated the basis for the finding.<sup>145</sup> The Court held that the key inquiry is whether the change “produces a sufficient risk of increasing the measure of punishment attached to the covered crimes.”<sup>146</sup> The Court concluded that the 1981 changes did not violate the Constitution because the law applied to a limited class of prisoners;<sup>147</sup> the likelihood of release for inmates convicted of multiple homicides was very low;<sup>148</sup> the Board of Parole Hearings maintained discretion to issue one- or two-year denials;<sup>149</sup> the default denial period remained one year;<sup>150</sup> and term-to-life inmates could petition for and receive expedited hearings.<sup>151</sup> Five years after *Morales*, the Court affirmed its analysis in *Garner v. Jones*,<sup>152</sup> citing similar factors to determine that a significant risk of increased punishment had not arisen after the Georgia State Board of Pardons and Paroles changed the maximum deferment period from three to eight years.<sup>153</sup>

On July 20, 2011, the California Supreme Court granted a petition for

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143. Cal. Dep’t Corr. v. Morales, 514 U.S. 499, 499 (1995).

144. CAL. PENAL CODE § 3041.5(b)(3) (Deering 2008).

145. *Id.* § 3041.5(d)(3).

146. *Morales*, 514 U.S. at 509.

147. The changes applied only to those inmates convicted of multiple homicides, rather than all term-to-life inmates. *Id.* at 510–11.

148. At the time, the Court noted that 90 percent of all prisoners were denied parole at their first hearing and 85 percent were denied at their second hearing. The Court concluded that in light of these statistics, there was nearly a zero chance of inmates convicted of multiple homicides ever being released. *Id.*

149. A three-year deferral was warranted only if it was unreasonable to expect parole to be granted before that time. *Id.* at 511–12.

150. The 1981 changes presumed that inmates found unsuitable for parole were entitled to annual hearings. *Id.* at 511.

151. The Court discussed the Board of Parole Hearings’ functioning expedited hearing process in which it was Board policy to review any communication from an inmate requesting an earlier hearing. *Id.* at 512–13.

152. *See generally* Garner v. Jones, 529 U.S. 244 (2000) (concerning 1985 changes by the Georgia State Board of Pardons and Paroles).

153. *Id.* at 250–52 (discussing the balancing of factors approach used in *Morales*). At the time of Mr. Jones’s conviction, the Georgia Board’s Rules required reconsideration for parole every three years. *Id.* In 1985, the Rules were amended to allow deferments of up to eight years. *Id.* at 247. The Court found that there was not a significant risk of increased incarceration because the Board maintained discretion to issue a deferral below eight years, the three-year deferment was still an option, the Board’s policies allowed for expedited hearings in the event of new information or circumstances, the presumption remained that a three-year deferment was appropriate, and the burden remained with the Board to prove why a lengthier deferment was necessary. *Id.* at 253–54.

review to decide whether the statutory changes of Marsy's Law violates the ex post facto clauses of the California and U.S. Constitutions.<sup>154</sup> The remainder of this section discusses the relevant statutory changes and argue that Marsy's Law does violate the ex post facto clause.

### 1. Marsy's Law's Statutory Changes

Inmates convicted to indeterminate sentences can begin to attend parole hearings one year before their minimum eligible parole date.<sup>155</sup> The Board of Parole Hearings presides over the parole hearing and has the power to grant prisoners parole.<sup>156</sup> There is a presumption that parole will be granted.<sup>157</sup> Parole can be denied only if the "Board finds, in the exercise of its discretion, that [the applicant is] unsuitable for parole in light of the circumstances specified by statute and regulation."<sup>158</sup> If an inmate is granted parole, a lengthy review process begins in which the decision can be modified or reversed.<sup>159</sup> If parole is denied, the Board will issue a

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154. See generally *In re Vicks*, 125 Cal. Rptr. 3d 627 (Ct. App.) (finding Marsy's Law violates the ex post facto clause of both the California and U.S. Constitutions), *review granted and opinion superseded by* 255 P.3d 952, 952 (Cal. 2011).

155. CAL. PENAL CODE § 3041(a) (Deering 2011).

156. *Id.* § 3040.

157. *Id.* § 3041.

158. *In re Lawrence*, 190 P.3d 535, 547 (Cal. 2008) (internal quotation marks and citations omitted). The *Lawrence* decision was a watershed case for interpreting the California Penal Code section 3041(b), which states that the Board of Parole Hearings "shall set a release date unless it determines the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that [by a preponderance of the evidence] *consideration of the public safety requires a more lengthy period of incarceration* for this individual, and that a parole date, therefore, cannot be fixed at this meeting." CAL. PENAL CODE § 3041(b) (Deering 2011) (emphasis added). This provision is expanded upon by CAL. CODE REGS. tit. 15, § 2281 (2012), which lists several factors tending to indicate whether an inmate poses an unreasonable risk of danger to society. According to section 2281, factors tending to indicate unsuitability for parole include: (1) an especially heinous, atrocious or cruel commitment offense; (2) a previous record of violence; (3) an unstable social history; (4) sadistic sexual offenses; (5) psychological factors; (6) institutional behavior. Circumstances tending to show suitability include: (1) no juvenile record; (2) stable social history; (3) signs of remorse; (4) motivation for the crime resulted from significant stress; (5) battered woman syndrome; (6) lack of criminal history; (7) age; (8) understanding and plans for future; and (9) institutional behavior. *Id.* Prior to *Lawrence*, parole boards universally cited the particularly heinous nature of the offense to indicate a prisoner was not suitable. *Lawrence* held that the often heinous commitment offenses were relevant only "when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense." *Lawrence*, 190 P.3d at 560. This shift away from relying solely on the commitment offense gave teeth to the some evidence standard of review and allowed courts to protect parole-worthy inmates against arbitrary and capricious denials. See generally Joey Hipolito, Casenote, *In re Lawrence: Preserving the Possibility of Parole for California Prisoners*, 97 CALIF. L. REV. 1887 (2009) (providing an excellent overview of California's parole process and the Board's prior emphasis on inmates' commitment offenses).

159. Following the Board's decision to grant parole, the entire Board of Parole Hearings in

deferral, a period of time before which the inmate can attend a subsequent parole hearing.<sup>160</sup> Marsy's Law makes significant changes to deferral setting procedures, as indicated by table 2.

TABLE 2. Effects of Marsy's Law on Major Parole Hearing Deferral Provisions

<i>Provision Subject</i>	<i>Pre-Marsy's Law</i> <sup>a</sup>	<i>Post-Marsy's Law</i> <sup>b</sup>
Minimum Deferment	1 Year	3 Years
Maximum Deferment	2 or 5 Years <sup>c</sup>	15 Years
Deferment Options	1, 2, 3, 4, 5 Years	3, 5, 7, 10, 15 Years
Default Deferment	1 Year	15 Years
Burden	Board Must Show Why Lengthier Deferment Is Appropriate	Inmate Must Show Why Shorter Deferment Is Appropriate

<sup>a</sup>CAL. PENAL CODE § 3041.5 (Deering 2011).

<sup>b</sup>*Id.*

<sup>c</sup>Prior to Marsy's Law, only those inmates convicted of homicide could receive a maximum deferment of five years. All other term-to-life inmates could receive a maximum deferment of two years. *Id.*

Prior to Marsy's Law, deferments above the default one-year period were to be issued only if the Board of Parole hearings demonstrated "that it is not reasonable to expect that parole would be granted at a hearing during the following year and states the bases for the finding."<sup>161</sup> After Marsy's Law, deferments below the new default period of fifteen years are to be granted only when an inmate can demonstrate, "clear and convincing evidence . . . [is] such that consideration of the public and victim's safety does not require a more lengthy period of incarceration."<sup>162</sup> In addition to the above changes, Marsy's Law significantly increases the role of victims

Sacramento has 120 days to review the decision for any errors of law or fact. Following the review, the Office of the Governor may review the decision within thirty days. The governor can allow the decision to stand by taking no action, actively approve the decision, modify the decision, refer the decision back to the Board of Parole Hearings for reconsideration, or reverse the decision in murder cases only. *Lifer Parole Process*, CAL. DEP'T CORR. & REHAB., [http://www.cdcr.ca.gov/Parole/Life\\_Parole\\_Process/Index.html](http://www.cdcr.ca.gov/Parole/Life_Parole_Process/Index.html) (last visited Jan. 2, 2013). Notably, the governor's power to reverse decisions regarding murder cases was granted by Proposition 89, adopted in 1988. *Id.* California is one of only four states to grant its governor this power. *Legal Overview*, USC PCJP (2012), [http://uscpcjp.com/?page\\_id=130](http://uscpcjp.com/?page_id=130) (last visited Jan. 2, 2013).

160. CAL. PENAL CODE § 3041.5 (Deering 2011).

161. *Id.*

162. *Id.*

in parole hearings.<sup>163</sup>

Based on the above changes alone, Marsy's Law would violate the ex post facto clause if less frequent parole hearings could be linked to lengthier incarceration. However, Marsy's Law includes very important expedited hearing provisions,<sup>164</sup> which may prevent an ex post facto violation. It provides that an inmate may make a "request that the Board exercise its discretion to advance a hearing . . . to an earlier date, by submitting a written request to the Board . . . that establishes a reasonable likelihood that consideration of the public safety does not require the additional period of incarceration of the inmate."<sup>165</sup> The Board of Parole Hearings has sole jurisdiction to grant or deny the written request,<sup>166</sup> must consider the "views and interests of the victim," and may summarily deny a request that fails to "set forth a change in circumstances or new information" indicating suitability.<sup>167</sup> The Board's decision is "subject to review by a court or magistrate only for a *manifest abuse of discretion* by the board."<sup>168</sup>

## 2. Marsy's Law Likely Violates the Ex Post Facto Clause

The California Supreme Court will soon determine whether section 3041.5 of the California Penal Code, as amended by Marsy's Law, violates the ex post facto clause of the U.S. or California Constitution.<sup>169</sup> This subsection urges the Court to find that it does. This subsection proceeds in four parts and raises four distinct arguments: (a) the Board loses significant discretion in setting subsequent hearings; (b) the default period is raised to

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163. Whether a victim is present at an inmate's parole hearing has a significant impact on the outcome. Since victims were permitted to attend and speak at parole hearings prior to Marsy's Law, the ex post facto implications are minimal. However, the changes are still very significant as a policy matter and are discussed *infra* Part IV.

164. For example, a functioning expedited hearing process would allow an inmate who received a seven-year deferral to petition and possibly receive a deferment below seven years, but not necessarily five or three years. See CAL. PENAL CODE § 3041.5 (Deering 2011).

165. *Id.* § 3041.5(d)(1).

166. *Id.* § 3041.5(d)(2).

167. *Id.*

168. *Id.* (emphasis added).

169. See generally *In re Vicks*, 125 Cal. Rptr. 3d 627 (Ct. App.) (holding an ex post facto violation), review granted and opinion superseded by 255 P.3d 952, 952 (Cal. 2011). Notably, the Court also accepted three other cases on the same issue for review but has deferred further action and briefing until *Vicks* is resolved. See generally *In re Russo*, 124 Cal. Rptr. 3d 444 (Ct. App.) (holding no ex post facto violation), review granted and opinion superseded by 255 P.3d 952 (Cal. 2011); *In re Aragon*, 126 Cal. Rptr. 3d 286 (Ct. App.) (same), review granted and opinion superseded by 260 P.3d 282 (Cal. 2011); *In re Smith*, 128 Cal. Rptr. 3d 179 (Ct. App.) (same), review granted and opinion superseded by 260 P.3d 283 (Cal. 2011).

fifteen years, shifting the burden to the inmate; (c) the petition to advance is an insufficient procedural safeguard to (a) and (b); and (d) a decrease in parole hearings does present a significant risk of an increase in the length of incarceration and therefore, constitutes a violation of the ex post facto clause.

a. Loss of Discretion

In both *Morales* and *Garner*, the U.S. Supreme Court held that the parole boards' continued discretion to set deferrals of equal length as before the changes was an important factor indicating the changed laws' constitutionality.<sup>170</sup> While the Board does maintain some discretion to set an appropriate deferment length under Marsy's Law,<sup>171</sup> it is significantly reduced.

Unlike *Morales* and *Garner*, Marsy's Law does more than increase the maximum deferral period. It eliminates the one-, two-, and four-year deferment options and requires the Board to issue a minimum deferral of three years upon a finding of unsuitability.<sup>172</sup> This change especially affects nonhomicide term-to-life inmates who were entitled to a maximum of two-year deferrals prior to Marsy's Law.<sup>173</sup> In cases in which three-year deferrals seem excessive, the Board of Parole Hearings has expressed frustration towards its limited discretion.<sup>174</sup>

170. In *Morales*, for example, the Board could still issue one- or two-year deferrals after the law changed to allow for a maximum deferment of three years. *Supra* notes 142–54 and accompanying text.

171. After all, the Board can issue deferments of three, five, seven, ten or fifteen years. MARSY'S LAW, *supra* note 2, § 5.1(b).

172. *Id.*

173. CAL. PENAL CODE § 3041.5 (Deering 2011). For example, Michael Vicks was subjected to a maximum two-year deferral prior to Marsy's Law. After Marsy's Law, Vicks received a five-year deferral, two-and-a-half times the maximum possible deferral as of early December 2008. *In re Vicks*, 125 Cal. Rptr. 3d 627, 637–38 (Ct. App.), *review granted and opinion superseded by* 255 P.3d 952 (Cal. 2011).

174. In a related federal case, *Gilman v. Brown*, plaintiff recently offered volumes of evidence, including the following summaries of Board commissioner statements to various parole applicants:

- (1) "very close," "I don't feel it will take three years"
- (2) lowest deferral we can give but you can get out earlier, you are a "strong candidate" for parole
- (3) lowest deferral we can give; what you should say in a petition to advance"
- (4) "least" deferral we can give, "wish it was one year that could be given,"
- (5) "don't think it will require three years"
- (6) would give one year if we could, encourages petition to advance
- (7) won't take you long to become suitable, can petition to advance,
- (8) we cannot give you one year, petition to advance can get you back for hearing sooner
- (9) lowest break we can, you can petition for advanced hearing

Corrected Plaintiffs' Post-Evidentiary Hearing Brief Re: Preliminary Injunction at 9–10 & n.12, *Gilman v. Schwarzenegger*, No. Civ. S 05-830 LKK/GGH (E.D. Cal. July. 11, 2011) [hereinafter Plaintiff's Brief].

b. The Default Period Is Fifteen Years and Shifts the Burden to the Inmate to Receive a Reduced Deferment

Marsy's Law changes the default deferment period from one year to fifteen years. Prior to Marsy's Law, the Board of Parole Hearings assumed that a one-year deferral was appropriate and could grant maximum deferrals of up to two years<sup>175</sup> or five years<sup>176</sup> only by stating a basis for why it was not reasonable to expect parole to be granted before that time.<sup>177</sup> This showing was required before increasing the deferment to two, three, four, and five years respectively.<sup>178</sup>

After Marsy's Law, the Board of Parole Hearings can grant a deferral below the default period of fifteen years only if clear and convincing evidence indicates the inmate will cease to pose a threat to public safety before that time.<sup>179</sup> The same inquiry is required before granting a deferment below ten, seven and five years.<sup>180</sup> Therefore, a three-year deferral will be granted only if clear and convincing evidence indicates that public safety does not require fifteen, ten, seven, or five years.<sup>181</sup>

These standards are exactly the opposite and have significant ex post facto implications. Inmates are now saddled with the burden of proving their suitability at a future date, unlike the previous regime, which required the Board to justify why an inmate continued to be a threat to public safety necessitating a longer deferment.<sup>182</sup> The Board loses discretion to issue a deferment below the maximum when it is unclear whether the inmate will be found suitable before that time.<sup>183</sup> Furthermore, the difference in standards used for determining suitability and determining the subsequent hearing upon a finding of unsuitability exacerbates the problem. Unsuitability can be found by a preponderance of the evidence that an

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175. CAL. PENAL CODE § 3041.5(b) (Deering 2011).

176. *Id.*

177. *Id.*

178. *Id.* In other words, a five-year deferral is granted only after finding it is not reasonable to expect parole after one, two, three, or four years.

179. *Id.*

180. *Id.*

181. *Id.*

182. Respondent's Answering Brief on the Merits at 26, *In re Vicks*, 255 P.3d 952 (Cal. 2011) (No. S194129), 2011 WL 6841164 [hereinafter Respondent's Answer].

183. For example, under the prior regime, the Board could decide that a two-year deferral is appropriate even though it is unclear that the inmate will be found suitable in two years. Under the current regime, the Board cannot issue a deferment below fifteen years unless *clear and convincing* evidence indicates that the inmate will be found suitable at the earlier hearing date. *See In re Vicks*, 125 Cal. Rptr. 3d 627, 647–48 (Ct. App.), *review granted and opinion superseded by* 255 P.3d 952 (Cal. 2011).

inmate continues to pose a risk to public safety, while the inmate must prove by clear and convincing evidence that the inmate will be suitable prior to the fifteen-year default deferral period.<sup>184</sup> As a result,

[I]t is possible for the Board to be certain that the prisoner would be found suitable for and granted parole in one or two years because a preponderance of the evidence would show he was no longer a risk to public safety and yet have to defer reconsideration of parole for fifteen years because it could not find by clear and convincing evidence that public safety would not require a more lengthy period of incarceration than ten additional years.<sup>185</sup>

These changes in conjunction raise significant concerns. In fact, data shows that prior to Marsy's Law, two-thirds of deferments were one or two years.<sup>186</sup> After the law's enactment, a majority of inmates receive three- and five-year deferrals.<sup>187</sup> Because the inquiry is whether there is a significant increased risk of *incarceration*, the decrease in parole hearings alone is inadequate to prove an *ex post facto* violation. Marsy's Law will not be found unconstitutional unless the petition to advance hearing provisions is found inadequate<sup>188</sup> and there is a link between decreased hearings and increased incarceration.<sup>189</sup>

c. The Petition to Advance Is an Inadequate Remedy to the Concerns Raised in Sections a and b

The California appellate courts are split on whether the significant risk of increased incarceration presented by Marsy's Law's statutory changes is alleviated by the petition to advance provisions.<sup>190</sup> There are three main

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184. Respondent's Answer, *supra* note 182, at 27.

185. *Id.*

186. WEISBERG, MUKAMAL & SEGALL, *supra* note 41, at 13.

187. *Id.*

188. Lower courts holding Marsy's Law constitutional based their decision on the petition to advance provisions. *In re Aragon*, 126 Cal. Rptr. 3d 286, 298–300 (Ct. App.), *review granted and opinion superseded by* 260 P.3d 282 (Cal. 2011); *In re Russo*, 124 Cal. Rptr. 3d 444, 454–55 (Ct. App.), *review granted and opinion superseded by* 255 P.3d 952 (Cal. 2011).

189. *Supra* Part III.C.2.d.

190. However, the courts finding that the petition to advance provisions do not prevent an *ex post facto* violation rely on a strained reading of section 3041.5(d)(3). Those courts held that section 3041.5(d)(3) precludes an inmate from applying for an expedited hearing until a minimum of three years has passed. This three-year "blackout" period in turn, causes an *actual* increase in incarceration since subsequent parole hearings cannot occur prior to a three-year minimum deferment period. *In re Reed*, No. D058592, 2011 WL 3035393, at \*16 (Cal. Ct. App. July 25, 2011); *In re Vicks*, 125 Cal. Rptr. 3d 627, 638–39 (Ct. App.), *review granted and opinion superseded by* 255 P.3d 952 (Cal. 2011). This interpretation ignores the plain language of the statute and Board practice. The Board of Parole Hearings has promulgated Form BPH 1045(A), "Petition to Advance Hearing Date." CAL. DEP'T CORR. & REHAB., BPH 1045(A) PETITION TO ADVANCE HEARING DATE, *available at* <http://www.cdcr.ca.gov/>

reasons the California Supreme Court should find that it is not: (1) Form BPH 1045(A) is not a substitute for regular parole hearings; (2) statistics indicate petitions to advance are almost always denied; and (3) even if petitions to advance are granted, the lengthy review process will lead to a risk of increased deferment periods.

Proponents of Marsy's Law propose that it merely changed the administrative procedure by which parole is granted.<sup>191</sup> They argue that while inmates may receive lengthier deferrals, they are able to apply for an advanced hearing using Form BPH 1045(A). Inmates must demonstrate in eight lines,<sup>192</sup> along with attached supporting documentation, that those factors indicating unsuitability for parole at the initial hearing have been addressed and eliminated.<sup>193</sup> Inmates are not entitled to in-person reviews and must demonstrate, exclusively in writing, that they no longer present an unreasonable risk to public safety. Because inmates are often denied parole for poorly defined, intangible reasons, such as lack of remorse or lack of insight,<sup>194</sup> this standard can be very difficult to meet. This is especially true

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BOPH/docs/BPH\_1045%28A%29-Petition\_to\_Advance\_Hearing\_Date.pdf (last visited Dec. 14, 2012) [hereinafter BPH1045(A)]. The form is used by inmates when they apply for an advanced hearing and explicitly provides, "You can make one initial request for an advanced hearing date following a denial of parole at any time, but from then on you can only submit requests once every three years." *Id.* at 1. The California Supreme Court has long granted significant deference to the Board's interpretation of its legal obligations and will likely do the same with respect to its interpretation of section 3041.5(d)(3). *See Roberts v. Duffy*, 140 P. 260, 264 (Cal. 1914) ("[E]ntire discretion is left the board as to when, if at all, parole will be granted to prisoners . . ."). As a result, this Note will proceed to discuss other potential arguments for why Form BPH 1045(A) is not a sufficient protection against ex post facto violations.

191. *See, e.g., In re Russo*, 124 Cal. Rptr. 3d at 454.

192. Form BPH 1045(A) allows an applicant to list up to four reasons why an expedited hearing is appropriate. It allows two lines per reason and recommends attaching supporting documentation such as "support letters, job offers, and vocational or education certificates." BPH 1045(A), *supra* note 190, at 1.

193. *Id.* *See also* Reporter's Transcript: Evidentiary Hearing Re Preliminary Injunction at 25–28, *Gilman v. Schwarzenegger*, No. Civ. S-05-830 LKK/GGH (E.D. Cal. Apr. 6, 2011) [hereinafter Reporter's Transcript] (recording Sue Facciloa's testimony, a former Board commissioner, who discusses how the Board flags deficit areas during the hearing and in order to establish a prima facie case for an advanced hearing and overcome the summary denial stage, the inmate must address every single deficit and indicate that it is no longer a factor indicating current dangerousness).

194. In *In re Shaputis*, the California Supreme Court affirmed the Board's use of lack of "insight" as a factor indicating unsuitability and attempted to define the elusive term. The Court found that an inmate's "past and present attitude toward the crime," "the presence of remorse," and indications that the inmate "understands the nature and magnitude of the offense" all fall within the definition of insight and are all legitimate factors to consider according to California's parole regulations. *In re Shaputis*, 265 P.3d 253, 270 (Cal. 2011). Furthermore, the inmate should demonstrate "insight into other aspects of his or her personal history relating to future criminality." *Id.* at 272. The Court defined insight broadly but affirmed the basic *Lawrence* requirement that any factor used to deny parole must have a rational nexus to current dangerousness. *Id.* at 270–72 (denying Mr. Shaputis's habeas corpus petition

in light of the California Supreme Court's emphasis on inmate credibility, a quality best conveyed by live questioning rather than prepared written statements.<sup>195</sup> Even if these difficult standards are met, Marsy's Law provides only that the Board may advance hearings, not that it must.<sup>196</sup>

For example, Mr. James Alexander was denied parole at his hearing mainly for a lack of insight. In response, Mr. Alexander wrote a seven-page statement of insight and filed a petition to advance his hearing. He was summarily denied for failing to indicate changed circumstances. After serving the duration of his deferment, Mr. Alexander attended his subsequent hearing and was found suitable for parole. Ironically, the Board commended him for the exact same statement of insight attached to his petition to advance. The only factor that seems to have changed from the time of his denied petition to his suitability finding was the opportunity for the Board to assess him in person. Unlike on paper, Mr. Alexander was able to express his credibility, insight, and genuine rehabilitation in person.<sup>197</sup>

Mr. Alexander's case is not surprising in light of the statistics regarding petitions to advance. From the time of Marsy's Law's enactment to December 2010, 119 requests to advance hearing dates were made.<sup>198</sup> Of those, 114 were denied (96 percent) and 106 were summarily denied (89 percent).<sup>199</sup> Of the five petitions to advance, three were for improving parole plans.<sup>200</sup> Every inmate who applied for an advanced hearing and was previously deemed to "lack insight" by the Board was summarily denied.<sup>201</sup>

The courts cannot prevent the Board's practice of overwhelmingly summarily denying petitions to advance. While Marsy's Law allows for

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for the second time at the California Supreme Court level).

195. "[I]t was also reasonable for the Board to be unpersuaded by petitioner's written statement when it considered whether he had gained the insight that was found to be lacking in the *Shaputis I* proceedings." *Id.* at 267–68 (admonishing the California Court of Appeal for "substitut[ing] its own credibility determination for that of the parole authority").

196. MARSY'S LAW, *supra* note 2, § 5.1(b)(4).

197. Reporter's Transcript, *supra* note 193, at 56–58. Although Mr. Alexander was serving a three-year deferral at the time his petition to advance was denied, it is unlikely the case that the Board of Parole Hearings would have granted his petition had he been serving a five-, seven-, ten-, or fifteen-year deferral. As a result, the potential increase in incarceration could have been significantly worse.

198. *Id.* at 8.

199. *Id.* at 9.

200. *Id.* at 10. The Board may consider an inmate's parole plans (for example, transitional facility, job opportunities, and so forth) as a factor tending to indicate suitability. If an inmate is lacking parole plans, the inmate can easily attach documentation to the BPH 1045(A) indicating the issue has been addressed. *Id.* at 8.

201. *Id.* 9–10. Similar results could be expected for remorse, which, like insight, is difficult to express on paper.

judicial review of expedited hearing denials, reversal is permissible only upon a showing of “manifest abuse of discretion” by the Board.<sup>202</sup> In light of Marsy’s Law providing only that a Board may (rather than must) grant a petition to advance, it is unlikely a court could find such a “manifest abuse of discretion.”<sup>203</sup>

Finally, Marsy’s Law results in increased deferment periods even if the petitions to advance were regularly granted. Prior to Marsy’s Law’s enactment, the default deferment was one year, and many inmates did in fact receive one-year deferrals.<sup>204</sup> If Marsy’s Law provided a mere procedural change, a one-year deferral should still be possible.<sup>205</sup> Based on current practice, it is not. Following a parole hearing, the Board of Parole Hearings’ decision becomes final after 120 days.<sup>206</sup> The Board may change its decision at anytime during this 120-day period, during which time it is impossible to file a petition to advance. Assuming the inmate is able to file a petition on day 121,<sup>207</sup> the Board will then begin its review process. The Board is required, under Marsy’s Law, to consult the victims<sup>208</sup> and review the inmate’s prison file before a decision can be made.<sup>209</sup> This process can require between three and six months.<sup>210</sup> Following a decision to grant the petition, the Board of Parole Hearings must place the advanced hearing on the calendar. At a minimum, the Board must wait at least ninety days to

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202. MARSY’S LAW, *supra* note 2, § 5.1(d)(2).

203. This is reflected in the 2012 decision, *In re Thompkins*, 137 Cal. Rptr. 3d 718, 726 (Ct. App.) (citations omitted) (internal quotation marks omitted) (holding that petitions to advance do not require a full hearing and the “highly deferential” manifest abuse of discretion standard of review requires the court to affirm the Board decision unless “it falls outside the bounds of reason under the applicable law and the relevant facts”), *review granted and opinion superseded by* 277 P.3d 742 (Cal. 2012).

204. WEISBERG, MUKAMAL & SEGALL, *supra* note 41, at 13 (stating that two-thirds of inmates received deferrals of two years or less).

205. This would require the Board of Parole Hearings to receive and grant a meritorious petition to advance and then schedule a subsequent parole hearing within one year of the initial parole hearing.

206. CAL. PENAL CODE § 3041(b) (Deering 2011).

207. This is unlikely to be the case. According to BPH procedure, an inmate demonstrates the requisite “changed circumstances” only after showing that all prior “deficits” to parole have been addressed. Reporter’s Transcript, *supra* note 193, at 27–28. For example, an inmate who is denied for lack of insight into the commitment offense, lack of parole plans, and prior criminal behavior would need to demonstrate that each of the “deficits” has been alleviated. Failure to do so would result in summary denial. The inmate may require more than 120 days to acquire the necessary documentation to demonstrate a change in insight or reasons the prior criminal behavior is no longer probative of current dangerousness. *See id.* at 30–32.

208. Under Marsy’s Law, the term “victim” is given a very broad definition extending to anyone who suffers any harm (physical, psychological, or financial) as a result of the (attempted) commission of a crime and that person’s spouse, parents, children, siblings, guardians, and lawful representatives. *Supra* note 37 and accompanying text.

209. MARSY’S LAW, *supra* note 2, § 5.1(d).

210. *See* Plaintiff’s Brief, *supra* note 174, at 25–26.

schedule the subsequent hearing pursuant to Marsy's Law's victim notice requirements.<sup>211</sup> In the few cases where subsequent hearings have been granted, scheduling has been found to take eight months or longer.<sup>212</sup> Based on the above timetable, the process can take well above the one-year minimum deferment prior to Marsy's Law. In fact, three of the five granted petitions to advance resulted in subsequent hearings two years from the date of their initial hearing.<sup>213</sup>

Ultimately, the petitions to advance are not functioning as a mere procedural substitute for regular parole hearings. As Mr. Alexander's case demonstrates, there are fundamental differences between impersonal petitions to advance and live parole hearings. Furthermore, the Board's implementation of Marsy's Law eliminates the possibility of a one-year actual deferment and makes a two-year deferment highly unlikely. Therefore, Marsy's Law has, at best, extended the period of time between parole hearings for California term-to-life inmates.

d. A Decrease in Parole Hearings Does Increase the Risk of Prolonged Incarceration

An *ex post facto* violation exists only if Marsy's Law creates a significant risk of increased *incarceration*. A decrease in parole hearings alone will not be sufficient to demonstrate unconstitutionality.<sup>214</sup> Recent data shows that, of those inmates who are parole eligible, 17 percent are granted parole.<sup>215</sup> Furthermore, denials of parole suitability can be challenged in state court via a petition of habeas corpus.<sup>216</sup> From August 2008 to April 2011, 70 percent of inmates who challenged their denial<sup>217</sup> in an appellate court prevailed and received expedited court-ordered parole

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211. MARSY'S LAW, *supra* note 2, § 5.2(a)(1).

212. Plaintiffs' Brief, *supra* note 174, at 25–26.

213. *Id.* Notably, all three of the petitions granted were for improved parole plans.

214. *See* Cal. Dep't Corr. v. Morales, 514 U.S. 499, 508–13 (1995) (discussing how increased deferment times were unlikely to affect term-to-life inmates convicted of multiple homicides since the possibility of release was practically zero).

215. Application for Permission to File Amicus Curiae Brief and Brief of Amicus Curiae in Support of Petitioner at 48 & n.42, *In re Vicks*, 255 P.3d 952 (Cal. 2011) (No. S194129), 2012 WL 479591 [hereinafter Amicus Curiae Brief] (arguing that this number is held artificially low since it includes inmates who are several years away from a suitability finding and that the number would likely be significantly higher if only those inmates who received a one-year deferral under the prior version of section 3041.5 were included).

216. In most cases, the petition for habeas corpus will allege that the Board's denial of parole was arbitrary and capricious in violation of due process. *See, e.g., In re Prather*, 234 P.3d 541, 544 (Cal. 2010).

217. For these purposes, denial includes both a denial by the Board at a regularly scheduled parole hearing and a reversal of a suitability finding by the Governor's Office.

hearings.<sup>218</sup> This error rate suggests more parole hearings are necessary to properly protect the due process interests of term-to-life inmates. For purposes of ex post facto analysis, it indicates even Board denials can lead to earlier hearings and release. Once an inmate is found to be suitable for parole, Governor Brown has allowed 80 percent of Board decisions to stand while Governor Schwarzenegger allowed 28 percent to stand.<sup>219</sup> Therefore, there is strong evidence that a decrease in parole hearings, and thus a decrease in opportunity for release, will increase the length of incarceration for term-to-life inmates.

In addition to the above evidence of a significant risk of increased incarceration, data indicates that Marsy's Law has imposed an actual increase in incarceration. Following the implementation of Marsy's Law on December 15, 2008, 442 prisoners received post-Marsy's Law deferments but had them modified to pre-Marsy's Law deferments pursuant to a class action stipulation.<sup>220</sup> Of the 442 inmates, 305 received their subsequent hearing by March 2011 and fifty-one (16.7 percent) were granted parole.<sup>221</sup> Similarly, 408 different inmates received pre-Marsy's Law deferments subsequent to Proposition 9's passage.<sup>222</sup> Many of the 408 received grants of parole, but of the 247 who were found unsuitable, eighty-eight received one- or two-year deferrals and reached their subsequent hearing by April 2011.<sup>223</sup> Twenty-five (28 percent) were granted parole at their subsequent hearing.<sup>224</sup> If these inmates were subjected to the provisions of Marsy's Law, it would have been impossible to receive a subsequent hearing in 2011. Thus, inmates receiving pre-Marsy's Law deferments under the class action stipulation "would have done, on average, two years in excess of when the Board and / or governor found they were suitable for parole and

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218. Amicus Curiae Brief, *supra* note 215, at 24 n.15, 51. Notably, this 70 percent rate may be artificially high since many of the early reversals following *Lawrence* imposed post-*Lawrence* interpretation of section 3041 on Boards relying exclusively on the heinous nature of the commitment offense. In addition, the courts of appeal may have misinterpreted the some evidence standard of review as discussed in *In re Shaputis*. *Id.* at 51 n.44.

219. *Id.* at 50.

220. *Id.* at 22–23 & n.13 (“[A] state class action habeas proceeding that initially involved a challenge to the untimeliness of parole suitability hearings for life prisoners and resulted in a settlement.”) (citation omitted).

221. *Id.* at 23.

222. *Id.* at 23 & n.14 (“These were primarily prisoners similarly-situated to the *Rutherford* prisoners (because if their hearings had been timely held, they would have occurred before the implementation of Proposition 9) but had not had their hearings before the stipulation in *Rutherford*. Thus, they did not need modifications of Proposition 9 deferrals; they simply needed the old law to be applied to their hearings.”) (citations omitted).

223. *Id.* at 24.

224. *Id.*

allowed their releases” if Marsy’s Law was applied to their deferment period.<sup>225</sup> This data indicates that inmates have in fact been subjected to increased incarceration, violating the ex post facto clause.

D. WOULD A RIGOROUS LEGISLATIVE PROCESS HAVE PREVENTED THE ABOVE PROBLEMS?

“The process of legislating often involves tradeoffs, compromises, and imperfect solutions . . . .”<sup>226</sup> By design, lawmaking is difficult and generally involves significant debate and amendment. As discussed, the ballot initiative process avoids this and requires voters to make a binary choice, whether they approve or disapprove of the proposed law in its entirety.<sup>227</sup> As a result, errors and constitutional flaws should be expected; they are an inherent feature of the ballot initiative process.<sup>228</sup> The question remaining is whether a rigorous legislative process would have prevented this.

In general, legislators are better equipped to consider tradeoffs on policy or budgetary matters.<sup>229</sup> The ballot initiative process does not allow the voter to consider tradeoffs, or consider alternatives over a period of time.<sup>230</sup> Robert Cooter and Michael Gilbert explain,

Hundreds of thousands of scattered citizens cannot effectively bargain with each other over public policies, yielding on one issue in exchange for support on another. By contrast, legislators can bargain and compromise with one another by taking advantage of their small numbers, as well as committees, agendas, procedural rules, and political parties. In the language of economics, the transaction costs of bargaining are much higher in direct democracy than in representative government. Consequently, political bargaining usually produces better results in the legislature than in the initiative process.<sup>231</sup>

In the case of Marsy’s Law, legislators may have been concerned with the financial strain it could place on the state for the foreseeable future.<sup>232</sup> Perhaps a compromise would have been struck to incorporate only some of

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225. *Id.* at 52.

226. *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 19 (1990).

227. Henry, *supra* note 19, at 567.

228. *See supra* text accompanying notes 23–24.

229. *See* Henry, *supra* note 19, at 550 (discussing the strengths of a representative democracy in which legislators are best able to discern the interests of their constituency).

230. *Id.*

231. Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 689 (2010) (footnote omitted).

232. *Supra* notes 69–82 and accompanying text.

the changes in Marsy's Law to ensure the financial strain was not too great.

Furthermore, the California legislature is divided into numerous standing committees, subcommittees, select committees, and joint committees. The general purpose of the committee system is to ensure that the various concerns of the citizenry are represented and considered before a new law is enacted.<sup>233</sup> Justice Linde of the Oregon Supreme Court explained, "[T]here is nothing comparable to the hearings of legislative committees to raise questions and allow the presentation of different viewpoints in order to eliminate unacceptable aspects of a proposal and to produce an improved or at least defensible compromise . . . ."<sup>234</sup> In the case of Marsy's Law, state senate standing committees that may have been involved include: Budget and Fiscal Review; Public Safety; Elections and Constitutional Amendments; and Health.<sup>235</sup> Similarly, several state assembly and joint committees would have likely analyzed the bill before its passage. As a result, the bill may have undergone significant revision.

Specifically, Marsy's Law could have avoided judicial intervention by incorporating very minor changes. The parole revocation provisions could have likely been saved if the language was not so limiting.<sup>236</sup> As the *Valdivia* court suggested, Marsy's Law could have instead provided that "under California law, parolees are not entitled to any process other than the Constitutional minimums."<sup>237</sup> The ex post facto concerns could have been entirely prevented by changing section 10 of Marsy's Law "[r]etroactivity."<sup>238</sup> If Marsy's Law is found to violate the ex post facto clause, those term-to-life inmates who committed crimes after its enactment will still be subject to its changes.<sup>239</sup> California's legislature may have been equally concerned with the parole system, but realized the

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233. See *Committees*, CAL. STATE SENATE, <http://senate.ca.gov/committees> (last visited Dec. 14, 2012) (listing the California Standing and Subcommittees).

234. *Or. Educ. Ass'n v. Phillips*, 727 P.2d 602, 613 (Or. 1986) (Linde, J., concurring).

235. *Committees*, *supra* note 233.

236. "[N]o person . . . shall . . . be entitled to procedural rights other than the following . . . ." MARSY'S LAW, *supra* note 2, § 5.3.

237. *Valdivia v. Brown*, No. Civ. S-94-671 LKK/GGH, 2012 U.S. Dist. LEXIS 8092, at \*17 (E.D. Cal. Jan. 24, 2012). This change would have required a presumptive right to counsel, thus undermining a stated goal of Marsy's Law: to reduce wasteful spending. *Id.* at \*38.

238. "The provisions of this act shall apply in all matters which arise and to all proceedings held after the effective date of this act." MARSY'S LAW, *supra* note 2, § 10. This is not to suggest that all retroactive laws violate the ex post facto clause. The U.S. Supreme Court has long held that is not the case. *Calder v. Bull*, 3 U.S. 386, 387 (1798).

239. *In re Vicks*, 125 Cal. Rptr. 3d 627, 650 (Ct. App.) (finding an ex post facto violation), *review granted and opinion superseded by* 255 P.3d 952 (Cal. 2011). There would essentially be two parole systems in place: one for those inmates who committed crimes prior to Marsy's Law's enactment, and one for those prisoners who committed crimes after. *Id.*

budgetary and constitutional ramifications of applying it to all inmates. As a result, compromise may have led to a law applying only prospectively.

Whether the California legislature would have enacted a different law is impossible to determine. However, the ballot initiative process does not allow voters the opportunity to debate and modify proposals the way the legislature can. For a proposed initiative as complicated as Marsy's Law,<sup>240</sup> a lengthy lawmaking process may have prevented some of the possible constitutional flaws.

#### IV. MARSY'S LAW REFLECTS THE BALLOT INITIATIVE SYSTEM'S PUBLIC POLICY FLAWS

Direct democracy, including the ballot initiative, was designed to give the ordinary citizen a voice and combat entrenched special interests in the lawmaking process.<sup>241</sup> As discussed, it circumvents representative democracy and a rigorous lawmaking process.<sup>242</sup> Without opportunity for debate and revision, the ballot initiative process can only offer voters a binary choice: maintain the status quo or adopt the proposed law in its entirety.<sup>243</sup> The single-subject rule seeks to mitigate potential problems associated with this binary choice.<sup>244</sup>

This section will first explain the single-subject rule and its application to Marsy's Law. It will then discuss the rationale for the single-subject rule and how it explains Marsy's Law's passage.

##### A. THE SINGLE-SUBJECT RULE

"An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."<sup>245</sup> This seemingly straightforward provision of California's Constitution was designed "to avoid confusion of . . . voters . . . and to prevent subversion of the electorate's will."<sup>246</sup> With the prevention of voter confusion as the overarching goal, scholars have opined that the rule serves three main political purposes: (1) prevent logrolling;<sup>247</sup> (2) prevent riding;<sup>248</sup> and

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240. See *infra* Part IV.

241. Garrett, *supra* note 25, at 1846.

242. *Supra* Parts II and III.

243. Henry, *supra* note 19, at 567.

244. *Infra* Part IV.A.

245. CAL. CONST. art. II, § 8(d).

246. Cal. Family Bioethics Council v. Cal. Inst. Regenerative Med., 55 Cal. Rptr. 3d 272, 284 (Ct. App. 2007) (quoting Senate of Cal. v. Jones, 988 P.2d 1089, 1098 (Cal. 1999)).

247. Logrolling involves combining multiple measures, none of which would pass on its own, into

(3) improve transparency.<sup>249</sup> With respect to the third goal, transparency, a well-functioning direct democracy should separate or combine proposals according to voters' needs for information and not distract voters with irrelevant information.<sup>250</sup>

Despite these goals, legislatures and courts have struggled to define the key term, "subject."<sup>251</sup> Dictionary definitions of the word are of little help since whether two topics fit into the same subject is a matter of abstraction.<sup>252</sup> The California Supreme Court has established that "an initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, *all of its parts are 'reasonably germane'* to each other, and to the general purpose or object of the initiative."<sup>253</sup> Critics of the test argue it is tautological and allows the court to find parts reasonable germane to one another by defining the "subject" at a higher level of generality.<sup>254</sup> And in fact, California courts have generally been lax in enforcement of the single-subject rule.<sup>255</sup>

Proposition 21, the "Gang Violence and Juvenile Crime Prevention Initiative," was approved in 2000.<sup>256</sup> It changed provisions to allow the death penalty for gang-related murder, authorized wiretapping in certain cases, increased punishment for vandalism and graffiti, amended portions of the Three Strikes Law and provisions of the Welfare and Institutions Code concerning the juvenile justice system, changed the confidentiality of juvenile criminal records, and altered various evidentiary rules for juvenile wardship proceedings.<sup>257</sup> Despite these varied changes, the Court determined that all of the parts of Proposition 21 were reasonably germane

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a single proposition that receives majority support. Cooter & Gilbert, *supra* note 231, at 689–90.

248. Riders are unpopular measures that would never pass but are slipped through the lawmaking process, concealed within popular measures. *Id.*

249. *Id.* at 693.

250. *Id. Infra* Part IV.B argues that the ballot initiative process, and particularly the campaign for Marsy's Law, was colored by significant voter confusion.

251. Courtney Paige Odishaw, Note, *Curbing Legislative Chaos: Executive Choice or Congressional Responsibility*, 74 IOWA L. REV. 227, 242 (1988).

252. For example, Lowenstein asks whether the "subjects" of torts and physics could be part of one subject and answers that if the overarching category is "university education," then yes. Daniel Hays Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 939–40 (1983).

253. *Manduley v. Superior Court*, 41 P.3d 3, 28 (Cal. 2002) (quotation marks and citation omitted).

254. Cooter & Gilbert, *supra* note 231, at 710 ("'Germaneness' provides no clear guidance to the correct level of abstraction.").

255. *Id.* at 711 (projecting an upswing in enforcement).

256. *Manduley*, 41 P.3d at 8.

257. *Id.* at 27–28.

to the subject of addressing the problem of violent crime committed by juveniles and gangs.<sup>258</sup>

In 1982, California voters approved Proposition 8, The Victims' Bill of Rights, with a purpose very similar to Marsy's Law: to "ensure[] a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights."<sup>259</sup> Proposition 8 of 1982 amended the state constitution to provide the following: general victims' rights;<sup>260</sup> restitution to victims; a guarantee of safe schools, changes to evidentiary standards; consideration of the public safety before ruling on bail; abolishment of the diminished capacity defense; limits on the insanity defense; sentence enhancements for "habitual criminals"; allowance for victims' statements at all sentencing and parole hearings; limits on plea-bargaining; and limits on sentencing to the Youth Authority.<sup>261</sup> Applying the "reasonably germane" test, the California Supreme Court, in *Brosnahan v. Brown*, concluded that the proposition's "several facets bear[] a common concern . . . promoting the rights of actual or potential crime victims."<sup>262</sup>

In light of the California courts' interpretation of "single-subject," it is unlikely that Marsy's Law violates the single-subject rule. Similar to *Brosnahan*, a court would likely conclude that the overarching purpose of Marsy's Law is to promote the rights of crime victims and that each part of the law is reasonably germane to that purpose. Notably, scholars have proposed different tests that would potentially invalidate Marsy's Law.<sup>263</sup> Despite Marsy's Law passing current single-subject analysis, the concerns of voter confusion and the influence of special interests still pervades the

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258. *Id.* at 29–31.

259. *Brosnahan v. Brown*, 651 P.2d 274, 276 (Cal. 1982) (quoting CAL. CONST. art. I, § 28(a)) (internal quotation marks omitted).

260. These rights include "the right to restitution for financial losses, and the expectation that felons will be 'appropriately detained in custody, tried by the courts, and sufficiently punished so that public safety is protected and encouraged . . .'" *Id.* at 277 (quoting CAL. CONST. art. I, § 28(a)).

261. *Id.* at 277–79.

262. *Id.* at 280.

263. For example, Cooter and Gilbert argue that when a plaintiff contends that an initiative contains two subjects, the inquiry should be whether a majority of voters would support the first component without the second component. If the answer is no, the court should find that the law violates the single-subject rule. Cooter & Gilbert, *supra* note 231, at 720. Under that formulation, it is possible to imagine a set of circumstances that Marsy's Law would fail. For example, a majority of voters may have supported the Victims' Bill of Rights without supporting the parole revocation provisions. Both portions can stand without the other and therefore should be considered two subjects under the Cooter and Gilbert analysis. See also Michael D. Gilbert, *Does Law Matter? Theory and Evidence from Single-Subject Adjudication*, 40 J. LEGAL STUD. 333, 335 (2011) (arguing for a "democratic process theory" that urges judges to examine provisions of a proposition and determine if voters can make independent judgments about them).

passage of the proposition. The remainder of this section discusses these concerns.

## B. VOTER CONFUSION

Ballot initiatives are notoriously obtuse and complex, often incorporating provisions that are “lengthy, complex, technical, carelessly phrased, and ambiguous.”<sup>264</sup> In fact, Eule’s research suggests voters are generally not confident about whether their vote was “wise[ly]” placed.<sup>265</sup> He found confused voters tend not to vote or often vote contrary to their policy preferences.<sup>266</sup> Proposition 9 received the fourth fewest votes of the November 2008 election, suggesting its complexity may have discouraged voter participation.<sup>267</sup> Voters could be confused by a proposition for a number of reasons.<sup>268</sup> For purposes of this Note, the analysis of Marsy’s Law will be limited to the following reasons: (1) the subject matter of the initiative may be so complex that special knowledge is required to understand the proposal; (2) the subject matter may be obscured by a proponent’s simplistic explanation; and (3) the voter may be misled by advertising campaigns and slogans.<sup>269</sup>

### 1. Marsy’s Law Contained Complex Subject Matter

Marsy’s Law involved changes to a variety of specific constitutional and statutory provisions. It altered the California Constitution, added two penal code sections, and amended two additional penal code sections.<sup>270</sup> It altered laws that will not concern a vast majority of citizens, but will greatly affect a minority.<sup>271</sup> As discussed, its provisions regarding parole revocation and length of deferment between parole hearings have already been challenged in court, providing hundreds of pages of legal opinion and interpretation.<sup>272</sup>

Scholars suggest that amendments to the California Constitution may be particularly difficult to understand. It has been amended over five

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264. Eule, *supra* note 62, at 1516.

265. A “poll of voters revealed that only 15 percent of those surveyed felt that they consistently knew enough about initiative measures to make a wise decision.” *Id.* at 1516 (footnote omitted).

266. *Id.* at 1516–18.

267. *Supra* note 3 and accompanying text.

268. Ray, *supra* note 24, at 1104.

269. *Id.* Ray also found that the length of the proposal, the voter’s education level, and the voter’s lack of time and resources might make understanding difficult. *Id.*

270. MARSY’S LAW, *supra* note 2, §§ 5–6.

271. *See supra* Part II.

272. *See supra* Parts II and III.

hundred times since its adoption in 1879.<sup>273</sup> Its length “produce[s] an instrument bad in form, inconsistent in particulars, loaded with unnecessary detail, [and] encumbered with provisions of no permanent value.”<sup>274</sup> It fulfills the fears of Chief Justice John Marshall: particularly lengthy constitutions “would probably never be understood by the public.”<sup>275</sup>

Marsy's Law added a lengthy “Victims’ Bill of Rights” to Article I, section 28 of the California Constitution. It includes unnecessary truths. For example, it states, “Criminal activity has a serious impact on the citizens of California” and “California’s victims of crime are largely dependent upon the proper functioning of government, upon the criminal justice system and upon the expeditious enforcement of the rights of victims of crime.”<sup>276</sup> It continues, a victim of crime is “[t]o be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process.”<sup>277</sup> These statements, while true, have long been recognized as such and add little to California’s legal system. Instead, these sweeping findings and declarations obscure the significant changes beneath layers of complex jargon.

Within the pages of victims’ rights, Marsy’s Law amended the California Constitution to provide that a victim has the right

[t]o reasonable notice of and to reasonably confer with the prosecuting agency, upon request, regarding, the arrest of the defendant if known by the prosecutor, the charges filed, the determination whether to extradite the defendant, and, upon request, to be notified of and informed before any pretrial disposition of the case.<sup>278</sup>

This right is the sixth in a list of seventeen individual victim rights, follows a list of eight findings and declarations, and precedes six collective rights held by all California residents.<sup>279</sup> This single clause may have significant consequences.

The California Supreme Court has held that “a crime victim [does not

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273. Manheim, Caragozian & Warner, *supra* note 14, at 398 (footnote omitted).

274. *Id.* at 401 (quoting Pat Ooley, *State Governance: An Overview of the History of Constitutional Provisions Dealing with State Governance*, in CAL. CONST. REVISION COMM’N, CONSTITUTION REVISION: HISTORY AND PERSPECTIVE 3, 6 (1996), available at <http://californiacityfinance.com/CCRChistory.pdf>) (internal quotation marks omitted).

275. *Id.* at 400–01 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 407(1819)) (internal quotation marks omitted).

276. MARSY’S LAW, *supra* note 2, § 4.1 (codified at CAL. CONST. art. I, § 28(a)).

277. CAL. CONST. art I, § 28(b)(1).

278. *Id.* § 28(b)(6).

279. *Id.* §§ 28(a)–(g).

have] a legally enforceable interest, public or private, in the commencement, conduct, or outcome of criminal proceedings against another.”<sup>280</sup> The Court recognized prosecutors must make decisions “legitimately founded on the complex considerations necessary for the effective and efficient administration of law enforcement” without intervention by victims pursuing personal concerns.<sup>281</sup> Marsy’s Law purports to change this by granting victims the ability to “enforce the rights enumerated . . . in any trial or appellate court with jurisdiction over the case as a matter of right.”<sup>282</sup> Thus, Marsy’s Law at least purports to expand the involvement of victims at every phase of criminal prosecution. This limits the prosecution’s ability to weigh whether to pursue conviction, offer a plea bargain, or drop the charges in light of scarce resources and the strength of the case.<sup>283</sup> Oddly, Marsy’s Law allows “victims” to be involved prior to conviction, that is, before it is actually determined whether the person is actually a victim at all.<sup>284</sup> It presents the possibility that prosecutors will lose the ability to exact “evenhanded justice” in exchange for pursuing convictions for especially persistent or vindictive victims.<sup>285</sup> Marsy’s Law seeks to personalize a justice system intentionally depersonalized.<sup>286</sup>

## 2. The Subject Matter of Marsy’s Law Was Obscured by a Simplistic Explanation

Proponents of propositions will undoubtedly have biases that they will seek to project onto the electorate. For this reason, California entrusts the attorney general with the task of preparing impartial ballot titles and summaries for each initiative submitted to the voters.<sup>287</sup> The attorney general must offer a condensed version of the proposed ballot initiative that is true, impartial and not misleading.<sup>288</sup> Marsy’s Law’s complexity and broad ramifications were obscured by overly simplistic explanations by both its proponents and the California attorney general.

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280. *Dix v. Superior Court*, 807 P.2d 1063, 1066 (Cal. 1991).

281. *Id.* (quoting *People v. Keenan*, 758 P.2d 1081, 1098 (Cal. 1988)) (internal quotation marks omitted).

282. MARSY’S LAW, *supra* note 2, § 4.1 (codified at CAL CONST. art. I, § 28(c)(1)). This Note does not examine whether this change conflicts with other California Constitution guarantees or the U.S. Constitution. Instead, it focuses on the potential effects of this provision.

283. *2008 California Criminal Law Ballot Initiatives*, *supra* note 103, at 179–80.

284. *Id.*

285. *Id.* at 181–82 (citation omitted).

286. *Id.*

287. *Yes on 25, Citizens for an On-Time Budget v. Superior Court*, 118 Cal. Rptr. 3d 290, 294–95 (Ct. App. 2010).

288. *Id.*

Proponents of Marsy's Law frequently cited its tragic origins.<sup>289</sup> The "Argument in Favor of Proposition 9," written by proponents and unchecked for accuracy by any official agency, began,

No pain is worse than losing a child or a loved one to murder . . . EXCEPT WHEN THE PAIN IS MAGNIFIED BY A SYSTEM THAT PUTS CRIMINALS RIGHTS AHEAD OF THE RIGHTS OF INNOCENT VICTIMS. The pain is real. It's also unnecessary to victims and costly to taxpayers. Marsy Nicholas was a 21-year old college student at UC Santa Barbara studying to become a teacher for disabled children. Her boyfriend ended her promising life with a shotgun blast at close range. Due to a broken system, the pain of losing Marsy was just the beginning. Marsy's mother, Marcella, and family were grieving, experiencing pain unlike anything they'd ever felt. The only comfort was the fact that Marsy's murderer was arrested. Imagine Marcella's agony when she came face-to-face with Marsy's killer days later . . . at the grocery store! How could he be free? He'd just killed Marcella's little girl. This can't be happening, she thought. Marsy's killer was free on bail but her family wasn't even notified. He could've easily killed again. CALIFORNIA'S CONSTITUTION GUARANTEES RIGHTS FOR RAPISTS, MURDERERS, CHILD MOLESTERS, AND DANGEROUS CRIMINALS.<sup>290</sup>

A similar account is provided on the Marsy's Law website<sup>291</sup> and the Findings and Declarations of the proposed law itself.<sup>292</sup>

It is unquestionable that Marsy and her family experienced an incredible tragedy. However, the story is misleading for at least three reasons. First, it presents one tragic case as justification for harsher punishments affecting over 32,000 California inmates.<sup>293</sup> Marsy's Law highlights the protections afforded to "dangerous" "rapists, murderers, [and] child molesters"<sup>294</sup> as unjustified, glossing over the key issue for parole: parole will not be granted unless the inmate ceases to pose a risk to public safety.<sup>295</sup> Second, it capitalizes on "voters' concern and empathy for

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289. See, e.g., CAL. ATT'Y GEN., OFFICIAL VOTER INFORMATION GUIDE: PROPOSITION 9 ARGUMENTS AND REBUTTALS 62 (2008) [hereinafter ARGUMENTS AND REBUTTALS], available at <http://vig.cdn.sos.ca.gov/2008/general/argu-rebut/pdf/prop9-a-and-r.pdf>.

290. *Id.*

291. About, MARSY'S LAW FOR ALL, <http://marsyslawnforall.org/about/> (last visited Dec. 14, 2012) ("While criminals have more than 20 individuals rights spelled out in the U.S. Constitution, the surviving family members of murder victims have none. But the passage of Marsy's law changed all that in California.").

292. MARSY'S LAW, *supra* note 2, § 2.

293. WEISBERG, MUKAMAL & SEGALL, *supra* note 41, at 3.

294. ARGUMENTS AND REBUTTALS, *supra* note 289, at 62.

295. *In re Lawrence*, 190 P.3d 535, 546 (Cal. 2008).

victims of crime”<sup>296</sup> and ignores the immense fiscal, legal, and policy concerns. Finally, Marsy’s story and the story of her murderer appear to present a flaw in the bail process. Despite this, the proposition adds the word “bail” only once, stating that the “safety of the victim and the victim’s family [is to be] considered in fixing the amount of bail and release conditions for the defendant.”<sup>297</sup> This addition is of questionable value since the California Constitution previously provided that public safety is the primary consideration in setting bail.<sup>298</sup> Aside from requiring judges to consider the victims’ safety in addition to public safety, Marsy’s Law places no new restrictions or requirements on setting bail. Marsy’s Law addresses potential flaws in the criminal justice system unrelated to the Nicholas family’s trauma.

Marsy’s Law’s proponents also highlighted the importance of increased victims’ rights, even naming the proposition the “Victims’ Bill of Rights Act of 2008: Marsy’s Law.”<sup>299</sup> This is problematic for two main reasons. First, it conflates “victims’ rights” and “criminal justice.” Though a victim’s participation in the criminal justice system is valuable for dignity, catharsis, and fairness purposes,<sup>300</sup> it is not to be confused with the constitutional due process protections afforded criminal defendants and convicts.<sup>301</sup> Furthermore, victims’ rights have not traditionally extended to personally aiding in the prosecution, conviction, and postconviction of criminals.<sup>302</sup> Second, Marsy’s Law largely repeats Proposition 8, the Victims’ Bill of Rights, approved in 1982.<sup>303</sup> The 1982 proposition included provisions for notifying victims and allowing victims to be heard throughout the legal process, including the right to make statements at parole hearings.<sup>304</sup> In fact, since the 1982 proposition was enacted, victims

296. 2008 California Criminal Law Ballot Initiatives, *supra* note 103, at 190.

297. MARSY’S LAW, *supra* note 2, § 4.1 (codified at CAL. CONST. art. I, § 28(b)(3)).

298. Compare CAL. CONST. art. I, § 28(e) (indicating law before Marsy’s Law), with CAL. CONST. art. I, § 28(f)(3) (indicating law after Marsy’s Law).

299. MARSY’S LAW, *supra* note 2, § 1.

300. Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocation, Defendant Allocation, and the Crime Victims’ Rights Act*, 26 YALE L. & POL’Y REV. 431, 435 (2008).

301. For example, some scholars at the time of Marsy’s Law’s passage feared its provisions regarding discovery, conferment with prosecution, and truth in sentencing could violate constitutionally protected due process rights. 2008 California Criminal Law Ballot Initiatives, *supra* note 103, at 180–82, 184; *In re Lawrence*, 190 P.3d 535, 548–49 (Cal. 2008) (reaffirming the inmate’s due process right against arbitrary and capricious parole decisions).

302. *Supra* notes 280–83 and accompanying text.

303. CAL. SEC’Y OF STATE, CALIFORNIA BALLOT PAMPHLET: PROPOSITION 8: TEXT OF PROPOSED LAW 33 (1982), available at [http://librarysource.uchastings.edu/ballot\\_pdf/1982p.pdf](http://librarysource.uchastings.edu/ballot_pdf/1982p.pdf) (“This amendment shall be known as ‘The Victims’ Bill of Rights.’”).

304. *Id.*

who exercised their rights have enjoyed significant power. For example, based on a sample of hearings from October 1, 2007 to January 28, 2010,<sup>305</sup> only 5 percent of inmates were granted parole when the victim was present compared to 13.8 percent when the victim was not present.<sup>306</sup> Thus, the message that Marsy's Law "levels the playing field"<sup>307</sup> is misleading. The law in place prior to Marsy's Law functionally guaranteed, for those victims willing to exercise it, the power to reduce an inmate's chance at parole by over two-and-a-half times.<sup>308</sup> Instead, Marsy's Law most drastically changes other areas of the criminal law process.

The California attorney general and the legislative analyst also failed to provide a necessarily clear summary of Marsy's Law to California voters. The "Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact" provides,

Potential loss of future state savings on prison operations and potential increased county jail operating costs that could collectively amount to hundreds of millions of dollars annually, due to restricting the early release of inmates to reduce facility overcrowding.

Net savings in the low tens of millions of dollars annually for the administration of parole hearings and revocations, unless the changes in parole revocation procedures were found to conflict with federal legal requirements.<sup>309</sup>

Though both statements are true, the summary ignores the larger budgetary concern: the increased incarceration resulting from decreased parole hearings.<sup>310</sup> Regardless of whether California sought to impose an early release program, term-to-life inmates would most likely serve increased sentences as a result of Marsy's Law.<sup>311</sup> Assuming, as research suggests, Marsy's Law, on average, increases the length of incarceration by approximately two years,<sup>312</sup> the term-to-life population was 32,000,<sup>313</sup> and an inmate costs \$47,000 per year at the time of the law's passage,<sup>314</sup>

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305. About 50 percent of the sample had hearings prior to Marsy's Law and 50 percent had hearings after Marsy's Law. WEISBERG, MUKAMAL & SEGALL, *supra* note 41, at 18.

306. *Id.* at 20.

307. ARGUMENTS AND REBUTTALS, *supra* note 289, at 62.

308. *Supra* notes 305–06 and accompanying text.

309. VOTER INFORMATION GUIDE, *supra* note 77, at 58.

310. *See supra* notes 72–78 and accompanying text.

311. *Supra* Part III.C.

312. *See supra* note 213 and accompanying text.

313. WEISBERG, MUKAMAL & SEGALL, *supra* note 41, at 3. This estimate is likely conservative since the population will likely increase due to Marsy's Law and California's Three-Strikes Law. *Id.* at 6.

314. LEGISLATIVE ANALYST'S OFFICE, *supra* note 74. This estimate is also likely conservative

Marsy's Law should have been projected to impose an additional cost of slightly over \$3 billion. This number dwarfs the projected "low tens of millions of dollars" savings and may have significantly changed voter perception. In fact, the 2008 voters appeared to have been heavily influenced by the projected budget impact of other propositions. Propositions 5<sup>315</sup> and 6<sup>316</sup> were soundly rejected, in part, for requiring allocations of potentially over \$1 billion and at least \$965 million, respectively.<sup>317</sup> Proposition 6 was rejected by 70 percent of voters,<sup>318</sup> despite championing a similarly harsh-on-crime message as Marsy's Law.<sup>319</sup> This suggests that voters would have been highly influenced by the potential budgetary consequences of Marsy's Law if they were better informed.

### 3. The Advertising Campaign and Special Interests Mised California Voters

The preceding section discussed the potential flaws in characterizing Marsy's Law as an act championing victims' rights. This section will focus on the significant impact special interests, particularly the interests and wealth of Henry Nicholas, had on misleading the public into that perception.

As discussed, the ballot initiative process was designed to restrain the influence special interests—particularly the railroad industry—had on the California legislature.<sup>320</sup> Ironically, critics of direct democracy have lamented the influence "well-endowed interest groups, corporations, and individuals" have on the process.<sup>321</sup> Wealth is important in qualifying initiatives for the ballot,<sup>322</sup> passing or defeating propositions,<sup>323</sup> and

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since Marsy's Law and California's Three-Strikes Law will likely incarcerate California's oldest and most costly inmates longer. *See Williams, supra* note 75, at A19; *supra* note 75 and accompanying text.

315. Proposition 5 sought to relieve California's prisons by reforming California's policies towards nonviolent drug offenders. *2008 California Criminal Law Ballot Initiatives, supra* note 103, at 190.

316. Proposition 6 sought to expand law enforcement and probation spending to initiate a "comprehensive anti-gang and crime reduction measure [to] bring more cops and increased safety to our streets and greater efficiency and accountability to public safety programs and agencies that spend taxpayer money." *Id.* at 194 (citation omitted) (internal quotation marks omitted).

317. *Id.* at 192, 194.

318. *Id.* at 190 n.118.

319. Proposition 6 would have imposed increased sentences for gang-related offenses, made it easier to try juveniles as adults for gang-related crimes, and changed the legal procedures for bringing lawsuits against gang members. *Id.* at 194–95.

320. *Supra* notes 13–14 and accompanying text.

321. *E.g., Garrett, supra* note 25, at 1846–47.

322. *Id.* at 1847 ("[M]oney increasingly appears to be a necessary condition for access; in a

confusing voters.<sup>324</sup>

The main proponent of Marsy's Law was Henry Nicholas, Marsy's brother.<sup>325</sup> He is the cofounder of Broadcom and currently valued at \$1.3 billion by *Forbes* magazine.<sup>326</sup> He personally contributed \$4,851,406,<sup>327</sup> accounting for 94 percent of the total amount spent to support the passage of Marsy's Law.<sup>328</sup> Proponents of Marsy's Law spent a total of \$5,149,931 on the campaign,<sup>329</sup> as compared to the \$2,356,567 spent by various groups simultaneously opposing Marsy's Law and Proposition 6.<sup>330</sup> The Marsy's Law campaign spent two-and-a-half times the amount on "campaign consultants" as its opponents and \$75,000 on campaign literature and mailings, after extensive petition circulating.<sup>331</sup> These expenditures allowed proponents to frame the issue as one of "victim's rights" rather than costly criminal law reform.

The above data is concerning mainly because it undermines the basis for the ballot initiative system, a response to a corrupt legislature influenced by special interests.<sup>332</sup> Marsy's Law reflects the unfortunate state of the ballot initiative. Due to his significant wealth, Henry Nicholas was able to amend the California Constitution to respond to a tragic event in his life. While the group most affected by Marsy's Law—term-to-life inmates—was left voiceless, the ballot initiative system allowed Henry

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growing number of elections, the only proposals presented to the people are those that qualify with the help of well-compensated political consultants.") (footnote omitted).

323. *Id.*

324. Eule, *supra* note 62, at 1517. ("This past year saw the tobacco industry spending twenty-three million dollars in an effort to defeat an initiative intended to raise cigarette taxes. The industry ads labelled it 'the first initiative which actually creates crime' (apparently on the bizarre theory . . . that higher tobacco taxes would encourage cigarette smuggling).")

325. *About, MARSY'S LAW FOR ALL*, *supra* note 291.

326. *Forbes 400 Richest Americans: Henry Nicholas, III*, FORBES, <http://www.forbes.com/profile/henry-nicholas/> (last updated Sept. 2012).

327. *California Proposition 9, Marsy's Law (2008)*, *supra* note 4. Mr. Nicholas also contributed \$1 million to the campaign for Proposition 6. *Yes on 6 Committee to Take Back Our Neighborhoods*, CAL. SEC'Y OF STATE DEBRA BOWEN, <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1301754&session=2007&view=received>, (last visited Dec. 14, 2012).

328. *California Proposition 9, Marsy's Law (2008)*, *supra* note 4.

329. *Id.*

330. Known collectively as the "Communities for Safe Neighborhoods and Fiscal Responsibility," these groups included the California Teachers Association (contributing \$955,911), the California State Council of Service Employees (\$572,805), the California Democratic Party (\$467,129), and the California Federation of Teachers (\$100,000). *Id.*

331. *Marsy's Law: Justice for Crime Victims, Yes on Prop. 9*, CAL. SEC'Y OF STATE DEBRA BOWEN, <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1303492&session=2007&view=expenditures>. Petition circulating cost proponents of Marsy's Law \$3,831,346.91. *Id.*

332. *Supra* notes 12–14 and accompanying text.

Nicholas to use his wealth and platform to significantly influence law.<sup>333</sup>

## V. CONCLUSION

The passage and constitutionally suspect implementation of Marsy's Law is not surprising given the well-documented flaws in California's ballot initiative system. Marsy's Law ignored the representative democratic protections afforded minority groups and imposed harsh conditions on term-to-life inmates. It bypassed the rigorous legislative process, avoided checks and balances, debate, revision, and improvement and as a result has already been determined constitutionally invalid in some parts and constitutionally suspect in others. Finally, Marsy's Law reflects the serious policy concerns inherent in allowing large, complicated proposals to be enacted by majority vote. Marsy's Law was confusing and heavily influenced by Henry Nicholas' wealth and tragic story. However well-intentioned Marsy's Law may have been, both California and federal courts must restrain the effects it has on the criminal justice system.

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333. Henry Nicholas continues to use his wealth and influence to rally victims' rights groups in pursuit of a U.S. constitutional amendment. *About, MARSY'S LAW FOR ALL*, *supra* note 291.