

ADOPTED

AMERICAN BAR ASSOCIATION

**CRIMINAL JUSTICE SECTION
SECTION ON CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON YOUTH AT RISK**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and
2 tribal governments to authorize judicial decision-makers to hear petitions for *de novo*
3 “second look” resentencing brought by any incarcerated person who has served at least
4 ten continuous years of a custodial sentence; and

5
6 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
7 territorial, and tribal governments to: (a) create guidelines specific to “second look”
8 decisions; (b) ensure that incarcerated persons are notified of their rights under this
9 provision and are provided with adequate assistance of counsel; and (c) develop
10 procedures that guarantee fair process throughout second look proceedings.

REPORT

Introduction

Agreement exists across ideological and party lines that there is an American crisis of mass incarceration.¹ Since 1970, the incarcerated population has grown by 700%.² By now, many are familiar with the bleak numbers – the United States is home to less than 5% of the world’s population but holds almost 25% of the world’s prisoners.³ And incarceration disproportionately impacts people of color. Blacks are incarcerated in state prisons across the country at almost five times the rate of whites, and Latinx are imprisoned at 1.3 times the rate of non-Latinx whites.⁴

Society’s emerging recognition that it is over-using imprisonment is exemplified in a wide range of new statutes, rollbacks of mandatory minimums, changes to sentencing guidelines, and updated charging and plea-bargaining policies in prosecutors’ offices. Changes have so far been most prevalent at the front end by reducing the potential for individuals to enter the criminal legal system and/or reducing their potential sentence (i.e., diversion programs; reconsidering various three strikes laws and other sentencing enhancement laws, reducing sentences for drug crimes, etc.).

However, at the current pace of decarceration, it will still take 75 years to cut the total U.S. prison population by half, raising questions about what additional solutions should be pursued to accelerate reform.⁵ To tackle the problem of mass incarceration at its core, reforms must also target the present living embodiment of the crisis -- all the people currently experiencing incarceration. Second Look legislation works to do just that by addressing the decades of harsh sentences that fueled mass incarceration and providing all individuals with an opportunity for resentencing or a sentence reduction after they have served a designated amount of time in prison.⁶

¹ Maggie Astor, *Left and Right Agree on Criminal Justice: They Were Both Wrong Before*, NY Times, May 16, 2019. Available at <https://nyti.ms/3nys6EE>.

² See, e.g., ACLU <https://bit.ly/3cxz8TH>. Some of the recognized causes for the explosion in the jail and prison population include the 1994 federal crime bill, the war on drugs, “get tough on crime” policies, and fear-mongering slogans like the racist trope of the super-predator. Scholars like John Pfaff also place blame on prosecutorial practices. See generally JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017) (arguing that prosecutors bear responsibility for mass incarceration); Eli Hager & Bill Keller, *Everything You Think You Know About Mass Incarceration Is Wrong*, MARSHALL PROJECT, Feb. 9, 2017, <https://www.themarshallproject.org/2017/02/09/everything-you-think-you-know-about-mass-incarceration-is-wrong> [<https://perma.cc/5E95-HRQY>].

³ See, ACLU *supra* n.2.

⁴ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project, October 13, 2021. Available at <https://bit.ly/3ctXNZs>.

⁵ Nazgol Ghandnoosh, *Can We Wait 75 Years to Cut the Prison Population in Half?* The Sentencing Project, March 8, 2018. Available at <https://bit.ly/3cyRpju>.

⁶ In its recent revisions to the Model Penal Code, the American Law Institute (ALI) urges legislatures to authorize a judicial panel or other judicial decisionmaker to hear and rule upon applications for resentencing from prisoners who have served fifteen years of any sentence. See, <https://bit.ly/3xtZaRs>. ALI chose not to recommend a specific legislative scheme for implementing “second looks” and instead drafted principles that a legislature should seek to effectuate through enactment of such a provision. In addition to ALI, comprehensive reports, including with model legislation, urging second looks have recently been issued by the National Association of Criminal Defense Lawyers, *Second Look = Second Chance: Turning the Tide Through NACDL’s Model; “Second Look” Legislation*, December 10, 2020 (available at

Lengthy sentences

While many individuals are behind bars for only a short time, the backbone of mass incarceration is people serving very lengthy sentences – often decades-long, and far longer than they would serve for comparable crimes in other western, industrialized nations.⁷ Many scholars believe that the dramatic increase in the prison population is ultimately the result of policies that have sent more people to prison for much longer periods of time.⁸

At the federal level, almost 22,000 people are serving sentences of twenty years or more, and almost 4,000 people are serving a life sentence.⁹ Overall, the number of people in the United States serving life sentences (162,000) is at an all-time high, and an additional 44,000 people are serving “virtual life” sentences of fifty or more years.¹⁰ All told, one out of seven people behind bars is serving a life sentence.¹¹ The racial disparity in these draconian sentences is massive – two-thirds of those serving life sentences are people of color.¹²

Long sentences do not fulfill the goals of sentencing; there is no evidence of general deterrence, and, as for specific deterrence, ten years according to data is more than sufficient as people age out of crime. Scholars posit that deterrence is primarily a function of the certainty of punishment, not the severity.¹³ Bruce Western, one of the country’s leading experts on incarceration, argues that lengthy prison terms keep individuals behind bars long after they present a significant risk to public safety.¹⁴ People serving draconian sentences merit second looks.

Aging prison population

A report from the Office of the Inspector General found that people fifty or over were the fastest growing segment of the federal prison population.¹⁵ Presently, people over forty

<https://bit.ly/3cWjMbG>) and The Sentencing Project, Nazgol Ghandnoosh, *A Second Look at Injustice*, May 12, 2021 (available at <https://bit.ly/3E1ldjl>).

⁷ Adam Liptak, *U.S. prison population dwarfs that of other nations*, NY Times, April 23, 2008. Available at <https://nyti.ms/3HKRQpw>.

⁸ Pew Center on the States, Pew Public Safety Performance Project, *One in 100: Behind Bars in America*, 2008.

⁹ See Federal Bureau of Prisons, *Sentences Imposed*. Available at <https://bit.ly/3xcOnuL>.

¹⁰ Ashley Nellis, *Still Life: America’s Increasing Use of Life and Long-Term Sentences*, The Sentencing Project, May 3, 2017. Available at <https://bit.ly/3x5NPHa>.

¹¹ *Id.*

¹² Ashley Nellis, *No End in Sight: America’s Enduring Reliance on Life Imprisonment*, The Sentencing Project, February 17, 2021. Available at <https://bit.ly/3HzIsES>.

¹³ Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev. 113, 123 (2018); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Just. 199, 201 (2013) (research suggests that increasing already long prison sentences has little to no deterrent effect on violent crime).

¹⁴ Bruce Western, *Punishment and Inequality in America* 187-188 (2006).

¹⁵ *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, Office of the Inspector General, U.S. Department of Justice, February 2016 (the population of federal prisoners fifty or over increased by 25% from 2009 to 2013).

years old make up almost 50% of the federal prison population,¹⁶ and more than 18,000 people in federal prison are over fifty-five.¹⁷

Across the country, from 1999-2016, the number of incarcerated people 55 years old or older increased by 280%.¹⁸ According to a 2017 report from the Bureau of Justice Statistics, there were 200,000 people 55 years old or older behind bars in the United States.¹⁹ These numbers are particularly significant given that the National Institute of Corrections considers prisoners age 50 or older to be elderly²⁰ because the lack of access to adequate healthcare prior to incarceration plus, *inter alia*, the stress and inadequate medical care inside prison, accelerates the aging process of prisoners.²¹

Some scholars estimate that a person's life expectancy is decreased by one year for each two years behind bars.²² Reports from the New York State Department of Corrections from 2003-2012 found that the average age of death from natural causes for people in New York's state prisons was between ages 53 and 57.²³ And more people are dying of old age in prison than ever before.²⁴ In just one six-year period from 2001-2007, 8,486 people over 55 years old died behind bars.²⁵

Not only have lengthy sentences been shown to have little impact on an individual's tendency to reoffend,²⁶ there is compelling evidence indicating that individuals "age out" of criminal behavior.²⁷ A team of scholars addressed the intersection of aging and crime this way:

The relationship between age and crime is one of the most solid within the field of criminology. It is understood that crime increases throughout adolescence and then peaks at age 17 (slightly earlier for property crime than for violent crime) and then begins to decrease over the life course moving forward. This trend has, over the years, withstood stringent testing

¹⁶ See Federal Bureau of Prisons, *Inmate Age*. Available at <https://bit.ly/3oN93WD>.

¹⁷ *Id.*

¹⁸ Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, Pew, [DATE]. Available at <https://bit.ly/3nCMW5F>.

¹⁹ See interrogatingjustice.org, *A Look at the United States' Aging Prison Population Problem*, April 7, 2021. Available at <https://bit.ly/3x7c9bL>.

²⁰ ACLU, *At America's Expense: The Mass Incarceration of the Elderly*, June 2012. Available at <https://bit.ly/3HD1MRT>.

²¹ *Id.*; see also Brie Williams & Rita Abraldes, *Growing Older: Challenges of Prison and Reentry for the Aging Population*.

²² Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003*, *Am. J. Public Health*, 2013 March, 103(3): 523-28.

²³ See, e.g., <https://on.ny.gov/3lgHCDA>.

²⁴ Hope Reese, *What Should We Do about Our Aging Prison Population?* *Jstor.org.*, July 17, 2019. Available at <https://bit.ly/3xglTjR>.

²⁵ *Hrw.org*, *Old Behind Bars: The Aging Prison Population in the United States*, January 2012. Available at <https://bit.ly/3CKCHkk>.

²⁶ Pew Center on the States, *Time Served: The High Cost, Low Return of Longer Prison Terms*, June 2012. Available at <https://bit.ly/3DErrar>.

²⁷ See, e.g., Dana Goldstein, *Too Old to Commit Crime,?* *The Marshall Project*, March 20, 2015. Available at <https://bit.ly/3cB3m8s>.

and examination across time periods and maintains consistent results regardless of race/ethnicity, education level, or income.²⁸

More specifically, researchers suggest that even among so-called “chronic offenders,” the vast majority will cease committing crime by their forties.²⁹ Yet prisons are filled with people well-beyond their forties who pose no evidence-based threat to public safety. Older prisoners certainly merit second looks.

People convicted of violent crimes

Any sincere effort to confront mass incarceration will need to address people serving time for violent crime as at least 55% of people in state prisons were convicted of violent crimes.³⁰ However, one objection to “second looks” for all incarcerated people is the belief that people convicted of violent crime present a unique threat to public safety. The evidence belies that notion.

In a recent law review article, researchers found that the evidence suggests that people convicted of violent offenses, even including homicide offenses, who are older at release, have lower overall recidivism rates relative to other released offenders.³¹ In *A New Lease on Life*, Ashley Nellis’s comprehensive analysis of recidivism rates shows that people convicted of homicide and other crimes of violence rarely commit new crimes of violence after release from long-term incarceration.³² Nellis quotes John Carner, former spokesperson for the New York State Division of Criminal Justice Services: “Individuals who are released on parole after serving sentences for murder consistently have the lowest recidivism rate of any offenders.”³³

While recidivism rates are already low for people convicted of violent crime, it is also the case that according to the Bureau of Justice Statistics, two out of every three people serving a prison sentence for violent crime are at least 55 years old, making them even

²⁸ Caitlin Cornelius et al, *Aging Out of Crime: Exploring the Relationship Between Age and Crime with Agent Based Modeling*, 2017. Available at <https://bit.ly/3Fy1Wbe>.

²⁹ Robert Sampson & John Laub, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70*, Harvard University press (2006).

³⁰ See, e.g., J.J. Prescott et al, *Understanding Violent-Crime Recidivism*, 95 Notre Dame L. Rev. 1643, 1643-44 (2020) (“reform will need to extend to the incarceration of violent offenders if the United States hopes to substantially reduce the large footprint of its prisons”); Danielle Sered, *To End Mass Incarceration, U.S. needs Alternatives to Prison for Violent Crimes*, USA Today, January 22, 2020; Nazgol Ghandnoosh, *The Next Step: Ending Excessive Punishment for Violent Crimes*, The Sentencing Project, April 2, 2019; New York City Bar, *A Pathway Out of Mass Incarceration and Towards a New Criminal Justice System: Recommendations for the New York State Legislature*, May 13, 2021; John Pfaff, *Five Myths About Prisons*, Washington Post, May 17, 2019; Jamiles Larty, *Can We Fix Mass Incarceration Without Including Violent Offenders?* The Marshall Project, December 12, 2019.

³¹ J.J. Prescott et al, *Understanding Violent-Crime Recidivism*, 95 Notre Dame L. Rev. 1643, 1643-44 (2020).

³² Ashley Nellis, *A New Lease on Life*, The Sentencing Project, June 30, 2021.

³³ Id. citing The Crime Report, *Low Recidivism Rate Reported for Paroled New York Murderers*, January 7, 2011. Available at <https://thecrimereport.org/2011/01/07/low-recidivism-rate-reported-for-paroled-ny-murderers/>. Of 368 convicted murderers granted parole in New York between 199 and 2003, six, or 1.6%, were returned to prison within three years for a new felony conviction – none of them a violent offense.

more unlikely to commit future crime.³⁴ Second looks should not carve out people convicted of violent crime.³⁵

People sentenced when they were young

Countless young people were sentenced to draconian terms of imprisonment during the 1980s and 1990s when racist tropes like “wilding,” “wolfpack,” and “super predator” were abundant in the media and in courtrooms.³⁶ In a line of cases beginning with *Roper v. Simmons*,³⁷ the Supreme Court has recognized that children are constitutionally different than adults for purposes of sentencing – they are less culpable and have greater capacity for reform and change. As a result, the Court banned use of capital punishment for juveniles, limited life without parole (LWOP) to homicide offenses, banned use of mandatory LWOP, and applied the decisions retroactively.³⁸

Central to the Court’s decisions were what it termed the distinctive attributes of youth, including immaturity, underdeveloped sense of responsibility, vulnerability to negative influences, and limited control of their environment.³⁹ Recent studies reveal that certain brain systems and development of the prefrontal cortex that are involved in self-regulation and higher-order cognition, continue to develop into the mid-20s.⁴⁰

As a result of the Supreme Court’s decisions in *Roper*, *Graham*, *Miller* and *Montgomery*, the courts had to resentence a number of people. When the Court decided *Miller*, the city of Philadelphia had the largest number of juveniles (325) serving LWOP in the country.⁴¹ In a comprehensive study of the Philadelphia cohort of juvenile lifers, researchers found that of the 174 people who had been resented and released, only 2 had new convictions, adding to the evidence that people convicted of violent crime, and

³⁴ Nellis, *supra* note 31, at n.19.

³⁵ National Association of Criminal Defense Lawyers, *Second Look = Second Chance: Turning the Tide Through NACDL’s Mode; “Second Look” Legislation*, December 10, 2020 (available at <https://bit.ly/3cWjMbG>) (“If second look legislation is truly meant as an antidote for mass incarceration, it must not categorically exclude any potential petitioner based on their underlying crime of conviction.”). To be clear, providing a “second look” does not guarantee that the applicant will be resented. A second look process should afford each applicant a fair, objective, and holistic consideration pursuant to applicable law, rules, and guidelines, taking into account the totality of all relevant circumstances including, but not limited to, length of time served, sincere remorse, impact to the victims and their loved ones, rehabilitation, humanitarian considerations (i.e., health, current age, and age at time of arrest), and public safety.

³⁶ See, e.g., Carroll Bogert & Lynnell Hancock, *The Media Myth that Demonized a Generation of Black Youth*, The Marshall Project (finding nearly three hundred uses of “superpredator” in forty leading newspapers and magazines from 1995-2000); Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. Gender Race & Just. 281 (2012).

³⁷ 543 U.S. 551 (2005).

³⁸ *Roper v. Simmons*, 534 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 132 S.Ct. 2455 (2012); and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). See Josh Rovner, *Juvenile Life Without Parole: An Overview*, The Sentencing Project, May 24, 2021.

³⁹ *Miller*, at 2464.

⁴⁰ *State v. O’Dell*, 358 P.3d 359, 364 n.5 (Wash. 2015).

⁴¹ Tarika Daftary-Kapur & Tina Zottoli, *Juvenile Lifers: The Philadelphia Experience*. Available at <https://bit.ly/30KP4zl>.

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who had already served substantial prison terms, were unlikely to reoffend.⁴² Those sentenced while young merit second looks.

Significant Racial Disparities in Sentencing

Serious racial disparities in sentencing are overwhelmingly clear when it comes to life or long-term sentences. In 2017, 48% of the approximately 206,000 individuals serving life and ‘virtual life’ sentences were African American.⁴³ Racial disparities are most pronounced among sentences for LWOP, with African Americans making up at least two-thirds of the LWOP population in nine states.⁴⁴ These trends impact youth as well, with people of color making up over 80% of youth sentenced to life- and virtual-life, over half of them African Americans.⁴⁵ Second look processes can address the prevalence of racial disparities in sentencing, in particular for people serving life and long-term sentences.

Financial Costs of Incarceration

State and federal governments bear the financial burden of overincarceration. On average, states spend \$33,274 to incarcerate one person annually, ranging from a low of \$14,780 in Alabama to a high of \$69,355 in New York.⁴⁶ These costs only grow as those incarcerated age, increasing their need for specialized medical attention and support services.⁴⁷

Parole and clemency

Parole and clemency are “back-end” processes that, in theory, could address the crisis of mass incarceration. Yet, as stated by Margaret Love and Cecelia Klingele: “The severity of American prison sentences is magnified by the atrophy of back-end release mechanisms like parole and clemency.”⁴⁸

⁴² Id.

⁴³ Ashley Nellis, *Still Life: America’s Increasing Use of Life and Long-Term Sentences*, The Sentencing Project, May 3, 2017.

⁴⁴ Id.

⁴⁵ The Sentencing Project, *Youth Sentenced to Life Imprisonment*, October 8, 2019.

⁴⁶ Chris Mai & Ram Subramanian, *The Price of Prisons: Examining State Spending Trends, 2010-2015*, Vera Institute of Justice, May 2017. Available at <https://www.vera.org/downloads/publications/the-price-of-prisons-2015-state-spending-trends.pdf>.

⁴⁷ See, e.g., Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, Pew Trusts, February 20, 2018; Office of Inspector General, U.S. Department of Justice, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, 2016 (BOP spent \$881 million or 19% of its total budget to incarcerate aging prisoners in 2013).

⁴⁸ Margaret Colgate Love & Cecelia M. Klingele, *First Thoughts About ‘Second Look’ and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. Tol. L. Rev. 859 (2011) (“The severity of American prison sentences is magnified by the atrophy of back-end release mechanisms like parole and clemency.”).

Current parole boards are risk averse and reluctant to release people incarcerated for violent crime out of concerns about reappointment or of being vilified in the local press.⁴⁹ Further, many parole boards are populated by political appointees and people with little to no background in criminal justice, let alone with clinical or therapeutic experience and at least some ability to assess someone's efforts at rehabilitation.⁵⁰ For these and other reasons, the American Law Institute in recent revisions to the Model Penal Code has referred to parole as a "failed institution."⁵¹

Clemency, although a vast and often unfettered power vested in the executive, is also of limited value when it comes to redressing the crisis of mass incarceration.⁵² At the federal level, one glaring problem is that clemency is housed in the Department of Justice and dependent on prosecutors who focus on the conviction as opposed to who the person has become while in prison.⁵³ At the state level, to the extent governors grant clemency applications, they tend to confine themselves to the so-called non-violent, low-level drug offender.⁵⁴

Procedures do exist for elderly and infirm prisoners at the state and federal level for medical or geriatric parole and compassionate release, but those mechanisms are seldom used.⁵⁵ In any event, those statutes, by limiting release to a segment of the prison population, fail to fully address the problem of over-punishment that fed mass incarceration.

⁴⁹ Beth Schwartzapfel, *Nine Things You Probably Didn't Know About Parole*, The Marshall Project, July 10, 2015 (most parole boards will not even think about giving parole to lifers); German Lopez, *Prisoners Rarely Get Released on Parole, Even When They're No longer a Threat. Here's Why*, Vox, July 13, 2015 ("States know that older prisoners pose little threat, but it's usually not enough to overcome politics").

⁵⁰ *Id.*

⁵¹ Beth Schwartzapfel, *How Parole Boards Keep Prisoners in the Dark and Behind Bars*, Washington Post, July 11, 2015. See also, Kevin R. Reitz & Cecelia M. Klingele, *Model Penal Code: Sentencing – Workable Limits on Mass Punishment*, 48 *Crime & Just.* 255, 285 (2019).

⁵² Paul L. Larkin, Jr., *Revitalizing the Clemency Process*, 39 *Harvard J. Law & Public Policy* 833 (2016) ("Presidents and governors have recently abandoned any serious use of their clemency powers"); Cara H. Drinan, *Clemency in a Time of Crisis*, 28 *Georgia St. L. Rev.* 1121, 1122 (2012) (in the last four decades state clemency grants have declined significantly; in some states, clemency seems to have disappeared altogether).

⁵³ Rachel E. Barkow & Mark Osler, *We Know How to Fix the Clemency Process. So Why Don't We?* NY Times, July 13, 2021.

⁵⁴ Katie Rose Quandt, *The Largest Commutation in U.S. History*, Slate, November 8, 2019. Available at <https://bit.ly/3lbuoba>.

⁵⁵ National Conference of State Legislatures, *State Medical and Geriatric Parole Laws*, August 27, 2018 ("While the vast majority of states have medical parole laws and a number of states have a geriatric parole law, they are rarely used."). See also, Keri Blakinger & Joseph Neff, *31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36*, The Marshall Project, June 11, 2021; Human Rights Watch & Families Against Mandatory Minimums, *The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons*, November 30, 2012; Robin Waters, *Federal Compassionate Release in the Era of COVID-19: Practice Tips*, American Bar Association, December 11, 2020 (prior to the passage of the First Step Act, few prisoners were granted compassionate release – on average, just twenty-four people per year).

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Current “Second Look” Efforts

At the federal level, U.S. Senator Cory Booker and Rep. Karen Bass introduced the *Second Look Act* in 2019. The bill allows any individual who has served at least ten years in federal prison to petition a court to take a “second look” at their sentence to see if they are eligible for a sentence reduction or release.⁵⁶

In the District of Columbia, the *Second Look Amendment Act of 2019*, now known as the *Omnibus Public Safety and Justice Act of 2020*, is an expansion of the *Incarceration Reduction Amendment Act of 2016*. The new bill allows a person who committed a crime before the age of twenty-five, and who has served at least fifteen years in prison, to apply to a court to have their sentence reduced.⁵⁷

Legislators in twenty-five states have recently introduced second look bills, and various states have passed or are considering bills focused on people who were emerging adults at the time of crime or conviction.⁵⁸

Some states are considering bills that provide opportunities for older prisoners to seek resentencing. In New York, the *Elder Parole Bill* provides that anyone who is fifty-five or older and who has served at least fifteen years in prison, is eligible for parole regardless of their original sentence or crime of conviction.⁵⁹

There are also legislative efforts that provide prosecutors with the legal authority to seek resentencing.⁶⁰ For example, California’s 2018 law allows prosecutors to initiate resentencing proceedings.⁶¹ Over sixty elected prosecutors and law enforcement leaders have called for second look legislation,⁶² and some prosecutors are also utilizing internal, non-legislative efforts to review sentences by creating Sentencing Review Units.⁶³

Conclusion

Second look efforts recognize, value, and encourage redemption and transformation, and not surprisingly have the vast support of the faith-based community. Pope Francis’s call for the Jubilee Year of Mercy from December 2015 to November 2016 emphasized mercy, forgiveness, and reconciliation.⁶⁴ It is also appropriate, if not imperative, to re-

⁵⁶ See <https://bit.ly/3cXm1LQ>.

⁵⁷ See <https://bit.ly/3p7xcHr>.

⁵⁸ Nazgol Ghandnoosh, *A Second Look at Injustice*, The Sentencing Project, May 12, 2012. See also, the Campaign for the Fair Sentencing of Youth available at <https://cfsy.org/>.

⁵⁹ See <https://bit.ly/3lgFE5X>.

⁶⁰ See <https://bit.ly/3p68OG3>.

⁶¹ *CA Assembly Bill 2942*. Nazgol Ghandnoosh, *A Second Look at Injustice*, The Sentencing Project, May 12, 2012.

⁶² *Id.*

⁶³ See James Forman, Jr. & Sarah Lustbader, *Every D.A. in America Should Open a Sentence Review Unit*, NY Times, August 1, 2019.

⁶⁴ United States Conference of Catholic Bishops. Available at <https://bit.ly/3xswDMh>; Courtney Mares, *Life Imprisonment Forgoes the ‘Right to Start Over,’* Catholic News Agency, September 16, 2019 (speaking to prison staff and chaplains, Pope Francis urged that we should “[N]ever deprive one of the right to start over.”).

examine sentences because it is illogical to think that a sentence once imposed remains just, necessary, and appropriate in perpetuity: people convicted of even serious crime can and do transform; public attitudes about crime can and do change (i.e., about narcotics, marijuana); and our knowledge of behavior is ever-changing (i.e., the science around brain development).

It is also becoming increasingly clear that not all victims or family members of a victim demand lengthy prison terms for the person who caused harm.⁶⁵ The restorative justice movement is shining light on new approaches to harm and trauma and the needs and desires of those who have been harmed by violence.⁶⁶ Second looks can amplify the burgeoning restorative justice movement by promoting conversation about alternatives to relentless punishment.

And second looks are not just about beneficence or mercy. There is much wasted talent behind bars; people languishing on the inside when they could be contributing on the outside as mentors and helping repair families and communities that have been devastated by the draconian sentencing of the past several decades. More directly, second look sentencing can return fathers and mothers to support their sons and daughters, and sons and daughters to act as caregivers to aging parents. Returning citizens can serve as credible messengers to guide at-risk youth, serve as violence interrupters, and in myriad other ways help promote public safety, and can also be entrepreneurs revitalizing communities and becoming taxpaying contributors to society.

Respectfully submitted,

Wayne S. McKenzie
Chair, Criminal Justice Section

August 2022

⁶⁵ Campbell Robertson, *Would You Let the Man Who Killed Your Sister Out of Prison,?* NY Times, July 19, 2019.

⁶⁶ Michelle Alexander, *Reckoning with Violence*, NY Times, March 3, 2019 (90% of survivors of violent crime chose restorative justice when given the chance to choose between incarceration for the person who caused them harm or to engage in a restorative justice process).

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GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Wayne S. McKenzie, Chair

1. Summary of Resolution(s).

This resolution urges all jurisdictions to enact legislation permitting courts to hear petitions that allow *de novo* hearings to take a “second look” at criminal sentences where individuals have been incarcerated for ten years, to create guidelines for these hearings that allow petitioners to receive notice and obtain the assistance of counsel, and to develop due process procedures.

2. Indicate which of the ABA’s Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

The resolution advances both Goal 3 and Goal 4; it advances the rule of law to promote rational review into the sentencing process and it seeks to treat all persons who are sentenced to confinement in a more equitable manner.

3. Approval by Submitting Entity.

This resolution was passed by the Criminal Justice Council at the Spring Council meeting in Savannah, Georgia on April 9, 2022.

4. Has this or a similar resolution been submitted to the House or Board previously?

No.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

None.

6. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

7. Status of Legislation. (If applicable)

N/A

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

This Resolution will be used to educate all stakeholders in the criminal justice system, support ABA Governmental Affairs Office lobbying efforts and amicus briefs.

9. Cost to the Association. (Both direct and indirect costs)

None.

10. Disclosure of Interest. (If applicable) None.

11. Referrals

Center on Children and the Law
Center for Human Rights
Center on Racial and Ethnic Diversity
Center on Racial and Ethnic Justice
Commission on Disability Rights
Commission on Homelessness and Poverty
Commission on Immigration
Commission on Sexual Orientation and Gender Identity
Commission on Youth at Risk
Family Law Section
Government and Public Sector Lawyers Division
Health Law Section
International Law Section
Judicial Division
Law Practice Division
Section on Civil Rights and Social Justice
Section on Litigation
Section on Science and Technology
Special Committee on Hispanic Legal Rights & Responsibilities
Standing Committee on Legal Aid & Indigent Defense
Young Lawyers

12. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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13. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges all jurisdictions to enact legislation permitting courts to hear petitions that allow *de novo* hearings to take a “second look” at criminal sentences where individuals have been incarcerated for at least ten years, to create guidelines for these hearings that allow petitioners to receive notice and obtain the assistance of counsel, and to develop due process procedures.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the American crisis of mass incarceration. Since 1970, the incarcerated population has grown by 700%. Incarceration is disproportionately inflicted on people of color. Many individuals in prison are serving long sentences for offenses where shorter sentences now exist, where mandatory minimum sentences and habitual offender laws have been repealed, and where there is no ability for those individuals to present the rehabilitative steps they have taken to successfully re-enter society.

3. Please Explain How the Proposed Policy Position Will Address the Issue

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None