October 4, 2021

# Second Supplement to Memorandum 2021-11

## Sentencing Practices in California and Related Matters Generally
## Update to Panelist Materials

This memorandum presents an updated version of Exhibit A of the First Supplement to Memorandum 2021-11, a written submission by Justice J. Anthony Kline, who was a panelist at the Committee meeting on July 13, 2021. Justice Kline has submitted an updated version of his submission to the Committee, which is attached here.

Respectfully submitted,

Thomas M. Nosewicz
Legal Director

# M E M O R A N D U M

TO : Michael Romano, Chairperson
Committee on Revision of the Penal Code, and
All Members of the Committee
FROM: J. Anthony Kline
DATE: August 26, 2021
RE: Legislation Compelling the Parole Board to Consider During the Parole Process Whether Denial of Parole May Result in Disproportionate Punishment and to Corroborate its Predictions of Dangerousness

The parole process administered by the Board of Parole Hearings (Board), recently ceased considering whether denial of parole to indeterminately sentenced life prisoners might result in constitutionally excessive punishment. The sole factor now determining whether a parole eligible life prisoner will be found suitable for release is the Board's uncorroborated prediction whether the inmate remains dangerous.

This highly unreliable practice enables the imposition of disproportionate punishment, undermines judicial review of claims of constitutionally excessive punishment, exacerbates prison overcrowding, and countenances racial and ethnic bias in the parole process.

This memo has two parts. The first describes the largely unknown history that led to the present predicament - how the evaluation of culpability and proportionality were incorporated into the parole process in the past, and how California parole boards and the Department of Justice have eroded and ultimately emasculated that policy and practice. The second part, which commences at page 22, describes the ways in which the Legislature can rectify the unreliability of its predictions of dangerousness and integrate consideration of constitutional proportionality into the parole process.

I.

***Culpability as the Measure of the Proportionality of Punishment***

The concept of disproportionality refers to the fact that because no offense is always committed under the same circumstances and in the same manner, "rational gradations of culpability" can be made for a given commitment offense. (*In re Lynch,* (1972), 8 Cal.3d 410 at p. 426 (*Lynch*); *In re Foss* (1973) 10 Cal.2d 910, 919 (*Foss*).) Accordingly, the first of the three distinct techniques specified in *Lynch* to be used in determining whether a punishment is proportionate to the offense – examination of the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society" - involves an assessment of the "rational gradations of culpability that can be made on the basis of the injury to the victim or to society in general." (*Foss***,** at p. 919.)

In the context of the Indeterminate Sentencing Law (ISL), *People v. Wingo* (1975) 14 Cal.3d 169 (*Wingo*) held "that when a defendant serving an indeterminate sentence encompassing a wide range of conduct challenges the statute as imposing cruel or unusual punishment, judicial review must await an initial determination by the Adult Authority [then the parole board] of the proper term in the individual case. When the term is fixed a court can then analyze the constitutionality of the statute as applied." (*Id*. at p. 183.)

Immediately after *Wingo* was decided, the high court issued the seminal opinion in *In re Rodriguez* (1975) 14 Cal.3d 639 (*Rodriguez*), which held that the ISL was not "being administered in a manner which offers assurance that persons subject thereto will have their terms fixed at a number of years proportionate to their individual culpability (*People v. Wingo, supra, ante*, p. 169), or, that their terms will be fixed with sufficient promptness to permit any requested review of their proportionality to be accomplished before the affected individuals have been imprisoned beyond the constitutionally permitted term." (*Rodriguez,* at p. 650.) *Rodriguez* directed the parole board to address these issues by promptly fixing an indeterminately sentenced inmate's "primary term" – the maximum term that is not "disproportionate to the individual prisoner's offense." (*Rodriguez*, at p. 652, 653, fn. 18.)

The parole board adopted regulations implementing *Rodriguez,* pursuant to which an offender's culpability was measured by means of a "base term" reflecting the circumstances of the crime, which together with adjustments for the offender's criminal history comprised the "primary term." California parole boards began calculating base terms under the ISL and continued doing so under the Determinate Sentence Law (DSL) for life prisoners eligible for parole who served indeterminate sentences under the new law. Over the years, parole boards applied the base term in different ways and sometimes for different purposes. But the Board stopped using base terms altogether three years ago, after the California Supreme Court in *In re Butler* (2018) 4 Cal.5th 728 (*Butler*) declared base terms "unnecessary."

***The Nature of the Present Problem***

Our Supreme Court repeatedly states that "no person" - including indeterminately sentenced life prisoners eligible for parole -- "can be held for a period grossly disproportionate to his or her individual culpability for the commitment offense; and no statute can 'authorize the retention of an inmate beyond the constitutionally maximum period of confinement period. . . *[e]ven for reasons of public safety*. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1096, italics added), citing *Rodriguez, supra,* 14 Cal.3d at pp. 646-656; accord, *In re Butler, supra,* 4 Cal.5th 728, 744).)

The Board ignores this principle. Under its regulations, "[*r*]*egardless of the length of time served*, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison" (tit. 15 Cal. Code Regs, § 2402, italics added.) From the Board's perspective, the prediction of dangerousness trumps the constitutional prohibition on cruel and/or unusual punishment.

Recently, in *In re Palmer* (2021) 10 Cal.5th 959, the Supreme Court emphasized that "[f]or well over four decades, we have consistently recognized that life-top inmates denied release on parole may bring their constitutional challenges directly to court. And when inmates do bring such claims, they are not limited to challenging only the statutory life maximum, as the Attorney General suggests." (*Id*. at p. 789) This celebration of the

judicial remedy available to life prisoners is ironic, as *Palmer* is the rare case in which the Supreme Court has actually addressed a life prisoner's claim of constitutionally excessive punishment since the decision in *Rodriguez* forty-six years ago. Unlike the abundant number of habeas petitions claiming that no evidence supports a determination an inmate is unsuitable for release, petitions advancing constitutional claims, which are far more complex, are few and far between.

The cruel and/or unusual punishment provisions are underenforced with respect to life prisoners eligible for parole in part because lifers denied parole have no right to counsel. Neither county public defenders, the Office of the State Public Defender, nor any other group of lawyers represent life prisoners after they have been denied parole; lifers have essentially been abandoned by the criminal defense bar. It is theoretically true, as the Supreme Court often points out, that inmates can challenge the constitutionality of their punishment by filing a habeas corpus petition in propria persona. But doing so effectively is too much to expect of an unrepresented life prisoner: The *Lynch* test requires both an "examination of the nature of the offense and/or offender" and danger posed by each (*Lynch, supra*, 8 Cal.3d at p. 425) and a comparison of the challenged punishment with that applicable to similar offenses in California and to the same offense in other jurisdictions, showings requiring legal skills and resources ordinarily unavailable to lifers. It is telling that the petitioner in *Palmer* was represented by nine partners and associates of O'Melveny & Myers, which also represented him in the court that found the denial of parole resulted in unconstitutional punishment. Life prisoners rarely enjoy such extravagant legal assistance.

But the lack of legal assistance is not the only or even the biggest problem.

The principle of proportionality in punishment is difficult to enforce with respect to indeterminately sentenced lifers largely because the punishment they receive is not specified by the Legislature, imposed by a judge, or fixed by the parole board or any other authority until the inmate is released - which may be never.

As *Lynch, Foss, Wingo*, and *Rodriguez* all indicate, a reviewing court cannot easily assess the proportionality of punishment if it is unspecified and no assessment has

been made of the circumstances of the commitment offense and the inmate's individual culpability. Numerous studies have shown that the reason "prisoners incarcerated under indeterminate sentence laws serve longer terms of imprisonment than prisoners convicted of comparable crimes in jurisdictions using relatively fixed sentences" is "the structure of indeterminate sentencing." (Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm* (1974) 123 U. Pa. L. Rev 297, 303 and authorities there cited; accord, Morris, *The Future of Imprisonment* (Univ. Chicago Press 1974), Von Hirsch, *Doing Justice: The Choice of Punishment* (Hill & Wang 1976.)

The parole board justifies its disinterest in the culpability of lifers by denying there is such a thing as constitutionally excessive punishment for such prisoners so long as the Board deems them unrehabilitated. This position was supported by California courts during most of the time the ISL was in effect. For example, in *People v. Wade* (1968) 266 Cal.App.2d 918, the court explained that "the indeterminate sentence is in legal effect a sentence for the maximum term [citation]," and the purpose of the ISL "is to mitigate the punishment which would otherwise be imposed on the offender," "plac[ing] emphasis on the reformation of the offender" and "seek[ing] to make the punishment fit the criminal rather than the crime." (*Id*. at p. 928.) For these reasons, the court said, it was unable "to see how the indeterminate sentence law, which affords a person convicted of crime the opportunity to minimize the term of imprisonment by rehabilitating himself in such manner that he may again become a useful member of society, can be held to constitute the infliction of cruel and unusual punishment." (*Ibid*.) According to the *Wade* court, challenging application of the law "on the ground that it violates the constitutional rights of the defendant would constitute a step backwards in the treatment and rehabilitation of those convicted of crime." (*Id*. at p. 929.)

Such reasoning was repudiated by the California Supreme Court in 1972, when *Lynch* imposed constitutional considerations of proportionality on confinement whose purpose is rehabilitative. In 1975, when the ISL was still in effect, our Supreme Court acknowledged in *Rodriguez* that the failure of the parole board to assess culpability and

promote proportionality in the punishment imposed on indeterminately sentenced prisoners was no longer judicially tolerable.

***The Rationale of Rodriguez and its Subsequent Administrative Defeat***

In requiring the Board to fix inmates' primary (constitutionally maximum) term immediately after they entered prison, based on assessment of individual culpability for the commitment offense, *Rodriguez* explained that the Board's "term-fixing responsibility" was independent of its power to grant parole and its discretionary power to later reduce the primary term on the basis of the prisoner's "good conduct in prison, his effort toward rehabilitation, and his readiness to lead a crime-free life in society," or "to retain the prisoner for the full primary term if his release might pose a danger to society." (*Ibid*.) The court made clear a critical distinction between the Board's term-fixing and parole-granting functions: While the considerations regarding decisions to reduce a term or retain a prisoner for the full primary term "are based in large measure on occurrences subsequent to the commission of the offense," the primary term "must reflect the circumstances existing at the time of the offense." (*Id.* at p. 652.)

*Rodriguez* identified several purposes for the requirement of prompt fixing of the primary term shortly after a person entered prison. One was to ensure administrative application of the *Lynch* test of proportionality and "prevent the intrusion of irrelevant, post-conviction factors into the determination of the punishment that is proportionate to the offense of the particular inmate" – because culpability for the commitment offense is based only on the circumstances of the offense and the manner in which it was committed, which are immutable factors. (*Id.* at pp. 652-653, 654, fn. 18.) Another was to relieve the anxieties of prisoners, whose rehabilitation was undermined by their lack of knowledge as to when, if ever, they would be released. Facilitation of judicial review was also an important purpose, (*Id.* at p. 654, fn. 18.) As the court explained at length, prompt fixing of the primary term by the parole board was also essential "to relieve courts of the burden of contending with inadequate petitions unaccompanied by necessary supporting data inmates might lack the ability the obtain and present." (*Ibid.*) "Once the primary term is fixed by the Authority," the court stated, "all of the relevant

data regarding the particular inmate, the circumstance of his offense, and the criteria upon which the term is based will have been marshalled by the [parole board], thus enabling [the] petitioner to set out the base or bases for his complaint, while at the same time providing the court with a record adequate to permit meaningful review." (*Id.,* p. 654, fn. 18)*)*

The regulations adopted by the parole authority in response to *Rodriguez* required it to set the "primary term" for a prisoner sentenced to an indeterminate life term and eligible for parole fairly soon after the inmate entered prison[1] (former 15 Cal. Admin. Code, §§ 2000 et seq. [Cal. Admin. Register 76, No. 21–B, May 22, 1976] (1976 Regs.), and defined the primary term as "the maximum period of time which is constitutionally proportionate to the individual's culpability for the crime." (1976 Regs., § 2100, subd. (a).)[2] The primary term consisted of a "base term" reflecting the circumstances of the crime pertinent to the inmate's culpability, and "adjustments for the individual's criminal history" (prior prison terms and current commitments). (*Id.,* § 2150) Thus, the primary term set the maximum term that could be constitutionally imposed based on the particular offense and offender, with the base term serving as a direct assessment of an inmate's

[1] The term setting hearing was to be scheduled, together with the inmate's first parole hearing, for the earlier of one month before his or her minimum eligible parole date or the 12th month after reception (1976 Regs., §§ 2125, subd. (a)(2), 2251); for an inmate whose minimum eligible parole date was within 120 days of arrival in prison, the hearing was to be within 120 days of reception. (1976 Regs., § 2125, subd. (a).)

[2] The original regulations were issued by the Adult Authority on September 2, 1975, two months after *Rodriguez* was decided and prior to publication of the California Code of Regulations. It is entitled "Chairman's Directive No. 75/30 and entitled "*Implementation of In re Rodriguez*." This regulation states that, once fixed the primary term "cannot be refixed upward. A discharge date earlier than the primary term may be fixed, but may be refixed upward to the primary term if the inmate . . . engages in conduct which affords cause to believe he or she would pose a danger to society if free." The regulation states that the purpose of the base term is to "Evaluate the Inmate's Culpability" and enumerates non-exclusive criteria to be used in undertaking that evaluation.

individual culpability for his or her specific commitment offense. The effect of *Rodriguez* and the implementing regulations was to introduce an element of determinateness into an indeterminate life sentence where the defendant was eligible for parole.

Immediately after the DSL became effective on July 1, 1977, the parole authority, then called the Community Release Board (CRB), published parole regulations for life prisoners which no longer referred to a "primary term." (Former 15 Cal. Admin. Code, §§ 2265–2329 [Register 77, No. 28–B, July–9–77] (1977 Regs.).) However, the CRB continued to require the setting of a base term for prisoners who were still indeterminately sentenced and, in 1978 regulations, adopted a method for doing so that was followed until the *Butler* decision.

For a given life crime, the regulations provided a biaxial matrix specifying a triad of base terms depending on the seriousness of the circumstances in which it was committed.[3] The vertical axis specified categories of pertaining to the relationship between the inmate and his victim (so that, for example, culpability for second degree murder would be mitigated if the victim was a crime partner and aggravated if the victim had little or no personal relationship with the inmate, as well as if the death occurred during commission of another crime) and the horizontal axis specified categories based on the level of violence employed (ranging from death caused accidentally to torture). (The matrix for first degree murder last employed by the Board is attached to this Memo as Appendix A.) Board regulations enumerated 30 additional non-exclusive factors pertaining to culpability that could be used to aggravate (e.g., killing to preclude testimony of witness, lying in wait) or mitigate (e.g., prisoner played minor role, killing

[3] The CRB's 1976 regulations did not refer to "base term" but, in what amounted to the same thing, required calculation of a "base period of confinement" which, together with adjustments, would establish the "total period of confinement" upon which a tentative parole date would be set. (1977 Regs., § 2304, subd. (a), 2318-2328.) Regulations published in 1978 returned to use of "base term." (Former 15 Cal. Admin Code, § 2282 [Register 78, No. 31–A, August 5, 1978] (1978 Regs.).)

during unusual situation unlikely to recur) the middle base term triad. (Former tit. 15 Cal. Code Regs., §§ 2404, 2405.)[4] (The regulations describing the 30 additional factors are set forth in Appendix B.)

But, in critical distinction to *Rodriguez* and the 1976 regulations, beginning with the 1977 regulations, the calculation of the base term was to be made by the CRB only *after* an inmate was found suitable for parole. (*Id.*, § 2304, subd. (a).) This change was enormously consequential, because it eliminated consideration of proportionality during the process of determining suitability for release on parole, when it most mattered.

The reasoning behind abandonment of the requirement that a "primary term," based on a base term measuring the circumstances of the offense and adjustments for the offender's criminal history, be determined early in an inmate's incarceration – including those sentenced to indeterminate terms even under the DSL - may be indicated by the California Attorney General's subsequent explanation of his view that the CRB was no

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[4] For example, the matrix of base terms for second degree murder last suggested by Board regulations (former tit. 15 Cal. Code of Regs., § 2403, subd. (c)) provided that if the victim "was involved in a personal relationship with prisoner (spouse, family member, friend, etc.) which contributed to the motivation for the act resulting in death," and the "[d]eath was almost immediate or resulted at least partially from contributing factors from the victim; e.g., victim initiated struggle or had goaded the prisoner," the applicable base term triad was 17-18-19 years. If none of the numerous additional mitigating factors (former 15 Cal. Code of Regs., § 2405) or aggravating factors (former 15 Cal. Code of Regs., § 2404) applied, the base term would be 18 years.

The most aggravated base term triad prescribed for by the parole board's matrix for second degree murder, 19-20-21 years, applied when the "[v]ictim had little or no personal relationship with prisoner or motivation for the act resulting in death was related to the accomplishment of another crime (e.g., death of victim during robbery, rape, or other felony," and "[d]eath resulted from severe trauma inflicted with deadly intensity; e.g., beating, clubbing, stabbing, strangulation, suffocation, burning, multiple wounds inflicted with weapon not resulting in immediate death or actions calculated to induce terror in the victim." (former 15 Cal. Code of Regs., § 2403, subd. (c).) The most mitigated triad of terms, where the victim "died of causes related to the act of the prisoner but was not directly assaulted by prisoner with deadly force; e.g., shock producing heart attack, a crime partner actually did the killing," and the victim was an accomplice or otherwise implicated in a criminal act with the prisoner during which or as a result of which the death occurred." (*Ibid.*)

longer required to exercise the term fixing function *Rodriguez* imposed. Attorney General George Deukmejian had created a committee that assessed possible changes to the legal nature of prison sentences made by the DSL and Proposition 7, the so-called Death Penalty Act, which was approved by the voters in 1978.[5] In a five-page memo dated July 26, 1979, the committee detailed a list of changes in law it believed resulted from the DSL and/or Proposition 7. The Office of the Attorney General sent the memo to all criminal deputies with a declaration that it "sets out the Attorney General's position statewide."

Among other things, the memo stated that the "primary features" of the parole process under the ISL "passed into history on July 1, 1977, with the coming of DSL. The parole board's power to fix terms was withdrawn by the repeal of [Penal Code] section 2940 et seq., and nothing in the current Penal Code evidences an intent to reestablish those powers for first or second degree murder [which remained indeterminately sentenced]."

The 1979 memo went on to conclude that "In re Rodriguez (1975) 14 Cal.3d 639 also appears to have been rendered obsolete by the changed structure of life sentences. In Rodriguez, the California Supreme Court placed the burden on the parole board to set a prisoner's 'primary term' quickly and without regard to any post-conviction behavior. This 'primary term' established the outer limit of the prison system's jurisdiction over the prisoner. The basis for the Rodriguez decision lay in the judicial branch's obligation to examine terms, as fixed by the parole board, to determine whether they were cruel or unusual. In light of the fact the CRB has no term fixing power, it was the unanimous conclusion of all members present that *Rodriguez* is no longer applicable."

The reasoning of the July 26 Memo is misleading. That the DSL eliminated the parole authority's explicit statutory term-fixing authority with respect to determinately

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[5] The Attorney General's eight-person committee was originally charged with assessing state agency compliance with the new due process requirements prescribed by the United States Supreme Court in *Morrissey v. Brewer* (1972) 408 U.S. 471, and it was commonly referred to as the "Morrissey 8 Committee."

sentenced prisoners – and therefore the obligation imposed by *Rodriguez* to fix the constitutionally maximum "primary term" of such prisoners - does not necessarily mean it eliminated the authority's power to consider proportionality during the parole process for *indeterminately* sentenced inmates, whose terms were fixed by the Board when it grants parole. The purpose of *Rodriguez* was to facilitate enforcement of parole-eligible life prisoners' right to enjoy the benefits of the constitutional prohibition against punishment disproportionate to culpability for the commitment offense, without regard to postconviction conduct. Neither the DSL nor Prop 7 (which changed sentencing for prisoners convicted of murder in the first degree only for those *ineligible* for parole) interfered with the continuing applicability of this aspect of *Rodriguez* to the parole process applicable to inmates eligible for parole whose offenses remained indeterminately sentenced after enactment of the DSL.

The parole regulations implementing *Rodriguez* mandated that the base term be fixed soon after an inmate entered prison primarily to ensure there was an assessment of culpability for the commitment offense, free of post-conviction factors, so constitutional proportionality could be incorporated into the process of determining suitability for parole. True, the base term did not purport to represent the maximum term that could be constitutionally imposed, but it informed the Board, the inmate and, if necessary, a reviewing court whether the denial of parole might result in punishment grossly disproportionate to an inmate's individual culpability. That ceased to be the case when the Board delayed fixing the base term until after the life prisoner was deemed suitable for release, if he or she was ever deemed suitable.

The Board justified its practice of deferring the fixing of the base term on the ground that it promoted uniformity in sentencing by ensuring an inmate found suitable for release was not released earlier than would be indicated by his or her base term. Uniformity in sentencing had not been a goal of the ISL, under which release was based on rehabilitation. The present sentencing goals of the DSL include *both* uniformity *and* proportionality. As stated in the opening paragraph of the DSL, the purpose of incarceration "is best served by terms that are proportionate to the seriousness of the

offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances." (§ 1170, subd. (a)(1).) The Board's rationale ignores proportionality presumably because it would cabin its unrestricted right to serially deny parole to persons unreliably predicted to remain dangerous.

Promotion of uniformity did not require deferring the setting of the base term, but postponement served another, undeclared, purpose. Uniformity and proportionality are closely related because, as later discussed, both are based on culpability for the commitment offense. However, while both are sentencing goals of the DSL, proportionality is also constitutionally mandated. Therefore, although the goal of uniformity has been judicially deemed subordinate to the need to promote public safety (*In re Dannenberg, supra,* 34 Cal.4th 1061 at p. 1077-1095), [6] proportionality is not subordinate to public safety but the regnant factor. As the majority opinion in *Dannenberg* also makes clear, a statute "cannot authorize [a parole eligible life prisoner's] retention, *even for reasons of public safety*, beyond this constitutional maximum period of confinement." (*Id*. at p. 1096, italics added.) Postponing calculation of the base term until a prisoner was found suitable for release had the effect of severing the constraint of constitutional proportionality from the determination of suitability.

***In re Butler and the Demise of the Base Term.***

In 2013, Roy Butler, a parole eligible lifer, challenged the board's deferral of the fixing of a prisoners base term, claiming it "effectively eliminated any meaningful consideration of proportionality in sentencing during the most crucial portion of the parole process, and therefore facilitated imposition of constitutionally excessive punishment." (*In re Butler* (2015) 236 Cal.App.4th 1222, 1227.) As the case came before

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[6] *Dannenberg* was a split decision. Justice Moreno's dissent, which was joined by Justices Kennard and Werdegar, persuasively makes the case that the parole board failed to comply with statutory and constitutional mandates for prisoners to obtain parole according to a uniform, proportional system designed by the board. That is, in my view, still the case.

a Court of Appeal panel of which I was a member, the central dispute was the role of the base term.

The parole board took the position that the sole purpose of the base term was to promote uniformity in sentencing by ensuring an inmate who had reached his minimum eligible parole date and been found suitable for release had *also* served the minimum term prescribed by his or her base term.

Although Butler did not dispute the role of the base term with regard to uniformity he contended that, because it consisted of an assessment of culpability for the commitment offense, it was equally relevant to proportionality, the assessment of which was the original purpose of the base term in the wake of *Rodriguez*. He did not maintain the base term was the maximum term that could be constitutionally imposed, but simply that, when set prior to a determination of suitability for parole, it provided an indication whether the denial of parole would result in disproportionate punishment.

During a discovery dispute in which the Board resisted Butler's efforts to obtain demographic data relating to possible racial or ethnic disparities in the granting of parole, the parties settled the case by stipulating to a judicial order "directing the board to publicly announce and implement new policies and procedures that would result in the setting of base terms at life inmates' initial parole consideration hearings or, if that hearing had already taken place, at the next hearing resulting in a grant or denial of parole." (*Ibid*.) Although it did not resolve the parties' disagreement about the purpose of the base term -- the Board believed it served only to promote uniformity, Butler believed it also served the purpose of proportionality -- the settlement made sense for the parties. The benefit to Butler was that fixing the base term prior to the initial parole hearing introduced consideration of proportionality into the process of determining suitability for release: Inmates who had already served their base term could emphasize that at parole hearings and, if denied parole, present the issue to a reviewing court with a developed record. The benefit of the settlement to the Board was that it did not require the Board to do anything it was not already doing except change the timing, and relieved it of the need to provide Butler demographic data that might be indicative of racial bias in the parole

process.[7] Both parties knew their different contentions regarding the role of the base term would eventually have to be judicially resolved, but they were willing to put that off to another day.

Butler then moved for attorney fees pursuant to Code of Civil Procedure section 1021.5, maintaining the settlement he obtained vindicated an important right affecting the public interest by causing the Board to change its policy and set inmates' base terms at the first suitability hearing.

Opposing this motion, and focusing on uniformity rather than proportionality, the Board argued that "the settlement and stipulated order merely create 'a new mutually beneficial term-setting policy,' not 'the vindication of a right the Board had previously violated or curtailed.' " This was so, the Board claimed, " 'because the right [Butler] asserts -- that of a base term calculation at the initial parole hearing -- did not exist until the settlement went into effect.' " The Board argued that *In re Dannenberg, supra*, 34 Cal.4th 1061, upheld the practice of deferring the fixing of the base term until after an inmate was found suitable for release, and no statute required setting the base term before the determination of suitability.

Our court rejected the first argument because *Dannenberg* held only that public safety takes precedence over *uniformity* in sentencing and made clear it does not take precedence over constitutional proportionality, which was the basis of Butler's claim. We rejected the Board's second argument because Butler never asserted a preexisting statutory right to calculation of the base term, but rather that postponement of the

[7] The Board's position that "records regarding the race/ethnicity of the applicants considered for parole" are exempt from disclosure under the Public Records Act" was rejected by the San Francisco Superior Court last year (*Brodheim v. Calif. Dept. of Corrections and Rehabilitation* (July 16, 2020) 2020 WL 4558319), and the Board has not appealed. The superior court observed, "this case unquestionably involves a weighty public interest in disclosure, i.e., to shed light on whether the parole process is infected by racial or ethnic bias. The importance of that public interest is vividly highlighted by the current national focus on the role of race in the criminal justice system and American society in general."

calculation obstructed his and other inmates' constitutional right to proportionate punishment.

We were not asked to, and did not, say the adjusted base term represented the maximum punishment that may constitutionally be imposed on a parole eligible life prisoner. But we agreed with Butler that the base and adjusted base terms relate to proportionality as well as uniformity, and awarded him public interest attorney fees because the settlement restored consideration of proportionality in punishment during the parole process.

We explained, "[u]niformity and proportionality, the dual sentencing principles the Legislature thought best served the punitive purpose of the DSL (§ 1170, subd. (a)), are conceptually related. The principles can conflict: imposing the same sentence on all persons convicted of an offense would serve the purpose of uniformity, but it would disserve the principle of proportionality because no offense is always committed in the same circumstances and those who commit the same offense are not all equally culpable or blameworthy. But these two sentencing principles usually do not conflict and in practice they are largely complementary. Both are linked to retribution and both also serve the law's preference for discernible norms and enhance public respect for the criminal law and criminal justice systems, which is essential to the reduction of crime. (Frase, *Punishment Purposes* (2005) 58 Stan. L. Rev. 67, 74-79 ['Proportionality and uniformity of sentencing are based on widely shared fairness concerns, so highly disparate penalties are likely to reduce the public's willingness to obey the law and cooperate with law enforcement.'].)" (*In re Butler, supra*, 236 Cal.App.4th at pp. 1236.)

Our opinion also pointed out that the dual requirements of uniformity and proportionality set forth in Penal Code section 1170, subdivision (a), "clearly reflect a legislative desire to place limits on the largely unmitigated retributivism that might otherwise result from a parole system governed solely by predictions whether an inmate presented a threat to public safety. In the wake of *Dannenberg,* the only limitation that may be placed on the retributivism that might otherwise result from the systematic denial of parole is the constitutional prohibition of excessive punishment. The Board's position

that it may deny a prisoner release on parole based on its determination that he or she presents a risk presents a danger to public safety '[r]egardless of the length of time served' (Cal. Code, Regs., §§ 2281, subd. (a), 2402, subd. (a), italics added) would remove *all* limits on the severity of punishment the Board can impose." (*In re Butler, supra*, 236 Cal.App.4th at p. 1237, italics added.)

The Board did not seek review of this opinion, and continued to comply with the settlement agreement and stipulated order requiring it to fix the base term prior to inmates' initial parole hearing.

Eight months after our opinion was filed, however, the Board filed a motion to "modify" the settlement by eliminating the need to set the base term at the commencement of the parole process. The motion was based on the grounds that post settlement legislation constituted a material change in the facts, rendering the stipulated judgment "unnecessary." Specifically, the Board maintained there was no longer a role for base terms in the parole process because amendments to section 3041 by Senate Bill 230, sponsored by Senator Loni Hancock, repealed the requirement that release dates be set in a manner providing "uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public" – which the Board viewed as its authority for setting base terms – and required that inmates be released immediately upon a grant of parole becoming effective, as long as statutorily mandated minimum terms had been served.[8] The Board also relied upon new statutes relating to parole of youth offenders and elderly inmates, which specifically required release upon a grant of parole in those cases.

We denied the motion and the Board filed a petition for review. The California Supreme Court agreed with the Board that new legislation rendered the base term (and the settlement) "unnecessary," and reversed our denial of the Board's motion to wipe out the settlement agreement. (*Butler, supra,* 4 Cal.5th 728.) As a result, the Board ceased

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[8] The primary purpose of the bill, which is different, is described, *post*, at p. 26, fn. 15.

calculating base terms and repealed all provisions of its regulations pertaining to the base term.[9]

The Supreme Court commenced its analysis in *Butler* with the observation that "the settlement was premised on the idea that 'base terms' played some role -- defined by statute -- in determining release dates for those sentenced to indeterminate terms" and, due to post settlement legislation, this is no longer the case. (*Butler, supra*, at p. 732.) As the Supreme Court noted, "[a]t the time of the settlement agreement, 'base terms' governed the earliest possible release date for inmates serving indeterminate sentences." (*Ibid.*) It is true that the base term played this role after the Board, in service of the goal of uniformity, postponed the time at which it was fixed. But the settlement, which eliminated the postponement, was not premised on the idea that uniformity was the *only* role the base term played, nor was it premised on the idea that the role of the base term was "defined by statute." The phrase "base term" never appears in the Penal Code.

In any case, the Supreme Court's point -- that new legislation requiring inmates to be released when they are found suitable for parole eliminates the need for the Board to fix release dates, thereby rendering the base term useless and the stipulated judgment "unnecessary" -- makes sense only if the *only* purpose of the base term is to determine the release date in a manner that promotes the statutory goal of uniformity. That is, the high court's rationale depends upon the assumption that the base term has nothing to do with proportionality in sentencing. Unfortunately, that is the proposition for which the

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[9] I do not know whether the Supreme Court or any court has ever previously undone a voluntary settlement solely on the grounds it is no longer "necessary" or "desirable," but it is certainly uncommon. The *Butler* opinion stated that it found no reason to "enshrine the base term as constitutionally required" (*id*. at p. 745), but no one asked it to. All Butler asked was compliance with the terms of the settlement, which did not require the Board to do anything unlawful. It simply provided Butler the opportunity to make a record and show a judicial body that fixing the base term promptly would advance compliance with the principle of proportionality in punishment. Moreover, the post settlement legislation rendered the settlement "unnecessary" only if the base term assessment of culpability serves no constitutional purpose, and the Supreme Court did not go quite that far.

Supreme Court's opinion now stands, despite the fact it cannot be reconciled with the provenance of the base term and the indisputable fact that it can only reasonably be seen as an assessment of culpability, which is the referent of the constitutional principle of proportionality in punishment. As a result of *Butler*, rights of prison inmates protected by the Eighth Amendment and article I, section 17 of the California are ignored by the Board and almost impossible to enforce.

The Supreme Court noted that our opinion awarding Butler public interest attorney fees "discussed in some detail the Court of Appeal's theory about the constitutional significance of base terms." (*Id*. at p. 736.) Yet though it repudiated our conclusion that prompt fixing of the base term helped " 'ensure life prisoners do not serve terms disproportionate to the culpability of the individual offender' " (*Butler, supra,* 236 Cal.App.4th at p. 1231, quoting *In re Stoneroad* (2013) 215 Cal.App.4th 596, 617), the Supreme Court did not find it necessary to refute that proposition and the reasons we gave in support of our analysis.

The Supreme Court's confidence lifers do not need protection against disproportionate punishment as part of the parole process is difficult to understand. The court reiterated its explanation in *Dannenberg* "that *Rodriguez's* prophylactic measures" are not "constitutionally required" in the state's "current, mostly determinate sentencing regime," as lifers constitute a "narrower category" of serious offenders and, "[b]ecause of their culpability, there is a 'diminish[ed] possibility' that these serious offenders will suffer constitutionally excessive punishment." (*Butler, supra,* 4 Cal.5th at pp. 744-745.) Yet, while the category of offenders sentenced to indeterminate terms is necessarily "narrower" under the DSL than when *all* inmates received indeterminate sentences, the number of individuals in this category is significant and growing. At the time of the *Butler* litigation, the state prison population included 34,388 indeterminately sentenced prisoners (27,431 lifers and 6,957 third-strikers), more than a quarter (26.4 percent) of the total prison population (then 130,263 prisoners). (CDCR, *Offender Demographics for the 24-month period, ending December 2017*, at pp. 4, 6.) The number of indeterminately sentenced prisoners serving time under the DSL is now greater than the *entire* California

prison population at the time *Rodriguez* was decided**.** (U.S. Dept. of Justice, Bureau of Justice Statistics, Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86 (May 1988).)

Furthermore, the rates at which lifers are granted parole are incongruously low.[10] For example, a 2011 study suggests the parole process at that time had all but converted life with the possibility of parole into life without that possibility. (Weisberg, et al., Stanford Criminal Justice Center, Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California (Sept. 2011) (Stanford Study).) In the sample of hearing transcripts studied, life prisoners were granted parole at only 2.2 percent of initial parole hearings and at less than 15 percent of all subsequent hearings. (Stanford Study, at p. 18.) The report stated that "[t]he grant rate has fluctuated over the last 30 years— nearing zero percent at times and never arising above 20 percent." (*Id.* at p. 4.) In 2020, 16 percent of parole hearings scheduled resulted in grants of parole. (Board of Parole Hearings, 2020 Report of Significant Events, pp. 1, 6.) And this low rate is despite recent reforms that encouraged grants of parole for youth offenders and elderly inmates.[11]

The Supreme Court's statement that, due to their culpability, there is a "'diminish[ed] possibility' that lifers will suffer constitutionally excessive punishment" (4 Cal.5th at p. 745), also ignores the breadth of the crimes that may now be indeterminately sentenced.

Lifers include juveniles convicted of offenses that caused no physical harm to the victim (e.g., *In re Palmer, supra,* 10 Cal.5th 959) and the many third-strikers convicted

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[10] Because, as the Stanford Study pointed out, the recidivism rate of life prisoners is "miniscule") due to the fact that at the time they become eligible for parole most have "aged out" of crime.

[11] In 2019, the year after *Butler* was decided, sixty-one percent of hearings for indeterminately-sentenced youth offenders resulted in a denial, and sixty-eight percent of hearings held for indeterminately sentenced inmates eligible for an elderly parole hearing resulted in a denial. (CDCR, 2019 Significant Events: Workload at a Glance (Feb. 18, 2020 at p. 7.)

of crimes such as robbery with little or no physical harm to the victim. The Board's indifference to proportionality allows enormous disparities in the time actually served by lifers. For example, consider a person sentenced to life for a third strike robbery conviction and a person sentenced to life for a first-degree murder conviction who have the same sentence (25 years to life). Suppose the Board were to continually deny parole to the third-striker and the third-striker served 50-plus years before dying in prison. Suppose also that the Board were to grant parole to the person convicted of murder after 25 years. The result would be that California incarcerates the third-striker for twice the amount of time as the person convicted of murder regardless of whether the striker is markedly less culpable.

This problem is not hypothetical. A recent study found that many youth convicted of a non-homicide, non-sexual offense are imprisoned for over twice the amount of time as youth convicted of murder. (Bell, *A Stone of Hope, Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions* (2019) 54 Harv. C.R.-C.L. L. Rev. 458, 507, Table 10 (*Stone of Hope*).) The study reported that for youth offenders who were granted parole in 2014-2015, the number of years served by a youth convicted of a non-homicide, non-sexual offense ranged from 11 years to 35 years. The range for youth convicted of murder in the second degree was 13 years to 28 years. The same study showed that, on average, youth offenders convicted of murder in the first degree served 2.7 years over the statutory minimum (25 years for first-degree murder) prior to release whereas those convicted of second-degree served 8.7 years over the statutory minimum (15 years for second-degree murder). (Id. at fn. 184.) There is an *inverse* relationship between the severity of the crime and the time served over the minimum.

These disparities are countenanced because the Board pays no attention to culpability (and therefore proportionality) during the parole process.

The *Butler* court also stated that lifers are "protected against disproportionate punishment through other means" than base terms, referring to "provisions ending indeterminate sentences when individuals have served the statutory minimum term and have been found suitable for release" – that is, the youth offender and elderly parole

provisions and the amendment of section 3041. (*Butler, supra*, at p. 732.) This conclusion suggests the court believes parole is likely to be granted when inmates reach their parole eligibility dates, presumably because section 3041 continues to provide that the board "shall normally grant parole" one year before an inmate's minimum eligibility date. But this is an event that in fact rarely occurs. As Justice Moreno has pointed out, in the eyes of the parole board " 'normally can mean 'almost never' and the Board can disregard the statutory mandate that parole dates be set proportionally in relation to the magnitude of the offense." (*Dannenberg, supra*, 34 Cal.4th at p. 1101 (Dis. Op. of Moreno, J.) Indeed, as previously noted, at the time of the Stanford Study only 2.2 percent of applications for parole were granted at the initial parole hearing. And the idea that inmates are protected against disproportionate punishment by a statutory requirement that they be released once found suitable ignores the fact that the *Butler* opinion leaves the Board's ability to serially deny suitability on the basis of a prediction of dangerousness unimpaired either by statute or any constitutional consideration.

The *Butler* court's observation that inmates "retain the ability to perform the base term calculation or something equivalent and submit it to the Board for consideration" (*Butler,* at p. 747) reintroduces the untenable situation *Rodriguez* and the early base term regulations sought to alleviate. The idea that the Board -- which has for decades adamantly resisted any constitutional limitations on its ability to deny parole solely on the basis of a prediction of dangerousness -- would be influenced by a base term "or something equivalent" submitted by an inmate at a parole hearing is difficult to take seriously, even indulging the dubious assumption life prisoners possess the ability to ably calculate a creditable base term (an assumption repudiated by the Supreme Court in *Rodriguez, supra* 14 Cal.3d at p. 654, fn. 18).

The Supreme Court says "[c]alculating a base term does not serve as a judgment on constitutional proportionality" because it does not involve the "broad, fact-specific inquiry" courts engage in to assess constitutional proportionality claims, which must consider the "totality of the circumstances surrounding the commission of the offense.'" (*Id*. at p. 746, quoting *People v. Dillon* (1983) 34 Cal.3d 441, 447.) But this point is

based on consideration of only the "two-factor matrix method used to calculate a base term" (*ibid.*), apparently focusing on the basic factors regarding the crime directly measured by the matrices and ignoring the *thirty* other *non-exclusive* factors identified in Board regulations as justifying aggravation or mitigation of the base term (former 15 Cal. Code Regs., §§ 2404-2405), as well as the adjustments for specified factors including other offenses and prior prison terms (former 15 Cal. Code Regs., §§ 2406, 2407. (The regulations specifying the 30 factors are set forth in Appendix B.) It is unreasonable to think these numerous factors, in conjunction with those identified by the matrices and the Sentencing Rules for the Superior Courts, which Board regulations also allow to be considered, are insufficient to reflect "the totality of the circumstances surrounding the commission of the offense" and inform an assessment of culpability.

II.

***The Need for a Legislative Solution and Possible Approaches***

California shifted away from an entirely indeterminate sentencing scheme in 1975 largely due to the growing belief subjective predictions of dangerousness are unreliable. The most influential proponent of this view at that time was Dr. Bernard Diamond (Professor of Law at the UC Berkeley School of Law and Clinical Professor of Psychiatry at UCSF Medical School). In *The Psychiatric Prediction of Dangerousness* (1974) 123 U. Pa. L. Rev. 439, Dr. Diamond described studies whose "findings so consistently demonstrate that psychiatrists over-predict dangerousness by huge amounts that the studies must be taken seriously." (*Id.* at p. 445.) In Dr. Diamond's view, "[n]either psychiatrists or other behavioral scientists are able to predict the occurrence of violent behavior with sufficient reliability to justify the restriction of freedom of persons on the basis of the label of dangerousness." (*Id*. at p. 452)

Norval Morris, a leading American criminologist, also believed prediction of criminality "an unjust basis for imposing a sentence of imprisonment," because "it presupposes a capacity to predict future criminal behavior quite beyond our present technical ability." (Morris, The Future of Imprisonment (1974) at p. 62; see also Von Hirsch, Doing Justice: The Choice of Punishments (Hill & Wang 1976) at p. 22.) In

support of his dim view of such predictions and the tendency of parole authorities to over-predict dangerousness, Morris relied on studies of a California Department of Corrections research group that developed a "violence prediction scale" for use in parole decisions. "The use of this scale resulted in 86 percent of those identified as potentially dangerous failing to commit a violent act (more accurately, to be detected in a violent act) while on parole." A parallel effort to predict Youth Authority wards as likely to be violent on parole produced a 95 percent overprediction of violence. (*Id*. at p. 34.)

Years later, predictions of dangerousness remain unreliable. In a 2019 article, Professor Michael Tonry observed that "accuracy is little better now than it was four decades ago. . . In Morris's time, the state of the predictive art . . . was that two-thirds of individuals predicted to be violent were false positives. [¶] The technology of violence prediction is vastly more sophisticated than it was four decades ago. The early studies were based on clinical predictions by doctors, mental health specialists, judges, and correctional personnel. The contemporary literature is actuarial and is based on mathematical models, sophisticated statistical analyses, machine learning, and 'big data.' One might expect that violence predictions today would be vastly more accurate than in the 1970s. They aren't." (Tonry, *Predictions of Dangerousness in Sentencing: Déjà vu All Over Again* (2019) 48 Crime and Justice 439, 450.) According to Professor Tonry, two of the leading meta-analyses of the accuracy of prediction instruments "conclude that positive predictions of future violence are too inaccurate to be used in sentencing" and "[e]ven outspoken defenders of risk prediction agree" they should not be the sole or primary basis of sentencing decisions. (*Id.* at p. 452.)

The 1986 Miller and Morris article, which remains among the most insightful analyses of the use of predictions of dangerousness, makes a number of points the Committee should consider. (The standard put forth by Miller and Morris was accepted by the National Academy of Sciences as its official position on predictions of dangerousness. (*Predictions of Dangerousness, supra,* 2 Notre Dame J. L. Ethics and

Pub. Pl'y at p. 393.))[12] Writing at a time when use of predictions of dangerousness was being widely criticized due to doubts about "accuracy, efficacy and morality," Miller and Morris make a persuasive case for accepting the need for such predictions (due to their wide use in criminal law and judicial acceptance of their use), but imposing constraints in order to "justly differentiat[e] among individuals." (*Id*. at p. 395.) The authors point out that statistical prediction refers to *group*s, *not individuals*: Prediction of future dangerousness based on an individual's membership in a defined group possessing certain attributes refers to a *condition* rather than the result in an individual case, and the question is "the justice of applying to each individual powers influenced by his membership in that group." (*Id.*, at pp. 410-411.) Recognizing that predictions will often be wrong, Miller and Morris point out that the issue is relative, not absolute, accuracy, and studies have repeatedly shown that " 'nonstatistical prediction in bail and sentencing decisions . . . produce[s] errors at a higher rate than the more scientific approach.'" (*Id.*, at p. 420, quoting Forst, *Selective Incapacitation: A Sheep in Wolf's Clothing?* 68 Judicature 153, 157, fn. 9 (1984).) In their view, "clinical" predictions of dangerousness made on an "intuitive, untested, and unverifiable basis" should not be relied upon as the basis for extended incarceration; predictions of dangerousness based on how an individual behaved in the past ("anamnestic prediction") and how similarly situated individuals behaved in the past ("actuarial prediction") are far more reliable, provided the systems of prediction do not rely on information -- "like poor employment records, educational deficiencies, residential instability -- that more commonly characterize minority communities." (*Predictions of Dangerousness, supra,* 2 Notre Dame J. L.

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[12] The standard advanced by Miller and Morris is not perfect. As Professor Tonry noted, "Morris wrote before much evidence had accumulated on the racial disparities inexorably produced by predictive sentencing and without considering the implications of use of youth, gender, race-correlated socioeconomic status, and bias-contaminated criminal history variables." (Tonry, *Predictions of Dangerousness in Sentencing: Déjà vu All Over Again, supra,* at p. 468.) Nevertheless, our Legislature and courts have accepted a parole system based on evaluation of dangerousness, and in such a system, the emphasis Miller and Morris place on proportionality and objective evidentiary assessment is critical.

Ethics and Pub. Pl'y at p. 404-405, 421 and fn. 25.) Miller and Morris maintain it is much easier for bias or prejudice, unconscious or otherwise, to enter into a discretionary process when there are not neutral, or at least testable, principles to guide the decision. Therefore, they see "predictions of dangerousness, used as a guide to discretion, as a tool which is likely to reduce the impact of racial bias." (*Id*. at p. 421.)

There is evidence that the "intuitive, untested, and unverifiable" manner in which the Board predicts whether applicants for parole remain dangerous involves racial bias. An empirical study conducted by Professor Kristen Bell analyzed 465 youth offender parole hearings conducted in 2014-2015. The data showed that "[a]mong Black parole candidates who have not retained a private attorney and who have no prior experience with the board, one of twenty-four candidates (4%) was granted parole. The grant rate was eighteen times higher among non-Black parole candidates who have retained an attorney and have prior experience with the board. Of those candidates, thirty-four of forty-seven (72%) were granted parole." (Bell, *Stone of Hope, supra,* 54 Harv. C.R.-C.L. L. Rev. at pp. 491-492.)[13] A regression model that considered sixteen variables (including disciplinary history, programming, and other variables that have been hypothesized to influence parole decisions) showed that being a Black person substantially reduced the odds of parole for an average parole candidate. (Id. at 498-500, see also id. at 544, Appendix C). Being a Black person also reduced the likelihood of receiving a low risk score on the comprehensive risk assessment. (Id. at 499.)

The two most critical principles Miller and Morris advance are that (1) punishment should not be imposed or increased based on predicted dangerousness "beyond that which would be justified as a deserved punishment independently of that prediction" and (2) an individual's predicted dangerousness should be assessed by comparison to the "base expectancy rate of violence" for a group of others who committed similar offenses

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[13] On the presence of racial and ethnic bias in the parole process generally see Huebner & Bynum, *The Role of Race and Ethnicity in Parole Decisions* 46 CRIMINOLGY 907 (2008)

and had similar criminal records. (*Id.* at pp. 431-433.)[14] "Base expectancy rate" is "the expected rate-at which a given event occurs across a population"; for example, a 50% expectancy rate means 50 individuals in a group of 100 would be expected to act in accordance with the prediction. (*Id.* at p. 404, fn. 21.)

The "first principle" of the Miller and Morris article is, in essence, a requirement of proportionality as the upper limit on punishment.

The second principle is a requirement that empirical evidence underlie and corroborate the prediction.

Miller and Morris maintain that "[t]he base expectancy rate of violence for the criminal predicted as dangerous must be shown by reliable evidence to be substantially higher than the base expectancy rate of another criminal with a closely similar record and with a conviction of a closely similar crime but not predicted as unusually dangerous, before the greater dangerousness of the former may be relied on to intensify or extended his punishment. . . . Only by comparing the predictions for individuals within relevant groups to the base expectancy rate of violence for that group can the decision be made about whether the use of the prediction is proper in controlling the individual." (*Id*. at p. 433-434.)

As earlier noted, the two factors Miller and Morris look to in defining the group against which a defendant's dangerousness should be assessed – similarity of offense and criminal record - are the two factors that were considered in calculating an inmate's "primary term" under the parole board regulations implementing *Rodriguez.* Even

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[14] Miller and Morris define "dangerousness" as "intentional behavior that is physically dangerous[] to the person or threatens a person or persons other than the perpetrator – in effect, . . . assaultive criminality," viewing "serious physical injury to the person or the threat of such injury" as "what emotionally fuels the whole movement toward the use of predictions of dangerousness in the criminal law." (*Predictions of Dangerousness, supra,* 2 Notre Dame J. L. Ethics and Pub. Pl'y at p. 402.) Their definition is consistent with Penal Code definitions, such as defining "unreasonable risk of danger to public safety" to mean "unreasonable risk that the [individual] will commit a new violent felony within the meaning of clause (iv) of subparagraph (c) of paragraph (2) of subdivision (e) of Section 667." (Pen. Code, § 1170.18.)

without a fixed, constitutionally maximum term, because these two factors measure individual culpability for the commitment offense, they provide a rough but useful yardstick for assessing proportionality. In dismissing the need to calculate base terms, the Supreme Court's *Butler* opinion thus relieved the Board of the need to undertake assessments of culpability that facilitate evaluation of proportionality as a check on predictions of dangerousness that result in extended imprisonment. It is appropriate for the Legislature to rectify this problem because it was created by the Supreme Court on the basis of reforms the Legislature could not have predicted would have this effect.[15]

There are a variety of other ways in which the Legislature could cabin the constitutionally unfettered discretion of the parole board to predict dangerousness. Professor Kristen Bell proposes the use of "a presumptive-maximum parole-release date" - that is, "a point in time at which the sentence does not technically expire, but a very strong presumption of release from prison takes hold. The parole board would retain broad discretion to grant or deny parole prior to the presumptive-maximum date, but when a person reaches the presumptive maximum, the parole board would have extremely limited discretion to deny release. For example, once a person has reached the presumptive maximum, the parole board would be required to grant release unless there is clear and convincing evidence the person poses a threat of grave physical injury to

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[15] Ironically, the problem the Legislature sought to remedy by repealing the provision in section 3041 that "a life prisoner's parole release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to the public" (Stats. 2015, ch. 470) -- which the Board viewed as its authority for setting base terms that pertained solely to uniformity, and the repeal of which the Supreme Court relied upon in finding base terms no longer necessary (4 Cal.5th at p. 737) -- was that inmates were being retained in prison too long. (Sen. Com. on Public Safety, Analysis of Sen. Bill 230 (2015-2016 Reg. Sess.) April 27, 2015, pp. 4-5.) As stated by the author of the bill, inmates could reach their minimum parole eligibility dates and be found suitable for release but still be required to serve additional time because they had not yet fully served their adjusted base terms. (*Ibid*.) The repeal of the uniformity provision (and therefore, as the *Butler* court saw it, the elimination of a need for the base term) thus appears to have been intended to avoid prolonging the incarceration of an inmate found suitable for parole.

others that cannot be managed in a non-custodial setting." (*Stone of Hope, supra,* 54 Harv. C.R.-C.L. L. Rev. at p. 529.)

Professor Bell proposes several methods for setting the presumptive maximum. One method would be to define the presumptive maximum "as the point at which an individual has completed some defined number and type of rehabilitation programs." (*Ibid*.) Alternatively, the presumptive maximum could be based solely on a minimum parole eligibility date, such as having served more than 110% of their minimum time served.A third suggestion is to set the presumptive maximum at the sentencing hearing "based on an individualized proportionality judgment about the gravity of a crime in a given case," such as the base term conceived in the wake of *Rodriguez*. (*Id.* at p. 530) In Bell's view, one advantage of setting the presumptive maximum at a sentencing hearing is that, relative to the Board, trial judges "have greater expertise in proportionality analysis and are more proximate to the facts of the crime." (*Id.* at pp. 530-531.)

The views of the experts just described are not shared by the present parole board. In its recent opinion in *In re Palmer, supra*, 10 Cal.5th 959, the court stated that, because the " 'paramount consideration' in making release determinations remained 'whether the inmate currently poses a threat to public safety[,]'"' "[i]f the inmate remains a danger, the Board 'can, and must decline to set a parole date.'" (*In re Palmer,* at p. 970, quoting *In re Lawrence* (2008) 44 Cal.4th 1181, 1210, 1227, and citing Board regulation § 2281, subd. (a) ['Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.'].) In other words, *Palmer* says (without further explanation), "the Board is not ever required, when making parole decisions, to consider whether an inmate's punishment has become constitutionally excessive." (*In re Palmer,* at p. 968, 971.) Instead, the responsibility to decide whether an inmate's punishment has become constitutionally excessive rests solely with the courts.

The parole process described by *Palmer* is deficient in two major respects.

First, *Palmer* not only absolved the Board of any responsibility to consider constitutional proportionality, but did so without imposing any requirement that the Board employ evidence to independently corroborate unreliable predictions of dangerousness. The result violates both of the two most critical principles advanced by Miller and Morris and others: (1) that punishment should not be imposed or increased based on predicted dangerousness "beyond that which would be justified as a deserved punishment independently of that prediction" and (2) that an individual's predicted dangerousness should be assessed by comparison to the "base expectancy rate of violence" for a group of others who committed similar offenses and had similar criminal records. A prediction of dangerousness not independently supported by testable evidence is not only unduly unreliable, but amenable to corruption by racial and/or ethnic bias.

The second flaw in the process described in *Palmer* is the unduly optimistic assumption that a constitutional claim never considered by the Board can "readily" be dealt with in the courthouse. As earlier pointed out, an important reason the *Rodriguez* court required the parole board to immediately assess the culpability of inmates was its concern that their constitutional claims in propria persona could not otherwise be meaningfully reviewed. "Were unrepresented prisoners required to take the initiative by seeking relief at such time as they believed their imprisonment to be constitutionally impermissible, not only might abuses such as that in the instant case and that in *Lynch* recur, but courts would continue, as now, to receive inadequate petitions unaccompanied by necessary supporting data. Since prison inmates understandably lack perspective as to the propriety of their continued incarceration, and also lack the ability to marshal the facts and applicable law in support of their claims, it is probable that courts would be burdened by a flood of meritless petitions." (*Rodriguez, supra*, 14 Cal.3d at p. 654, fn. 18) However, if the Board or some other agency must assess proportionality, it will collect the relevant data, which will facilitate an inmate's presentation of a claim to the courts and the courts' provision of meaningful review.

Viewed from the perspective of proportionality, the absence of a device like the base term or a presumptive maximum parole-release date enables the indefinite

incarceration of life prisoners eligible for parole based solely on the Board's unreliable predictions of dangerousness. Reliance on a prediction of dangerousness cannot be countenanced unless the Legislature requires that it be corroborated by neutral principles based on evidence that can be subject to empirical test. The base term that evolved from *Rodriguez* is predicated on such a neutral principle -- that of constitutional proportionality -- and the fixing of such a term on the basis of objective factors relating to culpability places a prisoner in a group whose "base expectancy rate of violence" can be calculated (by the Board or perhaps by a sentencing court pursuant to guidelines promulgated by the Judicial Council)[16] and employed as a means of cabining the discretion of the Board so as to avoid constitutionally excessive punishment

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In 1975, when the ISL was replaced by the DSL, there was broad agreement that the many deficiencies of our indeterminate sentencing system were intolerable and dramatic change was required. The rejection of what was only putatively a rehabilitative system was reflected in the first sentence of the DSL, which was the legislative finding and declaration "that the purpose of imprisonment for crime is punishment." (1976 Stats., Ch. 1139, p. 5140 (Sen. Bill No. 42), amending Penal Code section 1170, subd (a).) The declaration went on to state that the purpose of punishment "is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstance" and that "the elimination of disparity and the provision for uniformity of sentences can best be achieved by determinate sentences fixed by statute." (*Ibid*.)

Because "punishment" did not fit the situation of indeterminately sentenced prisoners it was subsequently amended, so that section 1170, subdivision (a)(1), now states that "the purpose of sentencing is public safety achieved through punishment, *rehabilitation*, and restorative justice. When a sentence includes incarceration, this

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[16] The DSL currently provides that "in sentencing a convicted person, the court shall apply the sentencing rules of the Judicial Council. (§ 1170, subd. (a)(3))

purpose is best achieved by terms that are proportionate to the seriousness of the offense with provision of uniformity in the sentences of offenders committing the same offense under similar circumstances." (Italics added.)

The Legislature has thus declared that -- though they were subjected to a nominally rehabilitative, not punitive, sentencing scheme -- the punishment of indeterminately sentenced lifers eligible for parole should be proportionate to their culpability and consistent with the sentences of offenders whose culpability is similar to their own; a principle also embodied in the opinion of the Supreme Court in *In re Lynch, supra*.

As I have explained, California parole boards have long defied the legislative mandate for proportionality and uniformity in the punishment of indeterminately sentenced persons, as they also long evaded the theses of the California Supreme Court in *Rodriguez*, which remain pertinent. The Legislature has the power to rectify this defiance, and it is my hope that, after studying the issue, this Committee will urge it to do so. The indifference of the Board to the constitutional limits of its power to punish has in my view resulted in injustice and cruelty that should no longer be ignored.

# APPENDIX

# A

**§ 2403. Base Term.**

(a) General. The panel shall set a base term for each life prisoner who is found suitable for parole. The base term shall be established solely on the gravity of the base crime, taking into account all of the circumstances of that crime. If the prisoner has been received in prison for more than one murder committed on or after November 8, 1978, the base crime is the most serious of the murders considering the facts and circumstances of the crime. If the prisoner has been sentenced to prison for murders committed before November 8, 1978 and for murders committed on or after November 8, 1978, the base offense shall be the most serious of the murders committed on or after November 8, 1978.

The base term shall be established by utilizing the appropriate matrix of base terms provided in this section. The panel shall determine the category most closely related to the circumstances of the crime. The panel shall impose the middle base term reflected in the matrix unless the panel finds circumstances in aggravation or mitigation.

If the panel finds circumstances in aggravation or in mitigation as provided in §§ 2404 or 2405, the panel may impose the upper or lower base term provided in the matrix by stating the specific reason for imposing such a term. A base term other than the upper, middle or lower base term provided in the matrix may be imposed by the panel if justified by the particular facts of the individual case and if the facts supporting the term imposed are stated.

(b) Matrix of Base Terms for First Degree Murder committed on or after November 8, 1978.

| | CIRCUMSTANCES | | | |
|---|---|---|---|---|
| *First Degree Murder* | A. *Indirect* | B. *Direct or Victim Contribution* | C. *Severe Trauma* | D. *Torture* |
| Penal Code § 189 (in years and does not include post conviction credit as provided in § 2410) | Victim died of causes related to the act of the prisoner but was not directly assaulted by prisoner with deadly force; e.g., shock producing heart attack, a crime partner actually did the killing. | Death was almost immediate *or* resulted at least partially from contributing factors from the victim; e.g., victim initiated struggle or had goaded the prisoner. This does not include victim acting in defense of self or property. | Death resulted from severe trauma inflicted with deadly intensity; e.g., beating, clubbing, stabbing, strangulation, suffocation, burning, multiple wounds inflicted with a weapon not resulting in immediate death or actions calculated to induce terror in the victim. | Victim was subjected to the prolonged infliction of physical pain through the use of nondeadly force prior to act resulting in death. |
| I. *Participating Victim* Victim was accomplice or otherwise implicated in a criminal act with the prisoner during which or as a result of which the death occurred, e.g., crime partner, drug dealer, etc. | 25–26–27 | 26–27–28 | 27–28–29 | 28–29–30 |
| II. *Prior Relationship* Victim was involved in a personal relationship with prisoner (spouse, family member, friend, etc.) which contributed to the motivation for the act resulting in death. If victim had a personal relationship but prisoner hired and/or paid a person to commit the offense, see Category IV. | 26–27–28 | 27–28–29 | 28–29–30 | 29–30–31 |
| III. *No Prior Relationship* Victim had little or no personal relationship with prisoner *or* motivation for act resulting in death was related to the accomplishment of another crime, e.g., death of victim during robbery, rape, or other felony. | 27–28–29 | 28–29–30 | 29–30–31 | 30–31–32 |
| IV. *Threat to Public Order or Murder for Hire* The act resulting in the victim's death constituted a threat to the public order including the murder of a police officer, correctional officer, public official, fellow patient or prisoner, any killing within an institution, or any killing where the prisoner hired and/or paid another person to commit the offense. | 28–29–30 | 29–30–31 | 30–31–32 | 31–32–33 |

# APPENDIX

# B

**§ 2404. Circumstances in Aggravation of the Base Term.**

(a) General. The panel may impose the upper base term or another term longer than the middle base term upon a finding of aggravating circumstances. Circumstances in aggravation of the base term include:

(1) The crime involved some factors described in the appropriate matrix in a category higher on either axis than the categories chosen as most closely related to the crime;

(2) The victim was particularly vulnerable;

(3) The prisoner had a special relationship of confidence and trust with the victim, such as that of employee–employer;

(4) The murder was committed to preclude testimony of potential or actual witnesses during a trial or criminal investigation;

(5) The victim was intentionally killed because of his race, color, religion, nationality or country or origin;

(6) During the commission of the crime the prisoner had a clear opportunity to cease but instead continued;

(7) The manner in which the crime was committed created a potential for serious injury to persons other than the victim of the crime;

(8) The murder was wanton and apparently senseless in that it was committed after another crime occurred and served no purpose in completing that crime;

(9) The corpse was abused, mutilated or defiled;

(10) The prisoner went to great lengths to hide the body or to avoid detection;

(11) The murder was committed to prevent discovery of another crime;

(12) The murder was committed by a destructive device or explosives;

(13) There were multiple victims for which the term is not being enhanced under Section 2407;

(14) The prisoner intentionally killed the victim by the administration of poison;

(15) The prisoner intentionally killed the victim by lying in wait;

(16) The prisoner occupied a position of leadership or dominance over other participants in the commission of the crime, or the prisoner induced others to participate in the commission of the crime;

(17) The prisoner has a history of criminal behavior for which the term is not being enhanced under Section 2407;

(18) The prisoner has engaged in other reliably documented criminal conduct which was an integral part of the crime for which the prisoner is currently committed to prison;

(19) The prisoner was on probation or parole or was in custody or had escaped from custody at the time the crime was committed;

(20) Any other circumstances in aggravation including those listed in the Sentencing Rules for the Superior Courts.

NOTE: Authority cited: Section 5076.2, Penal Code. Reference: Sections 3040 and 3041 Penal Code.

**§ 2405. Circumstances in Mitigation of the Base Term.**

(a) General. The panel shall impose the lower base term or another term shorter than the middle base term upon a finding of mitigating circumstances. Circumstances in mitigation of the base term include:

(1) The crime involved some factors described in the appropriate matrix in a category lower on either axis than the categories chosen as most closely related to the crime;

(2) The prisoner participated in the crime under partially excusable circumstances which do not amount to a legal defense;

(3) The prisoner had no apparent predisposition to commit the crime but was induced by others to participate in its commission;

(4) The prisoner tried to help the victim or sought aid after the commission of the crime or tried to dissuade a crime partner from committing other offenses;

(5) The prisoner was a passive participant or played a minor role in the commission of the crime;

(6) The crime was committed during or due to an unusual situation unlikely to reoccur;

(7) The crime was committed during a brief period of extreme mental or emotional trauma;

(8) The prisoner has a minimal or no history of criminal behavior;

(9) Battered Woman Syndrome. At the time of the commission of the crime, the prisoner suffered from Battered Woman Syndrome, as defined in section 2000(b), and it appears the criminal behavior was the result of that victimization.

(10) Any specific factors in mitigation, including those listed in the Sentencing Rules for Superior Courts.

NOTE: Authority cited: Sections 3041 and 5076.2, Penal Code. Reference: Sections 3040, 3041 and 4801, Penal Code.

HISTORY

1. New subsection (a)(9), subsection renumbering, and amendment of NOTE filed 3–16–2001 as an emergency; operative 3–16–2001 (Register 2001, No. 11). A Certificate of Compliance must be transmitted to OAL by 7–16–2001 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 3–16–2001 order transmitted to OAL 7–16–2001 and filed 8–20–2001 (Register 2001, No. 34).