

# A Janus-Faced Approach: Correctional Resistance to Washington State's *Miller* Fix

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## I. INTRODUCTION

In 1992, I shot and killed Tecle Ghebremichaele and seriously wounded his business partner, Efram Isak, inside their neighborhood convenience store. I committed these crimes when I was fourteen years old. Despite my youth, prosecutors believed that my just deserts was a mandatory sentence of life without the possibility of parole, which the judge reluctantly imposed.<sup>1</sup> Twenty years later, the United States Supreme Court decreed that sentencing a juvenile to such a term of confinement violates the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>2</sup> Consequently, the Washington legislature made retroactive changes to the state's sentencing guidelines, thus requiring that I be resentenced to an indeterminate life sentence with a mandatory minimum term of twenty-five years.<sup>3</sup> As a result, I am eligible for parole. My fate is now in the hands of the Indeterminate Sentence Review Board ("Board").<sup>4</sup>

Given that I have been confined since adolescence, correctional officials believe that if I am granted parole, the release process should proceed gradually—as if my psyche might snap were I suddenly ejected from the comforts of prison into society. This is a notion that I reject entirely.

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<sup>1</sup> See *State v. Bourgeois*, 917 P.2d 1101, 1103 (Wash. Ct. App. 1996), *rev'd*, 945 P.2d 1120 (Wash. 1997).

<sup>2</sup> *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

<sup>3</sup> See Erin Heffernan, *New Law Puts Killer Who Got Life Sentence as a Teen on Path to Parole*, SEATTLE TIMES (June 21, 2014, 2:31 AM), <http://www.seattletimes.com/seattle-news/new-law-puts-killer-who-got-life-sentence-as-a-teen-on-path-to-parole/> [<https://perma.cc/X89B-3HXR>]; WASH. REV. CODE §§ 10.95.035(1), 10.95.030(3)(a)(i) (2015).

<sup>4</sup> The Board (which is also referred to as the "ISRB") is a division of the Washington Department of Corrections, but its members are required to "exercise independent judgment when making any decisions concerning offenders. These decisions include, but are not limited to, decisions concerning offenders' release, revocation, reinstatement, or the imposition of conditions of supervision." WASH. REV. CODE § 9.95.0002(8) (2011).

Accordingly, this commentary addresses the requirement of the Washington Department of Corrections (“DOC”) that prisoners—who have spent twenty or more years confined for crimes that they committed prior to the age of eighteen—agree to a structured, *measured* release process to return to their communities.<sup>5</sup> I begin by tracing my personal history in order to provide context as to why I take issue with this practice and policy. I then highlight how the Board is violating its duty to promptly release prisoners that it finds are unlikely to commit crimes if set free—all in an effort to promote the DOC’s notion of sound public policy. I will end by exploring the inherent flaws in the policy that governs this practice, along with the components that are inconsistent with the statutory amendments that were made in response to *Miller v. Alabama*.

## II. THE ROAD TO REDEMPTION

No one who knew me during my first decade of life would have imagined that one day I would be in prison. I was a parochial school student. I was a ballet and tap dancer, too. I even starred in a toothpaste commercial, dancing in a tuxedo and singing about a college scholarship being awarded by *Crest*. It was obvious to everyone that I had a bright future ahead of me. Nobody who witnessed me dancing and singing could foresee that my life would unravel over the next four years and leave a trail of tears, that abuse and neglect would destroy my dreams and come to shape my destiny, how by the age of thirteen, I would be living alone on the streets. Yet tragically, this is exactly what happened.<sup>6</sup>

Behind the image of normalcy created by my attending Catholic school and taking dance lessons, my middle class childhood was actually “characterized by several types of traumatic experience, including physical abuse (via brother); emotional, guidance, and supervisory neglect (via both parents); domestic conflict and violence (via parents); observed abuse of sibling (via father and paternal grandmother); and emotional abuse (via father and paternal grandmother).”<sup>7</sup> At

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<sup>5</sup> See DOC POLICY no. 320.120, Directive § IX.

<sup>6</sup> The following account of my adverse life circumstances is not meant to excuse these crimes; rather, it is to provide insight into how a child can develop into a teenager who can commit such crimes. See, e.g., Nick Straley, *Miller’s Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 WASH. L. REV. 963, 980–81 (2014) (“Collectively, the family and home environments of Washington’s juvenile lifers were abysmal, marked by abuse and neglect, chemical dependency, homelessness, and other negative forces. . . . Additionally, many of these children had parents who suffered from mental illness or substance abuse, were murdered, or were incarcerated themselves. . . . At the times of their crimes, only a few of them were on track to graduate from high school and many had completely dropped out of school—one as early as the fourth grade.”) (citations omitted).

<sup>7</sup> TIFFANY L. CUNNINGHAM, MITIGATION INVESTIGATION REPORT 18 (Apr. 1, 2017), in *Mitigation Report Submitted by the NAACP Legal Defense & Education Fund to the ISRB Re: Jeremiah Bourgeois (July 28, 2017)* [hereinafter *Mitigation Report*] (on file with author).

the age of twelve my rapid evolution from victim to perpetrator began.<sup>8</sup> Juvenile court judges and social workers saw the need to intervene, but, inevitably, both lacked the necessary resources to do so effectively. Indeed, records illustrate that the system had ample warning that a tragedy was forthcoming.

A Personal Experience Inventory test administered shortly after I (“JJ”) turned thirteen revealed “low self-esteem” and indicated I “thought drug use is normal, [and believe I have] a parent ruined family.”<sup>9</sup> Nine months later, juvenile court records declared that my “family situation is a confused mess [and noted that the] mother reports she hasn’t seen JJ in 2 months; JJ living in a crack house.”<sup>10</sup> Prior to the instant offense, the Washington State Department of Social and Health Services reported that “JJ is a runaway, having problems in school, affiliated with gangsters, father has alcohol problem, child needs therapeutic intervention due to parent-child disengagement issues. Child has not been to the dentist since age 11.”<sup>11</sup> Shortly thereafter, I killed a man after he testified against my older brother and I wounded another.<sup>12</sup>

Months after my arrest, a juvenile court judge decided that I should be tried as an adult based upon the seriousness of my crimes along with other factors that justified declining juvenile jurisdiction.<sup>13</sup> This made no sense to me given that I was only fourteen and believed, naively, that confinement in a juvenile detention facility until I was twenty-one years of age was the worst thing, legally, that could happen to me. I was just as perplexed when my lawyer informed me that the murder charge was going to be raised to a higher offense.<sup>14</sup> I thought that first degree murder was the most serious crime a person could be charged with, but with sorrow he explained the ramifications of *aggravated circumstances*.<sup>15</sup> Over the next two weeks I slept a lot and ate very little. Following my conviction a year

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<sup>8</sup> Jeremiah Bourgeois, *The Irrelevance of Reform: Maturation in the Department of Corrections*, 11 OHIO ST. J. CRIM. L. 149, 151 (2013) [hereinafter Bourgeois, *The Irrelevance of Reform*] (“In the span of less than three years, I became a delinquent, then a runaway, then a drug dealer, then a killer.”).

<sup>9</sup> Mitigation Report, *supra* note 7, at 32.

<sup>10</sup> *Id.* at 21.

<sup>11</sup> *Id.* at 20.

<sup>12</sup> *State v. Bourgeois*, 945 P.2d 1120, 1122 (Wash. 1997) (“That trial arose out of a charge against [Jeremiah] Bourgeois’s brother for the shooting of Ghebremichaele and the third co-owner of the High Point Market, Dagnew Andemichael, at the market on January 5, 1992.”).

<sup>13</sup> *See State v. Holland*, 656 P.2d 1056, 1061 n.2 (Wash. 1983) (listing the criteria for determining whether waiver of the juvenile court’s jurisdiction to adult court is appropriate).

<sup>14</sup> *See WASH. REV. CODE* § 10.95.020(8)(a)-(b) (2003) (a person is guilty of aggravated murder if he kills a witness because of their performance of official duties).

<sup>15</sup> *See id.*; *WASH. REV. CODE* § 10.95.030(1) (2015) (“A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation.”).

later, I became one of the youngest children in Washington State to be sentenced to life without the possibility of parole.<sup>16</sup>

When I was awaiting transfer to the DOC, I was held in an adult detention facility. During my stay, I came to understand how perilous the years ahead would be after I was knocked unconscious by another prisoner for being the wrong race in the wrong place. The assault was executed directly in front of two jail guards who were escorting me to the cell in segregation where I was being housed for my protection. Upon being awakened, I found my assailant's audacity just as shocking as being viciously attacked, by a racist, without any provocation. Yet, as traumatic as the experience was, I counted my blessings in the infirmary. I wasn't raped. I wasn't killed. I suffered only a broken nose, a concussion, and abrasions, because, fortunately, the guards intervened before the man's stomps and kicks could inflict permanent injuries. This incident at age fifteen taught me a valuable lesson: I was on my own; I could not depend on others to ensure my safety; and if I did not protect myself by any means necessary, I would be prey to extortionists, rapists, and other sociopaths in the penitentiary.<sup>17</sup>

This brutal assessment was reinforced once I arrived in prison. Shortly after being sent to the receiving unit, a teenager that I befriended, "Scott," was raped.<sup>18</sup> I quickly learned from Scott's mistakes.<sup>19</sup> I saw the truth without needing anyone to tell me that "when you submit in spirit to aggressors or to an unjust and impossible situation, you do not buy yourself any real peace. You encourage people to go further, to take more from you, to use you for their own purposes."<sup>20</sup> I therefore geared myself for the battles to come and, once I overcame my trepidation, I went to war in order to establish a violent reputation.<sup>21</sup> For the next

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<sup>16</sup> Straley, *supra* note 6, app. A at 1007.

<sup>17</sup> *Id.* at 986 n.142 ("Entering prison at a young age is particularly dangerous. Youth incarcerated in adult prisons are five times more likely to be victims of sexual or physical assault than are adults.") (citations omitted).

<sup>18</sup> For a harrowing account on how such rapes are accomplished, see James Kraze, *Prisoners Talk About Going Up in Another Inmate "Dookie Love,"* YOUTUBE (Mar. 26, 2013), <https://www.youtube.com/watch?v=Q5cTgyLZdJk> [<https://perma.cc/4JVG-J3CB>].

<sup>19</sup> "This is for all you young guys out there, or for any of you who are good looking in the least. Begin by not shaving, unless you're really ugly. If your beard is spotty, so be it. A nice haircut, or even combed hair, is not a good idea. Rough yourself up a bit. You want to look as unappealing and as unapproachable as possible, especially at the start of your sentence, before you've had a chance to establish your reputation as a tough guy whose bootie is not for sale." TJ Granack, *Welcome to the Steel Hotel: Survival Tips for Beginners*, in *THE FUNHOUSE MIRROR: REFLECTIONS ON PRISON 9* (2000).

<sup>20</sup> 50 CENT & ROBERT GREENE, *THE 50<sup>TH</sup> LAW* 131 (2009).

<sup>21</sup> "The best way to fight off aggressors is to keep them from attacking you in the first place. To accomplish this you must create the impression of being more powerful than you are. Build up a reputation: You're a little crazy. Fighting you is not worth it. You take your enemies with you when you lose. Create this reputation and make it credible with a few impressive—impressively violent—acts. Uncertainty is sometimes better than overt threat: if your opponents are never sure what messing with you will cost, they will not want to find out. Play on people's natural fears and anxieties to make them think twice." ROBERT GREENE, *THE 33 STRATEGIES OF WAR* 123 (2006).

seven years, my life was “defined by violence. I spent five of those years in [disciplinary] segregation for being violent. Administrators probably thought it was all senseless violence. Yet Scott’s experience showed me that being violent made perfect sense.”<sup>22</sup>

After my ninth year of imprisonment, two events changed the direction of my life. The first involved a prisoner who succeeded in having his sentence reduced by seven years. He did it on his own without legal assistance by filing a *pro se* petition attacking his judgment and sentence. I was amazed at what he accomplished. However, when I expressed my admiration he replied, “If I can do this, there’s no reason you can’t—as smart as *you* are.” As I reflected on his response over the next several days, I began to recognize how much unrealized potential there was in me. I also came to see that imprisonment did not make everything that I could envision impossible to achieve—it only limited the resources and possibilities available to me. The second event took place months later when a prisoner committed suicide in the cell next to mine.<sup>23</sup> In the few short weeks that we were “neighbors,” we had grown close due to our similar circumstances. He too had been incarcerated for violent crimes that he committed when he was a minor and had been tried as an adult. He too was sentenced to spend the rest of his life confined and his appeals had been denied. Now he was dead. Apparently, there was nothing he could envision that made life worth living—so he chose to end it.<sup>24</sup> Even in grief, I saw quite clearly that the proximate cause of his death was hopelessness.

These two events had a profound effect on me. I concluded that losing hope was far more dangerous than any physical threat I might face in the penitentiary. The new reality of my situation was this: Enduring a life-without-parole sentence would require me to rise above my circumstances. To do this, I vowed that I would no longer tolerate being at an intellectual disadvantage when dealing with correctional staff, for knowledge is power and I needed higher learning to counterbalance the scales. I also decided to study the law continuously, for with such knowledge I could help not only myself, but others confined with me, by seeking to hold our keepers accountable when they acted arbitrarily or capriciously.<sup>25</sup> Unfortunately, by the time I had this epiphany, higher education programs had been eliminated from Washington’s correctional system by

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<sup>22</sup> Jeremiah Bourgeois, *Fear Factor*, MINUTES BEFORE SIX (Sept. 11, 2014, 5:42 PM), <http://minutesbeforesex.blogspot.com/2014/09/fear-factor.html> [https://perma.cc/MXR9-KGWS].

<sup>23</sup> Jeremiah Bourgeois, *Nil Desperandum*, MINUTES BEFORE SIX (Mar. 29, 2013, 7:55 PM), <http://minutesbeforesex.blogspot.com/2013/03/nil-desperandum.html> [https://perma.cc/7JZP-BX75].

<sup>24</sup> “But even if each and every case of suicide had not been *undertaken* out of a feeling of meaninglessness, it may well be that an individual’s impulse to take his life would have been *overcome* had he been aware of some meaning and purpose worth living for.” VIKTOR E. FRANKL, *MAN’S SEARCH FOR MEANING* 141–42 (2006).

<sup>25</sup> “All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.” *United States v. Lee*, 106 U.S. 196, 220 (1882).

legislative decree.<sup>26</sup> Congress had also excluded prisoners from receiving federal financial aid, making college degrees through distance learning beyond most prisoners' means.<sup>27</sup> Worse yet, I learned that many DOC administrators subscribe to the proverb that "in the land of the blind, the one-eyed man is king," and thus find it in their best interest to hamstring prisoners' pursuit of higher learning. These barriers had to be overcome to make my dreams a reality.

Therefore, after administrators spent years refusing to allow me to enroll in a distance learning program, I began writing colleges to have outdated textbooks donated to me so I could study independently.<sup>28</sup> When I was not given enough time to conduct legal research, I obtained a job in the law library and studied caselaw surreptitiously while performing my duties. While other prisoners spent money from family and friends on drugs and gambling, I used the \$150 that was available to me each month to take a few correspondence courses yearly. When others mocked me as I quietly studied, I refused to let their ignorance deter me. In the end, the education that I obtained transformed me.<sup>29</sup> As I highlight in *The Irrelevance of Reform: Maturation in the Department of Corrections*:

The value of philosophy, law, and history impressed itself on my life when I was drowning in the prison subculture, surrounded by nothing but bars and facing nothing but time. I had spent almost a decade doing little more than fighting prisoners and assaulting guards, until I somehow found the strength to turn my anger into something positive. Now I write term papers and legal briefs that benefit both me and others confined with me. My transformation has affected not only those who knew me when I was a menace, but also those who are just starting to serve their sentences. They see me as a role model and see what can be accomplished in spite of one's circumstances. No longer confined to an existence that the prison subculture glorifies, my intellect rather than

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<sup>26</sup> See Carol Estes, *School of Second Chances*, YES! MAGAZINE (July 1, 2011), <http://www.yesmagazine.org/issues/beyond-prisons/school-of-second-chances> [https://perma.cc/E8J7-5W8J].

<sup>27</sup> Prior to the Violent Crime Control and Law Enforcement Act of 1994, Pell Grants were "the primary source of financial support for postsecondary correctional education. Originally, qualified prisoners applied for a Pell grant and took approved educational curricula through correspondence or Inside-Out programs." KEESHA M. MIDDLEMASS, *CONVICTED AND CONDEMNED: THE POLITICS AND POLICIES OF PRISONER REENTRY* 116 (2017).

<sup>28</sup> Bourgeois, *The Irrelevance of Reform*, *supra* note 8, at 153. ("For years, my requests to pursue higher education—at my own expense—were denied 'per policy' until, finally, I was transferred to a facility where the administrators decided that I did, in fact, meet the eligibility requirements for enrollment in a distance-learning program. The policy governing this decision remained; only those pulling the strings had changed. Through this experience, I learnt the meaning of arbitrary and capricious decision-making. Since this experience, I find it difficult not to despise these people.")

<sup>29</sup> See Straley, *supra* note 6, at 982 ("Many of the men currently serving life without parole illustrate the degree to which rehabilitation is possible as children age and become adults.")

ruthlessness is the basis for self-respect. This is the essence of rehabilitation.<sup>30</sup>

In the years since, I have spoken to legislators and officials about the need for sentencing reform.<sup>31</sup> I regularly share my insights in a monthly column that I write for *The Crime Report*.<sup>32</sup> I have highlighted injustices suffered by those confined with me.<sup>33</sup> I have committed myself to exposing misconduct within the DOC.<sup>34</sup> Yet despite my hard-won accomplishments, I am often dejected and filled with bitterness because, for so long, my remorse and reform have been irrelevant to the calculus of punishment.<sup>35</sup> It is this sense of frustration that fuels the following critique of the gradual transition of prisoners into the community.<sup>36</sup>

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<sup>30</sup> Bourgeois, *The Irrelevance of Reform*, *supra* note 8, at 154. See Heidi Schumann, *The Difference Between "I Don't Want to Grow Up" and "I Can't Grow Up"*, AM. CRIM. L. REV. ONLINE (Jan. 22, 2015), <http://www.americancriminalawreview.com/aclr-online/difference-between-i-dont-want-grow-and-i-cant-grow/> [<https://perma.cc/7GZT-D7EF>] (“As is so poignantly demonstrated through the life of Bourgeois, the actions of a child, acting as a child, should not presumptively limit their entire life as an adult. That would be cruel to both the individual and to society by ridding each of the potential positive impact of a contributing member of society.”).

<sup>31</sup> See, e.g., *Video: Author-Prisoner Jeremiah Bourgeois Speaks About His Experience with Juvenile Sentencing*, OHIO ST. J. CRIM. L. AMICI BLOG, <http://moritzlaw.osu.edu/students/groups/osjcl/amici-blog/video-author-prisoner-jeremiah-bourgeois-speaks-about-his-experience-with-juvenile-sentencing/> [<https://perma.cc/YT6F-PFBE>].

<sup>32</sup> *The Crime Report* is a national criminal justice news and resource site produced by the Center on Media, Crime and Justice at the John Jay College of Criminal Justice.

<sup>33</sup> See, e.g., Jeremiah Bourgeois, *The Brady Loophole: Absolving the Post-Trial Destruction of Potentially Exculpatory Evidence*, TRUTHOUT: SPEAKOUT (Sept. 4, 2016), <http://www.truthout.org/speakout/item/37472-the-brady-loophole-absolving-the-post-trial-destruction-of-potentially-exculpatory-evidence> [<https://perma.cc/35XL-9447>].

<sup>34</sup> See, e.g., Jeremiah Bourgeois, *Prison Dilemma: When Profit Undermines Safety*, THE CRIME REPORT (June 29, 2016), <https://thecrimereport.org/2016/06/29/prison-dilemma-when-profit-undermines-safety/> [<https://perma.cc/9XKN-5ZQ9>]; Jeremiah Bourgeois, *Becoming a Whistleblower in Prison Is a 'Risky Business'*, THE CRIME REPORT (Jan. 11, 2017), <https://thecrimereport.org/2017/01/11/becoming-a-whistleblower-in-prison-is-a-risky-business/> [<https://perma.cc/B3NN-Z2JS>].

<sup>35</sup> See Levi Pulkkinen, *Limbo: Seattle Man Who Killed at 14 Wonders if He'll Be Freed*, SEATTLE PI (March 24, 2018, 4:24 p.m.), <https://www.seattlepi.com/seattlenews/article/Juvenile-Justice-Life-Bourgeois-12779252.php> (“Jeremiah ‘J.J.’ Bourgeois was 14 when he killed a man and injured another in a shooting at a West Seattle convenience store. Twenty-five years later, Bourgeois appears to be the picture of reform. Why can’t he get free?”). Cf. ISRB DECISION AND REASONS RE: JEREMIAH BOURGEOIS 7 (Nov. 2, 2017) (on file with author) (“The Board commends Mr. Bourgeois for completing a significant amount of programming. However the Board has determined that he does not meet the statutory criteria for release at this time for the following reasons. Mr. Bourgeois has been assessed . . . at a ‘Moderate to High’ risk to reoffend. Additionally, he has a history of serious violence while in prison to include two felony assaults against Corrections Officer [sic] during his prison stay. Also, Mr. Bourgeois’ offense is particularly heinous as it was a revenge killing against victims of a crime for which they had been willing to testify in court to assist in securing a conviction of their perpetrator, Mr. Bourgeois’ brother.”).

<sup>36</sup> “I saw the lifers go through some serious changes about [prison] time. Some days, those cats carried theirs as good as anybody else, but other days, they didn’t. You could look in their eyes

## III. THE BITTERSWEET RELEASE

In 2014, Second Substitute Senate Bill 5064 (the “*Miller* fix”) amended the aggravated first degree murder statute along with other provisions of the Sentencing Reform Act relating to juvenile offenders.<sup>37</sup> Under the *Miller* fix, a youth convicted of aggravated first degree murder must be sentenced to a twenty-five-year minimum term if the crime occurred prior to the age of sixteen.<sup>38</sup> If the crime occurred at age sixteen or seventeen, the law requires that a minimum sentence between twenty-five years and life without the possibility of parole be imposed.<sup>39</sup> The *Miller* fix also enables those who committed one or more crimes other than aggravated first degree murder prior to the age of eighteen to petition the Board for early release upon serving twenty years of the aggregate sentence.<sup>40</sup>

The *Miller* fix creates a presumption that prisoners will be released when their minimum terms are complete. The only exception that exists is when the Board determines that a preponderance of the evidence demonstrates that the person would commit new criminal law violations if set free.<sup>41</sup> When release is denied in cases of aggravated murder, a new minimum term not to exceed five years must be

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sometimes and tell they had run across a calendar, one of those calendars that let you know what day of the week your birthday will fall on ten years from now. Or you could see in the wild way they started acting and talking that they were on edge. Then it was time to get away from them, go to the other side of the prison yard, and watch the fireworks. They went *off*. Especially the brothers.” NATHAN MCCALL, *MAKES ME WANNA HOLLER: A YOUNG BLACK MAN IN AMERICA* 174 (1994).

<sup>37</sup> *In re* McNeil, 334 P.3d 548, 550, 552 (Wash. 2014). See also Straley, *supra* note 6, at 993–97 (summarizing the *Miller* fix).

<sup>38</sup> WASH. REV. CODE § 10.95.030(3)(a)(i) (2015).

<sup>39</sup> *Id.* § 10.95.030(3)(a)(ii). The Washington Court of Appeals recently held that this provision of the *Miller* fix violates the State’s constitutional prohibition against cruel punishment. *State v. Bassett*, 394 P.3d 430, 446 (Wash. Ct. App. 2017), (“Under a categorical analysis, we hold that to the extent that a life without parole or early release sentence may be imposed against a juvenile offender under the *Miller* fix statute, RCW 10.95.030(3)(a)(ii), it fails the constitutional categorical bar analysis. Therefore, a life without parole or early release sentence is unconstitutional under article I, section 14 of our state constitution.”), *rev. granted*, 402 P.3d 827 (Wash. 2017). Washington’s constitutional prohibition against “cruel” punishment affords greater protection than the Eighth Amendment’s proscription against cruel and unusual punishment. *State v. Fain*, 617 P.2d 720, 723 (Wash. 1980).

<sup>40</sup> WASH. REV. CODE § 9.94A.730(1) (2015). While the Supreme Court’s holding in *Miller* did not invalidate term-of-year sentences that equate to a sentence of life without the possibility of parole, the State legislature sought to get ahead of the curve believing, correctly, that Washington courts would find no constitutional distinction between a sentence of life without the possibility of parole and a de facto life sentence. See *State v. Ramos*, 387 P.3d 650, 660 (Wash. 2017) (“[W]e also reject the notion that *Miller* applies only to literal, not de facto, life-without-parole sentences. . . . Whether that sentence is for a single crime or an aggregated sentence for multiple crimes, we cannot ignore that the practical result is the same.”).

<sup>41</sup> WASH. REV. CODE § 10.95.030(3)(f) (2015). See, e.g., *State v. Shepherd*, 41 P.3d 1235, 1238 (Wash. Ct. App. 2002) (“That means considering all the evidence the proposition asserted must be more probably true than not true.”) (citations omitted).



set by the Board, and upon its completion, the prisoner is then reevaluated for release under the same standard of review.<sup>42</sup> For crimes other than aggravated murder, the prisoner “may file a new petition for release five years from the date of denial or at an earlier date as may be set by the board.”<sup>43</sup> Having stayed abreast of every iteration of the ever evolving *Miller* fix, the logical conclusion in my eyes when the law finally took effect was that once the Board decided that a prisoner was likely or unlikely to reoffend he would remain confined or immediately be freed—there was, so to speak, no in between.

To my dismay, in implementing the *Miller* fix, the Board began a practice of refusing to outright release prisoners whose minimum terms were complete, *even after determining these individuals were unlikely to commit further crimes if set free*. The delaying tactics began with Barry Massey, who was one of the youngest children to receive a life-without-parole sentence in the United States and the first to be freed under the *Miller* fix.<sup>44</sup> When ordering his release, the Board proclaimed:

Mr. Massey committed this crime as a 13 year old boy. At the age of 15 he was placed into general population in the adult prison system. At 23 years old a noticeable, remarkable and well documented change occurred in his attitude and behavior. He apparently willed himself to become a different and better person. Not only has he completed all available programming, but along the way he has amassed a support system that includes many people in the community, but also uniquely—from those staff in the institutions in which he has been incarcerated. He has taken responsibility for his part in a two week span of his life, during which he and his codefendant terrorized an elderly women and killed a business owner for no apparent reason.

. . . [H]e has excellent community support and it does not appear that he needs further transition through lower levels of custody, including work release. The Board expects him to continue on his path of self-improvement, helping others and doing all he can to prevent something like this from happening to youth with whom he speaks and mentors.<sup>45</sup>

This presentation amounted to Orwellian doublethink, for the Board went on to extend Mr. Massey’s term of confinement while simultaneously ordering his release. Furthermore, although Mr. Massey had led classes that teach prisoners

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<sup>42</sup> WASH. REV. CODE § 10.95.030(3)(f) (2015).

<sup>43</sup> WASH. REV. CODE § 9.94A.730(6) (2015).

<sup>44</sup> Straley, *supra* note 6, at 977 (“After his arrest, Barry indicated that one of his life goals was to overcome his fear of the dark.”) (citation omitted).

<sup>45</sup> ISRB DECISION AND REASONS RE: BARRY MASSEY 5 (June 1, 2015) (on file with author).

how to transform their lives and succeed upon being freed,<sup>46</sup> prior to his release he was compelled to complete a cognitive-behavior-therapy program that had questionable efficacy.<sup>47</sup> This was a harbinger of how the Board and DOC would proceed when releasing prisoners pursuant to the *Miller* fix.<sup>48</sup> However, when analyzing the relevant statutory provisions, the illegitimacy of this practice comes clearly into focus.

#### IV. RIPPING A FACE OFF OF JANUS

Were the Board not failing to act in accordance with the plain language of the *Miller* fix, the following statutory analysis would be myopic. At any rate, one does not need a juris doctor degree to perceive that the Board is duty-bound to promptly release prisoners who are deemed unlikely to reoffend. Both statutes state, in relevant part:

*The board shall order the person released, under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released. If the board does not order the person released, the board shall set a new minimum term not to exceed five additional years.*<sup>49</sup>

Clearly, then, the Board has only two choices given that “we construe statutes assuming that the legislature meant exactly what it said.”<sup>50</sup> Here, the statutes make evident that the Board cannot order a prisoner released in one breath then set a new

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<sup>46</sup> Straley, *supra* note 6, at 982.

<sup>47</sup> See Jordan Schrader, *Inmate Rehabilitation Program Needs Changes, Officials Say*, NEWS TRIBUNE (Apr. 6, 2015, 5:38 PM), <http://www.thenewstribune.com/news/politics-government/article/26275804.html> [https://perma.cc/5Y2H-6E2E]. See generally, Bourgeois, *The Irrelevance of Reform*, *supra* note 8, at 155–57 (discussing Pseudo-Rehabilitative Programs).

<sup>48</sup> See ISRB DECISION AND REASONS RE: ANTHONY PUGH 1 (Aug. 17, 2015) (on file with author) (“Based on the burden of proof set out in RCW 9.94A.730(3) and the totality of evidence and information provided to the Board, the Board does not find by a preponderance of the evidence that Mr. Pugh is more likely than not to commit any new criminal law violations if released on conditions. Consequently, the Board finds Mr. Pugh releasable in 18 months, upon his satisfactory completion of a transition through lower levels of custody that preferably includes a period of time in work release. The Board establishes a release date on or about February 28, 2017. The actual release date is contingent upon the approval of the Offender Release Plan and any mandatory Law Enforcement Notification.”).

<sup>49</sup> WASH. REV. CODE §§ 10.95.030(3)(f) (emphasis added) (aggravated murder), 9.94A.730(3) (2015) (de facto lifers).

<sup>50</sup> Birgen v. Dep’t of Labor & Indus., 347 P.3d 503, 507 (Wash. Ct. App. 2015) (citation omitted).

minimum term in the next.<sup>51</sup> Rather, the Board must do one or the other since “[t]he use of the word ‘shall’ creates an imperative obligation unless a different legislative intent can be discerned.”<sup>52</sup>

While these statutory provisions do not speak to how swiftly a prisoner is to be freed, one can nevertheless “discern the plain meaning of nontechnical statutory terms from their dictionary definitions.”<sup>53</sup> In this vein, the “term ‘release’ is defined as ‘[t]he action of freeing or the fact of being freed from restraint or confinement.’”<sup>54</sup> In no way does it suggest a *transition*, or rather, the “process or a period of changing from one state or condition to another.”<sup>55</sup> When a prisoner’s “release” is mandated, it is meant to have an immediate effect. As one federal judge explained to a party feigning ignorance, this is the “obvious, common sense, everyday definition of the term.”<sup>56</sup>

That prisoners are to be discharged forthwith under the plain meaning of “released” is further buttressed by the doctrine of *noscitur a sociis*.<sup>57</sup> The *Miller* fix requires that the Board “order the person released, under such affirmative and other conditions as the board determines appropriate,”<sup>58</sup> and when determining the meaning of a word in a series, one must “take into consideration the meaning

<sup>51</sup> See *State v. Nelson*, 381 P.3d 84, 86 (Wash. Ct. App. 2016) (“We recognize that the legislature intends to use the words it uses and intends *not* to use words it does not use.”) (citing *State v. Larson*, 365 P.3d 740, 744 (Wash. 2015)).

<sup>52</sup> *State v. Q.D.*, 685 P.2d 557, 563 (Wash. 1984) (citation omitted).

<sup>53</sup> *State v. Cooper*, 128 P.3d 1234, 1236 (Wash. 2006) (citation omitted).

<sup>54</sup> *Burton v. Lehman*, 103 P.3d 1230, 1234 (Wash. 2004) (quoting BLACK’S LAW DICTIONARY 1315–16 (8th ed. 2004)).

<sup>55</sup> *Transition*, THE NEW OXFORD AMERICAN DICTIONARY 1798 (2001). It should be noted that a prisoner’s release under the *Miller* fix could conceivably be delayed pending the Board’s approval of the Offender Release Plan. See DOC POLICY no. 320.100, Directive § II. A. 4 (the ISRB retains the sole authority to approve or deny the Offender Release Plan). However, this process does not involve extending a prisoner’s minimum term of confinement pro forma. Cf., *In re Ayers*, 713 P.2d 88, 91 (Wash. 1986) (“It is self-evident that if the inmate is not parolable or there is not an acceptable plan of parole, then the minimum term is necessarily extended.”). Moreover, any such delay cannot masquerade as a mandate to compel a prisoner to “transition” under the guise of “release.” See, e.g., *DeLong v. Parmelee*, 236 P.3d 936, 949–50 (Wash. Ct. App. 2010) (“It is a well-settled rule that so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy.”) (internal quotations and citation omitted).

<sup>56</sup> *Burdine v. Johnson*, 87 F. Supp. 2d 711, 718, 718 n.6 (S.D. Tex. 2000) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged) 1917 (1986) (“[T]o set free from restraint, confinement, or servitude; set at liberty; let go (ordered all prisoners released)”). See also *Release*, BLACK’S LAW DICTIONARY 1292 (7th ed. 1999) (“The action of freeing or the fact of being freed from restraint or confinement <he became a model citizen after his release from prison>.”).

<sup>57</sup> See *Jongeward v. BNSF Ry. Co.*, 278 P.3d 157, 164 (Wash. 2012) (“Under the principle of *noscitur a sociis*, a single word in a statute should not be read in isolation. Instead, the meaning of words may be indicated or controlled by those with which they are associated.”) (internal quotations and citations omitted).

<sup>58</sup> WASH. REV. CODE §§ 10.95.030(3)(f), 9.94A.730(3) (2015).

naturally attaching to them from the context, and . . . adopt the sense of the words which best harmonizes with the context.”<sup>59</sup> Consider then that the “affirmative and other conditions” that the Board may impose have nothing to do with imprisonment.<sup>60</sup> The conditions averred to are terms of *community custody*<sup>61</sup> which, by law, begin “[u]pon completion of the term of confinement . . . .”<sup>62</sup> Given the nexus between community custody and the release provisions of the *Miller* fix, the legislative intent for parole to commence is readily apparent, since “[t]wo statutes must be read together to give each effect and to harmonize each with the other.”<sup>63</sup>

Were this not “[e]nough, with over-measure”<sup>64</sup> to establish that a prisoner’s release must be effected expeditiously, recall that the Board’s power to extend the minimum term of those who *are* likely to reoffend is expressly limited to five years. To construe the *Miller* fix in a manner that supports the Board’s release practices is to believe that the legislature capped the amount of confinement that can be tacked on to a prisoner’s sentence when parole is denied, but empowered the Board to set any term it sees fit when ordering a prisoner’s release. The notion is ridiculous.<sup>65</sup> Such a reading must be rejected “because it will not be presumed that the legislature intended absurd results.”<sup>66</sup> Moreover, even if the *Miller* fix were susceptible to this fanciful interpretation, *stare decisis* would require Washington courts to construe it in prisoners’ favor pursuant to the rule of lenity.<sup>67</sup>

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<sup>59</sup> *State v. Flores*, 186 P.3d 1038, 1043–44 (Wash. 2008) (alteration in original) (internal quotations and citations omitted).

<sup>60</sup> *See* WASH. REV. CODE § 9.94A.704(10) (2015) (community custody conditions the Board may impose). *See also* *State Dep’t. of Ecology v. Campbell & Gwinn, L.L.C.*, 43 P.3d 4, 10 (Wash. 2002) (“Reference to a statute’s context to determine its plain meaning also includes examining closely related statutes, because legislators enact legislation in light of existing statutes.”) (citation omitted).

<sup>61</sup> WASH. REV. CODE § 9.94A.030(5) (2016) (“Community custody” constitutes “that portion of an offender’s sentence . . . served in the community subject to controls placed on the offender’s movement and activities by the department.”).

<sup>62</sup> *Id.* § 9.94A.707(1)(a) (2009).

<sup>63</sup> *Bour v. Johnson*, 864 P.2d 380, 383 (Wash. 1993) (internal quotations and citation omitted).

<sup>64</sup> WILLIAM SHAKESPEARE, *CORIOLANUS* act 3, sc. 1.

<sup>65</sup> *See Bour*, 864 P.2d at 383 (“Strained, unlikely or unrealistic interpretations are to be avoided.”) (citation omitted).

<sup>66</sup> *Tingey v. Haisch*, 152 P.3d 1020, 1026 (Wash. 2007) (internal quotations and citations omitted).

<sup>67</sup> *State v. Coucil*, 245 P.3d 222, 223 (Wash. 2010) (“If a statute is susceptible to more than one reasonable interpretation, it is ambiguous and, absent legislative intent to the contrary, the rule of lenity requires us to interpret the statute in favor of the defendant.”) (citation omitted). *See also* *Payseno v. Kitsap Cty.*, 346 P.3d 784, 787 (Wash. Ct. App. 2015) (“Washington courts apply the rule of lenity not only to criminal sanctions, but also to the community custody, probation, and post-conviction context, and to procedural statutes affecting an offender’s rights.”) (citations omitted).

As seen, even a jailhouse lawyer's statutory analysis of the *Miller* fix manifests the legislature's intent for the term of confinement to cease when prisoners are ordered released.<sup>68</sup> The *raison d'état* behind the Board's practice of extending the minimum term in spite of this becomes evident when reviewing the DOC policy that was adopted to further it.

## V. THE PRICE OF FREEDOM

Before I begin this section, allow me to highlight a parallel between the abolition of slavery and the release of prisoners pursuant to the *Miller* fix to give insight into the correctional system's response to these new statutory requirements. In the wake of the Civil War, many Americans believed former slaves would be lost and bewildered by their newfound liberty. It was too much to expect freedmen to take on the heavy burden of citizenship after spending their lives free from responsibility.<sup>69</sup> Steps needed to be taken to ensure Southern blacks did not squander their opportunity in their childlike naiveté. Such sentiments, of course, reflect a pathology of paternalism and prejudice—both of which I am convinced lie at the heart of many correctional officials' conception of their duties when releasing prisoners who have been confined since adolescence. There is a widespread sentiment that we are not fully formed beings and this, I believe, is one of the reasons that Barry Massey spent nearly a year transitioning to the community when he should have been freed immediately.

In order to make Mr. Massey's post-parole hearing odyssey a template for releasing similarly situated prisoners, the Board's practice was promptly enshrined in the DOC policy promulgated to effectuate the *Miller* fix.<sup>70</sup> This policy established a requirement that prisoners whom the Board orders released must transition through lower levels of custody while following conditions set by the DOC if, that is, they wish to be freed. These conditions include, among other things, a mandate to maintain employment while confined, participate in educational programs, and/or undergo treatment interventions as directed by correctional staff; a proscription against incurring any major disciplinary violations while transitioning from prison to the community; and a command to take part in available voluntary offender programs that correctional staff believe will address any other reentry or transition needs.<sup>71</sup>

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<sup>68</sup> See *State v. J.P.*, 69 P.3d 318, 320 (Wash. 2003) (“When the plain language is unambiguous—that is, when the statutory language admits of only one meaning—the legislative intent is apparent, and we will not construe the statute otherwise.”) (citation omitted).

<sup>69</sup> “It is proclaimed everywhere that he will not work, that he cannot take care of himself, that he is a nuisance to society, that he lives by stealing, and that he is sure to die in a few months . . . .” Sidney Andrews, *Sidney Andrews on the White South and Black Freedom (1866)*, in 2 VOICES OF FREEDOM: A DOCUMENTARY HISTORY 270–71 (Eric Foner ed., 1st ed. 2005).

<sup>70</sup> See DOC POLICY no. 320.120 (Juvenile Board Offenders).

<sup>71</sup> *Id.* at Directive § IX. D. c.

These conditions are spelled out in what is known as a Mutual Reentry Plan (“MRP”),<sup>72</sup> which originated in Wisconsin’s penal system during the 1970s.<sup>73</sup> The MRP was conceived as “a rehabilitation program under which a prisoner ‘contracts’ to meet a specified level of behavior and accomplishment while serving his sentence in exchange for securing a release from prison at a date earlier than he would normally be paroled.”<sup>74</sup> Within Washington’s correctional system, “[t]he inmate, his counselor, and the Department [of Corrections] enter into an agreement that they will each take certain steps to gradually acclimate the inmate to increased freedom in order to successfully prepare him or her for eventual release into the community.”<sup>75</sup> This innominate contract<sup>76</sup> is utilized by the DOC as a means to mitigate the risk to public safety when releasing “offenders committed for Murder 1, continuously confined for 10 years or more, or otherwise identified as needing a more structured transition to lower levels of custody, whether committed to a determinate or indeterminate sentence.”<sup>77</sup> Moreover, when it comes to prisoners serving indeterminate sentences, the possibility of parole can be made contingent upon their willingness to enter into an MRP agreement.<sup>78</sup>

DOC psychologists also incorporate the MRP *sub silentio* into their recommendation on how best to reduce the risk that prisoners who are subject to the *Miller* fix will reoffend upon release.<sup>79</sup> For instance, according to my

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<sup>72</sup> The MRP was originally coined the Mutual Agreement Plan (“MAP”). *See In re Marler*, 33 P.3d 743, 746 (Wash. Ct. App. 2001) (“The policy providing for the MAP was jointly adopted by DOC and the Board in 1992, and embodied in DOC Policy Number 350.300.”).

<sup>73</sup> *Reddin v. Israel*, 455 F. Supp. 1215, 1222 (E.D. Wis. 1978) (“MAP was not created by statute, but rather, it is the administrative creation of the Wisconsin prison authorities.”).

<sup>74</sup> *Id.* at 1221.

<sup>75</sup> *In re Baker*, 720 P.2d 870, 871 (Wash. Ct. App. 1986). The phrase “increased freedom” equates to greater access to sought-after programs, transfers to preferred DOC facilities with reduced levels of security, and, finally, partial confinement in work release.

<sup>76</sup> An innominate contract is a “contract not classifiable under any particular name; a contract for which the law supplies nothing in addition to the express agreement of the parties.” BLACK’S LAW DICTIONARY 395 (10th ed. 2014).

<sup>77</sup> DOC POLICY no. 350.300, Policy § I. *See also* DOC POLICY no. 320.120, Directive § IX (Juvenile Board Offenders).

<sup>78</sup> *See Abels v. ISRB*, No. C04-2259-JLR-MJB, 2006 U.S. Dist. LEXIS 100430, at \*2 (W.D. Wash. Dec. 28, 2006) (“On November 14, 1995, the full Board found Petitioner not parolable due to his refusal to participate in development of a MAP plan.”). The refusal to participate in an MRP does not affect the release date of a prisoner who is serving a determinate sentence. DOC POLICY no. 350.300, Directive § I. D. It simply precludes transfers to facilities with reduced levels of security and eligibility for work release. *See* DOC POLICY no. 300.380, Directive § VII. A. 3. (refusal to participate in MRP precludes Minimum Custody MI2).

<sup>79</sup> DOC POLICY no. 320.120, Directive § VII (“[A]ssigned Mental health personnel will conduct a psychological evaluation . . . [which] will include a prediction of the probability that the offender will commit another offense if released on conditions.”). The *Miller* fix requires that prisoners undergo psychological risk assessments prior to their parole hearings. WASH. REV. CODE §§ 10.95.030(3)(f), 9.94A.730(3) (2015). *But see* Jeremiah Bourgeois, *Why I Am Not a Recidivist*, THE CRIME REPORT (Jan. 22, 2018), <https://thecrimereport.org/2018/01/22/why-i-am-not-a-recidivist/>

psychological evaluation, “[Mr. Bourgeois’] risk of recidivism or violence towards others” can be reduced by “completing more intensive programming at this stage of his life when the programming becomes more relevant to him as parole becomes a possibility.”<sup>80</sup> However, this assertion by the psychologist—as will be seen—is tantamount to a preamble for engrafting the MRP to social psychology, and thereby subserves the policy of transitioning prisoners into the community. Accordingly, she echoes her paymaster’s philosophy by suggesting the following strategy to mitigate my potential for lawbreaking:

An exposure to increased stressors such as working in less protected areas may assist him in adjusting to situations requiring honing his coping skills while maintaining infraction free behavior for a period of a year.

A step-down program of reduced levels of custody including camp and work release will also allow him to gain confidence and strength in his self-regulation and ability to follow rules, guidelines, and suggestions as contributing to his successful transition[.]

Mr. Bourgeois is [also] less likely to engage in criminal activity in the presence of required participation in a therapeutic group where they discuss issues/stress associated with the process of transitioning to life outside of prison. Continuing in a therapeutic group could help establish a place to reinforce his knowledge/skill and to expand its use for outside of prison; as well as for situations not yet encountered. A structured regular group activity would also provide additional exposure to a positive peer culture with others who might be experiencing similar adjustment problems.<sup>81</sup>

So sayeth the policy; so sayeth the psychologist; and so goeth the cart before the horse on a bridle of circular logic.<sup>82</sup> Historically, the duration of an MRP has been thirty-six months but it can be extended for those serving indeterminate sentences if the Board believes that it is necessary.<sup>83</sup> Furthermore, violating any

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[<https://perma.cc/47R2-Q5JN>] (critiquing the methodology used by DOC psychologists to assess a prisoner’s risk of recidivism under the *Miller* fix).

<sup>80</sup> DEBORAH WENTWORTH, DOC PSYCHOLOGICAL EVALUATION FOR THE ISRB RE: JEREMIAH BOURGEOIS 11–12 (2017) (on file with author).

<sup>81</sup> *Id.* at 12.

<sup>82</sup> One cannot ignore that the neutrality of DOC psychologists is naturally called into question when such recommendations align perfectly with agency practice and policy. While these *Miller* fix evaluations are protected from disclosure, anecdotal evidence that I have gleaned through conversations with others who underwent these assessments suggests that these recommendations are, for the most part, boilerplate.

<sup>83</sup> DOC POLICY no. 350.300, Directive § II. C.

conditions of the MRP can result in the order of release being rescinded by the Board.<sup>84</sup>

Recall that the release provisions of the *Miller* fix establish that a mandatory minimum term must be served before a prisoner is eligible for release, and upon its completion, the presumption is that the prisoner will then be set free. As a consequence, if a prisoner is entitled by statute to be freed, the only way that an MRP can be implemented is if the Board nevertheless extends his term of confinement in the order of release—à la Barry Massey.<sup>85</sup> As set forth below, the legal problems that arise from this sort of discharge and parole are fivefold.

#### A. *The MRP Is Unnecessary Under the Miller Fix*

One of the purposes of an MRP is to ensure that prisoners complete programs designed to mitigate their risk of reoffending.<sup>86</sup> Yet under the *Miller* fix, no later than five years prior to the expiration of the prisoner's mandatory minimum sentence, the DOC is required to "conduct an assessment of the offender and identify programming and services that would be appropriate to prepare the offender for return to the community."<sup>87</sup> The DOC elected to begin this process *six* years before the minimum term ends and, for the remainder of the sentence, these prisoners are given priority "for programs and treatment, with the intent to have the offender finish all recommended programs by his/her Long Term Juvenile Eligibility Date."<sup>88</sup> With six years to work with, the programmatic, rehabilitative

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<sup>84</sup> See, e.g., *Abels v. Glebe*, No. C09-1720-RSM-JPD, 2010 U.S. Dist. LEXIS 68129, at \*1–2 (W.D. Wash. May 17, 2010) (Board added 60 months of confinement to the prisoner's minimum term because he had been involved in behavior that jeopardized his MRP agreement).

<sup>85</sup> See, e.g., *In re Lain*, 315 P.3d 455, 459 (Wash. 2013) ("In August 2009, after Lain had served 318 months, the board found him conditionally parolable and added 24 months to his minimum term to allow for reentry programming. Lain preferred more immediate parole. The board noted the disagreement and commented that Lain was rigid in his thinking and expressed a sense of entitlement to parole.").

<sup>86</sup> See *Reddin v. Israel*, 455 F. Supp. 1215, 1221–22 (E.D. Wis. 1978) ("MAP is designed to give an inmate incentive to prepare himself through employment or study for early release from prison into a community in which the inmate has been working or studying while imprisoned and participating in MAP."). See also KEITH O'BRIEN & SARAH LAWRENCE, MASS. EXEC. OFFICE OF PUB. SAFETY RESEARCH & POLICY ANALYSIS DIV., IMPLEMENTING A REENTRY PROGRAM ACCORDING TO BEST PRACTICES 4 (2007) ("The Washington State Institute for Public Policy found that job training, vocational education programs, and work release produce modest but statistically significant reductions in recidivism.") (citation omitted).

<sup>87</sup> WASH. REV. CODE §§ 10.95.030(3)(e), 9.94A.730(2) (2015) ("To the extent possible, the department shall make programming available as identified in the assessment.").

<sup>88</sup> DOC POLICY no. 320.120, Directive §§ II. A. 1., IV. B. The intent to have prisoners complete these programs by the "Long Term Juvenile Eligibility Date" refers to the date at which the mandatory minimum term under the *Miller* fix is complete and prisoners are eligible for release. *Id.* This stated intent creates a legal duty on the part of DOC administrators. See *In re Cashaw*, 866 P.2d 8, 14 n.6 (Wash. 1994) ("Because administrative rules and regulations are adopted through delegated legislative powers to make law, they are given the force and effect of laws.") (citation omitted).



elements of an MRP can easily be achieved long before the initial parole hearing and it cannot be said thereafter that additional programs are necessary if the DOC properly discharged its duty to prepare these prisoners for release.

*B. The MRP Cannot Be Made a Condition Precedent for Release*

When the MRP was adopted, many prisoners were still confined under Washington's former indeterminate sentencing regime wherein a prisoner's early release was "subject entirely to the discretion of the Board, which may parole him now or never."<sup>89</sup> No prisoner could presume that he would be released early because the Board could extend the minimum term "for a variety of reasons, any time prior to an inmate's completion of his maximum term."<sup>90</sup> This discretionary authority made it entirely lawful for the Board to determine that "before becoming eligible for parole, a prisoner completing a life sentence should participate in a structured plan preparing him for release into the community."<sup>91</sup> In contrast, the United States Supreme Court makes clear that "a statute that mandates release 'unless' certain findings are made" limits a parole board's discretion by establishing "a presumption that parole will be granted."<sup>92</sup> The *Miller* fix clearly falls under this rubric of presumptive release—for the Board must set prisoners free *unless* "it is more likely than not that the person will commit new criminal law violations."<sup>93</sup> Given this mandate, or rather lack of discretion, neither the Board nor DOC has the statutory authority to make an MRP contract a prerequisite for release because "[t]he outcome must follow when the language is mandatory."<sup>94</sup>

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<sup>89</sup> *In re Powell*, 814 P.2d 635, 645 (Wash. 1991) (citing WASH. REV. CODE §§ 9.95.100, .110; former § 9.95.115). Under this standard, the Washington Supreme Court explained long ago that "although releasing a convicted felon on parole may be beneficent and rehabilitative and in the long run produce a genuine social benefit, it is also a risky business. The parole may turn loose upon society individuals of the most depraved, sadistic, cruel and ruthless character who may accept parole with no genuine resolve for rehabilitation nor to observe the laws and customs promulgated by the democratic society, which in the process of self-government granted the parole. Thus, recognizing the risky nature of parole as well as its beneficent qualities, the courts have universally held that the granting or denial of parole . . . rests exclusively within the discretion of the board; that parole is not a right but a mere privilege conferred as an act of grace by the state through its own administrative agency." *January v. Porter*, 453 P.2d 876, 879–80 (Wash. 1969) (citations omitted).

<sup>90</sup> *In re Lain*, 315 P.3d at 466 (citation omitted).

<sup>91</sup> *In re Baker*, 720 P.2d 870, 872–73 (Wash. Ct. App. 1986) ("Requiring Baker to sign a MAP contract does not change any statutory requirement.").

<sup>92</sup> *Bd. of Pardons v. Allen*, 482 U.S. 369, 378 (1987) (citation omitted).

<sup>93</sup> WASH. REV. CODE §§ 10.95.030(3)(f), 9.94A.730(3) (2015).

<sup>94</sup> *Welch v. Thompson*, 20 F.3d 636, 640 n.12 (5th Cir. 1994) (citing *Bd. of Pardons v. Allen*, 482 U.S. at 377). As Straley notes, "This standard for release is substantially similar to that included in RCW 9.95.420, which prescribes when the ISRB must order offenders convicted of certain sex offenses paroled from prison." Straley, *supra* note 6, at 996. See also *State v. Clarke*, 134 P.3d 188, 192 (Wash. 2006) ("The ISRB must release the offender unless it determines by a preponderance of the evidence that the offender will commit sex offenses if released." (citing WASH. REV. CODE § 9.95.420(3)(a)). Ironically, neither the Board nor DOC saw the need to require sex offenders to

### C. *The MRP and the Miller Fix Are Mutually Exclusive*

The Washington Court of Appeals has determined that when an MRP is deemed by the Board to be “a mandatory prerequisite to actual parole” it is in essence a finding that the prisoner “is not presently fit for release.”<sup>95</sup> In the obverse, the threshold inquiry under the *Miller* fix is whether or not a prisoner is currently fit for release based upon his potential to commit new crimes upon being freed. Unless the Board determines that a prisoner’s release would more likely than not result in further law breaking he is, in the eyes of the legislature at least, ready to rejoin society.<sup>96</sup> Consequently, to insist that an MRP is necessary for a prisoner who is “presently fit for release” is in all actuality a non sequitur under the statutory scheme.

### D. *The MRP Contract Is Legally Unenforceable*

The MRP originally contemplated that prisoners serving indeterminate sentences would begin to transition when they had “36 months or less remaining in the minimum term, less good time.”<sup>97</sup> The benefit of entering into an MRP contract was that “a prisoner who fulfills promises to meet a certain level of accomplishment in prison may be released from prison at an earlier date than he would be paroled without participating in the program.”<sup>98</sup> Since, however, the DOC policy under the *Miller* fix implements the MRP *after* the minimum term is complete and the prisoner is entitled to be freed, he is not in fact “securing a release from prison at a date earlier than he would normally be paroled.”<sup>99</sup> In

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transition in accordance with an MRP in order to once again be at liberty to roam amongst the citizenry. *See generally* WASH. ADMIN. CODE § 381-90 (2009) (Procedures for conducting hearings for determination of release to community custody). *See also* DOC POLICY no. 320.110 (Community Custody Board/.420 Hearings).

<sup>95</sup> *In re Marler*, 33 P.3d 743, 747 (Wash. Ct. App. 2001).

<sup>96</sup> Constitutionally, the prisoner is also entitled to be freed under these circumstances. *See Hayward v. Marshall*, 603 F.3d 546, 560 (9th Cir. 2010) (“The prisoner’s interest in parole ripens into an entitlement only after the parole board has made the findings that under the statute entitle him to it, which is to say, perhaps tautologically, that a prisoner is entitled to parole only if the parole authority has made the discretionary decision that under the state standard he is entitled to parole.”) (explaining *Bd. of Pardons v. Allen*), *overruled on other grounds by Swarthout v. Cooke*, 562 U.S. 216 (2011).

<sup>97</sup> *In re Marler*, 33 P.3d at 746 (brackets and internal quotations omitted). *See In re Baker*, 720 P.2d 870, 871 (Wash. Ct. App. 1986) (“The MAP is a program for prisoners serving life sentences *who are approaching their parole eligibility.*”) (emphasis added).

<sup>98</sup> *Reddin v. Israel*, 455 F. Supp. 1215, 1218 (E.D. Wis. 1978). *See also Reynolds v. Pennington*, No. DKC-14-0532, 2015 U.S. Dist. LEXIS 98687, at \*11 (D. Md. July 28, 2015) (“[The] ‘Mutual Agreement Plan or MAP’ [is a contractual agreement] wherein inmates are given a plan to stay out of trouble and complete certain programs in exchange for a reduction of [their] sentence . . .”).

<sup>99</sup> *Reddin*, 455 F. Supp. at 1221.

reality, this “agreement” secures him nothing more than less loathsome conditions of confinement and the expectation of being released—eventually. While the DOC may believe that the belated fulfillment of its duty to set a prisoner free is a satisfactory term of release, an “agreement to do that which one is already obligated to do does not constitute consideration to support a contract.”<sup>100</sup> Under these circumstances, the MRP is not only obtained through undue influence since a prisoner’s freedom hangs in the balance<sup>101</sup> but it is substantively unconscionable because, of necessity, the terms strip the prisoner of his liberty.<sup>102</sup>

#### E. *An Agency Cannot Make Public Policy*

Notwithstanding the putative benefits of a policy requiring that prisoners who have been confined since their teens transition into the community in order to be freed, it is well settled that “[a]n agency may not legislate under the guise of rulemaking power. Rules must be written within the framework and policy of the applicable statutes. They may not amend or change enactments of the legislature.”<sup>103</sup> Similarly, with respect to the practice of extending these prisoners’ minimum terms in order to create the space to effectuate MRP contracts, “[t]he Board may not amend or alter the statutes under which it functions by its own interpretation of those statutes.”<sup>104</sup> Whether the Board and DOC have pursued this course due to a misapprehension of caselaw or in defiance to it is, in the final analysis, legally irrelevant. After all is said and done, an “agency action that is in violation of a statute is, by definition, arbitrary and capricious, or contrary to law.”<sup>105</sup>

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<sup>100</sup> *Crown Plaza Corp. v. Synapse Software Sys., Inc.*, 962 P.2d 824, 827 (Wash. Ct. App. 1997) (citation omitted).

<sup>101</sup> RESTATEMENT (SECOND) OF CONTRACTS § 177(1) (AM. LAW INST. 1981) (“Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.”). *But cf. In re Baker*, 720 P.2d at 871 (“Because Baker has refused to participate in the MAP, he has not been recommended for parole.”).

<sup>102</sup> A party can be exempted from a contract if a clause or term is substantively unconscionable. *Zuver v. Airtouch Commc’ns, Inc.*, 103 P.3d 753, 759 (Wash. 2004) (“Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh.”) (citation omitted).

<sup>103</sup> *Kitsap-Mason Dairymen’s Ass’n. v. Wash. State Tax Comm’n.*, 467 P.2d 312, 315 (Wash. 1970) (citations omitted). *See also Wash. State Hosp. Ass’n v. Wash. State Dep’t of Health*, 353 P.3d 1285, 1289 (Wash. 2015) (“Rules that are not consistent with the statutes that they implement are invalid.”) (citation omitted).

<sup>104</sup> *In re Myers*, 714 P.2d 303, 306 (Wash. 1986) (citation omitted).

<sup>105</sup> *Skamania Cty. v. Columbia River Gorge Comm’n*, 26 P.3d 241, 254 (Wash. 2001).

#### F. *The Psychological Cost of Incarceration*

While I have highlighted the legal infirmities of coupling the MRP to the *Miller* fix, I would be remiss if I failed to dispel the notion that further confinement, for the sake of marginally reducing a prisoner's recidivism risk, is of no consequence. Imprisonment is not defined by reform; it is a traumatic and dangerous experience:

For example, six months ago JJ was trapped in [his] cell for five hours with [a] man who was actively psychotic. JJ sat across from this man—alone—in a cell and listened to him talk about the murders he had just committed. This man was pacing back and forth, agitated one minute and laughing the next: “a switch would get flipped and this guy would get agitated and ask me ‘who the fuck do I think I am talking like this to him’ when I hadn’t said anything offensive. This went on for five straight hours.” JJ was unable to get the attention of the night guard so he was forced to sit there and navigate this situation alone. JJ was terrified and as such felt his body wanting to go into fight or flight mode during those five hours. Now, what 13- or even 20-year old JJ would have done would be to puff up his chest to appear larger than he was which would then send the unstable inmate into a rage which then in turn, would prompt JJ to feel the need to defend himself leading the other man to attack JJ. Then, JJ would have needed to respond by meeting violence with violence. “As an adult, I know now I had to deal with this threatening situation by keeping my body relaxed . . . I talked to myself constantly during those five hours, I’d say ‘keep your body calm, take a deep breath, keep your voice calm’ and I said things like ‘look man, I didn’t mean it like that.’” JJ remained calm as this man went from laughing hysterically to pacing back and forth and sobbing to becoming irrationally angry and then leaning in on JJ and getting in his personal space: “my gut wanted to get the jump on him so bad but I know this is not the way to handle adversity.”<sup>106</sup>

Only those who have managed to attain reform under the restraints of retributive punishment know, as I do, that “[i]t is a lonely, solitary existence filled with anger and depression when one’s life is lived at the intersection between rehabilitation and self-preservation.”<sup>107</sup> Ultimately, transitioning through lower levels of custody in accordance with an MRP means one must continue to navigate their way through hostile territory.

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<sup>106</sup> Mitigation Report, *supra* note 7, at 34.

<sup>107</sup> Jeremiah Bourgeois, *The Prison Code of Silence*, THE CRIME REPORT (Nov. 8, 2016), <https://thecrimereport.org/2016/11/08/the-prison-code-of-silence/> [https://perma.cc/L6HF-DAPV].

## VI. CONCLUSION: OUTRAGE PER DIEM

As Virgil wrote in antiquity, “The descent into Hell is easy, but to retrace your steps and to come out into the upper air, this is the deed, this is the labor.”<sup>108</sup> Having clawed myself out of the pit, I will readily admit that the cruel and unusual punishment I endured for so long has left me scarred. When I contemplate the illusive manner in which the Board and DOC are applying the statutes that affect the destiny of those who have been confined since their teens, this further troubles my psyche. Were you to look through my eyes and review my life since I was confined at the age of fourteen, you just might understand why I remain embittered and depressed despite having, at long last, an opportunity to be freed:

I was angered when stories were bandied about that I was gang raped when I arrived in the penitentiary.

I was angered when I heard how amused some people were when they heard those rumors about me being forced into sodomy.

I was angered by the looks of disdain and contempt on the faces of correctional officers when they saw my fifteen-year-old frame in the general population of the penitentiary.

I was angered when people would joke about my supposed virginity as if anything about my situation was funny.

I was angered when administrators would talk down to me—taking advantage of my ignorance and lack of education—and offering nothing to cure my deficiencies.

I was angered when I found how ready prisoners were to try to take advantage of me.

I was angered when I came to perceive the predatory nature of those who surrounded me.

I was angered when I saw terrible things inflicted upon those who were seen as prey because of their vulnerability.

So many reasons to be angry.<sup>109</sup>

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<sup>108</sup> See VIRGIL, AENEID BOOK VI.

<sup>109</sup> Jeremiah Bourgeois, *Mad Man*, MINUTES BEFORE SIX (June 22, 2017, 2:28 PM), <http://minutesbeforesix.blogspot.com/2017/06/mad-man.html> [https://perma.cc/ZZ3Q-S99C].

I doubt that I will ever be able to put any of this behind me.<sup>110</sup> Rest assured, if one day the Board orders my release and I am then compelled to transition to the community under the pretense that it is necessary to mitigate my risk of reoffending, the only thing that I will have been provided with as I walk out the door to freedom is one more reason to work to reform the criminal justice system.

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<sup>110</sup> See TYE F. HUNTER, FORENSIC PSYCHOLOGICAL EVALUATION FOR THE ISRB RE: JEREMIAH BOURGEOIS 10 (June 14, 2017) (submitted by the NAACP Legal Defense & Education Fund) (on file with author) (“Results indicate that the respondent does not currently appear to satisfy DSM-IV-TR diagnostic criteria for PTSD [Posttraumatic Stress Disorder] or ASD [Acute Stress Disorder], despite reporting a significant trauma history. Nonetheless, he does report significant levels of posttraumatic re-experiencing and avoidance, which is suggestive of posttraumatic stress that falls short of a diagnosable disorder. Individuals with such clinical presentations, although not meeting the full criteria for PTSD/ASD, may suffer considerable distress and often benefit from psychological treatment and/or pharmacotherapy.”).