A SECOND LOOK FOR CHILDREN SENTENCED TO DIE IN PRISON

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Scholars have championed "second look" statutes as a decarceral tool. Second look statutes allow certain incarcerated people to seek resentencing after having served a portion of their sentences. This Essay weighs the advantages and disadvantages of these statutes as applied to children sentenced to die in prison and argues that focusing on this small, discrete group may be a digestible entry point for more conservative states who fear widespread resentencing. Moreover, because early data indicates that children convicted of homicide and released as adults have very low recidivism rates, second look beneficiaries are likely to pose little threat to public safety. While resentencing and even releasing these individuals would not directly result in mass decarceration, it would serve as a litmus test for expanding second look statutes to adults convicted of violent crimes—the very group for whom meaningful decarceral efforts must ultimately be aimed.

The Essay also argues that second look legislation has the potential to redress two specific sentencing problems common to cases involving children: the inability to accurately assess an individual's capacity for change and racially discriminatory sentencing outcomes. To redress these problems, and to avoid reflexive impositions of original sentences, this Essay recommends three critical additions to juvenile second look statutes: automatic eligibility for resentencing at age twenty-five, jury resentencing, and inadmissibility of the defendant's original sentence.

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Introduction

Six years ago, the District of Columbia enacted the Incarceration Reduction Amendment Act of 2016, which permits anyone who committed a crime before turning eighteen years old to petition for resentencing after serving twenty years of their sentence.[1] Based in part on the success exhibited by released individuals—none of whom had reoffended—proponents pushed for an extension of the Act.[2] They argued that eligibility should be increased to age twenty-five because neuroscience establishes that brain development continues until that point.[3] Thus, nineteen to twenty-four-year-olds exhibit the same immaturity, vulnerability, and capacity for change that the Supreme Court recently found makes children under eighteen less culpable than adults.[4]

Resistance to the proposed extension was initially fierce. Mayor Muriel Bowser expressed reservations because the extension did not adequately factor in the wishes of crime victims.[5] The Metropolitan Police Department outright opposed the extension amendment, emphasizing an increase in gun crime during the COVID-19 pandemic and warning that expanding eligibility would lead to the "early release of hundreds of violent gun offenders."[6] But neither effort compared to the public lobbying campaign waged by the U.S. Attorney's Office of the District of Columbia, which prosecutes D.C.'s local felony cases.[7] In opposing the bill, the U.S. Attorney's Office spread misinformation both about D.C. and about the bill's contents, notoriously misrepresenting that D.C. had one of the lowest incarceration rates in the

1. Madison Howard, *Second Chances: A Look at D.C.'s Second Look Act*, AM. UNIV. WASH. COLL. L.: THE CRIM. L. PRAC. (May 8, 2021), https://www.crimlawpractitioner.org/post/second-chances-a-look-at-d-c-s-second-look-act.

2. *Id.*; Michael Serota, *Taking a Second Look at (In)Justice*, UNIV. CHI. L. REV. ONLINE (Jan. 23, 2020), https://lawreviewblog.uchicago.edu/2020/01/23/taking-a-second-look-at-injustice-by-michael-serota/ [hereinafter Serota, *Taking a Second Look at (In)Justice*].

3. Howard, *supra* note 1.

4. Roper v. Simmons, 543 U.S. 551, 573–74 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010); Miller v. Alabama, 567 U.S. 460, 477 (2012).

5. Howard, *supra* note 1.

6. *Id.*

7. Michael Serota, Commentary, *Second Looks & Criminal Legislation*, 17 OHIO ST. J. CRIM. L. 495, 500–03 (2020).

nation, when, in fact, the opposite was true.[8] Even after retracting the statement, the U.S. Attorney's Office continued to falsely contend that the statute's extension would prevent resentencing judges from considering the facts of the crime in their analysis.[9] Despite this opposition, in 2021, the D.C. Council passed the Second Look Amendment Act, extending the resentencing opportunity to anyone whose crime occurred before age twenty-five and who had served a minimum of fifteen years, making the D.C. Act one of the most expansive second look statutes in the country.[10]

Second look legislation provides a mechanism for reconsidering lengthy sentences.[11] Broadly defined, second look legislation includes laws that confer new parole eligibility, require parole boards to consider new factors for release, create special pathways for clemency, and permit courts to resentence defendants to shorter periods of incarceration.[12] This Symposium Essay focuses on the last type of second look legislation, where, as with D.C.'s Incarceration Reduction Amendment Act, defendants receive the opportunity to petition a court for a resentencing hearing. Most commonly, a defendant may petition the court for resentencing after serving a minimum period of incarceration—anywhere from ten to thirty years—and meeting

8. *Id.* at 502.

9. *Id.* at 503 n.38.

10. D.C. CODE ANN. § 24-403.03 (West 2021).

11. Though they are technically not resentencing procedures, many scholars include geriatric and compassionate release in the second look category. Renagh O'Leary, *Compassionate Release and Decarceration in the States*, 107 IOWA L. REV. 621, 636–40 (2022). These mechanisms typically permit an incarcerated person to obtain early release due to a significant medical condition. *See id.* In these cases, either the parole board or the Department of Corrections typically determines the release decision without court intervention. *See id.*

12. *See Second Chances Agenda*, FAMM, https://famm.org/secondchances (last visited Aug. 2, 2022) (chronicling pending second look legislation in the states). Second look statutes anticipate sentence reductions. Courts disagree on whether *increasing* a sentence following a resentencing hearing violates the Double Jeopardy Clause. *Compare* United States v. DiFrancesco, 449 U.S. 117, 138–39 (1980) (holding that the Double Jeopardy Clause does not prevent the government from appealing a sentence on the grounds that it is too lenient), *with* United States v. Jones, 722 F.2d 632, 637 (11th Cir. 1983) (holding that the Double Jeopardy Clause forbids increasing a sentence when it frustrates the defendant's "'legitimate expectations' as to the length of his sentence" (quoting *DiFrancesco*, 449 U.S. at 137)). Some states bar imposing a higher sentence under the Double Jeopardy Clause in their state constitutions. *See, e.g.*, CAL. CONST. art. I, § 15; People v. Henderson, 386 P.2d 677, 684–86 (Cal. 1963); WASH. REV. CODE § 36.27.130(2) (2022).

other threshold requirements.[13] In other instances, prosecutors must initiate the review.[14]

While there is growing interest in this type of second look legislation, there is also pushback. Proponents of the legislation emphasize utilitarian concerns.[15] They contend that second look statutes are a corrective measure for lengthy sentences that disregard and disincentivize rehabilitation and result in costly prison overcrowding.[16] Opponents stress that second look statutes undermine retributive goals[17] and upend finality.[18] Legal scholars have acknowledged that second look statutes have the potential to be meaningful decarceral tools,[19] but lament that, in practice, relief is not widely available—particularly to individuals convicted of violent crimes, who make up the majority of people serving lengthy sentences.[20] In light of these groups' concerns, this Symposium Essay identifies the individuals for whom second look legislation is most likely to have a promise of success: children sentenced to die in prison.[21]

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13. *See, e.g.*, MODEL PENAL CODE: SENTENCING § 305.6 (AM. L. INST., Proposed Final Draft 2017) (permitting defendants to petition for resentencing after serving fifteen years of incarceration); MODEL PENAL CODE: SENTENCING § 6.11A(h) (AM. L. INST., Proposed Final Draft 2017) (permitting petition for resentencing after ten years for child defendants); D.C. CODE ANN. § 24-403.03 (West 2021) (permitting defendants who committed crimes before age twenty-five to petition for resentencing after fifteen years of incarceration).

14. *See, e.g.*, Assemb. B. 2942, 2018 Leg., Reg. Sess. (Cal. 2018).

15. Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 93–99 (2019); Serota, *Taking a Second Look at (In)Justice*, *supra* note 2.

16. Hopwood, *supra* note 15, at 93–94, 96; Serota, *Taking a Second Look at (In)Justice*, *supra* note 2.

17. Serota, *Taking a Second Look at (In)Justice*, *supra* note 2.

18. Hopwood, *supra* note 15, at 97.

19. *See, e.g.*, O'Leary, *supra* note 11, at 634; Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 BROOK. L. REV. 149, 155 (2015) [hereinafter Ryan, *Taking Another Look*]; Margaret Colgate Love & Cecelia Klingele, *First Thoughts About "Second Look" and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859, 873–74 (2011) (indicating that there is a "consensus" that courts have power to reexamine lengthy sentences in certain circumstances).

20. *See, e.g.*, O'Leary, *supra* note 11, at 640, 657–59 (arguing that compassionate release has failed as a decarceral tool because decision makers are reluctant to grant it for people convicted of violent crimes).

21. I use the phrase "children sentenced to die in prison" to include those convicted of crimes committed under the age of eighteen who have received sentences that are likely to exceed their lifespans. These sentences include both life without parole and virtual life sentences—which consists both of sentences of life with parole, where parole eligibility exceeds fifty years, and of term-of-years sentences that exceed one's natural life span. *See* ASHLEY NELLIS, THE SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND

This Essay argues that focusing on this small, discrete group may be a digestible entry point for more conservative states that fear widespread application of second look statutes. Limiting second look statutes to a group with whom it is easier to sympathize than adults might also reduce political pushback. Moreover, because early data indicates that children convicted of homicide and released as adults have very low recidivism rates,[22] released individuals are likely to pose little threat to public safety. While resentencing and even releasing these individuals would not directly result in mass decarceration, it would serve as a pilot program for expanding second look statutes to adults convicted of violent crimes—the very group for whom meaningful decarceral efforts must ultimately be aimed.

The Essay also argues that second look legislation has the potential to redress two specific sentencing problems common to cases involving children: the inability to accurately and prospectively assess an individual's capacity for change, along with arbitrary and racially discriminatory sentencing outcomes. To redress these problems, and to avoid reflexive impositions of original sentences, this Essay recommends three critical additions to second look statutes: automatic eligibility for resentencing at age twenty-five, jury resentencing, and inadmissibility of the defendant's original sentence.

This Essay proceeds in three parts. In Part I, I chronicle the rise of second look statutes and explore the positions of their proponents and detractors. In Part II, I argue that a natural starting point for these laws is children sentenced to die in prison, considering this group's limited size, the likelihood of success, and the constitutional mandate for sentencers to consider capacity for change. In Part III, I evaluate second look statutes as a solution to two problems posed by contemporary sentencing of these juvenile defendants. First, I examine whether they create an opportunity for more accurate sentencing outcomes by shifting "capacity for change" from a forward-looking inquiry to a backward-looking one. Second, I assess whether second look statutes may be utilized to render sentencing less arbitrary and racially discriminatory. In Part IV, I recommend three procedural protections that would render second look legislation more likely to achieve these aims and explore additional benefits that could result from their implementation.

LONG-TERM SENTENCES 1, 16 (2017), https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf.

22. NAZGOL GHANDNOOSH, THE SENT'G PROJECT, A SECOND LOOK AT INJUSTICE 10 (2021) [hereinafter GHANDNOOSH, A SECOND LOOK AT INJUSTICE], https://www.sentencingproject.org/wp-content/uploads/2021/05/A-Second-Look-at-Injustice.pdf.

I. The Rise of Second Looks

In the last decade, second look statutes have presented an opportunity for reconsidering lengthy sentences. Although the United States remains the leading incarcerator in the world,[23] new interest in curbing mass incarceration has grown in the last decade.[24] Since 2009, the prison population has fallen, albeit modestly.[25] Reformers have focused on the front-end of incarceration, advocating for decriminalization of drug and other nonviolent crimes and shrinking the police footprint to reduce the number of people entering the criminal legal system.[26] Initially, less attention was paid to back-end decarceral efforts, which would provide for the early release of individuals already serving lengthy sentences.[27] However, as it became clear that front-end reforms failed to put a meaningful dent in the prison population, advocates and decarceral scholars began to champion back-end proposals, including the liberalization of parole, compassionate or geriatric release, and second look sentencing.[28]

One of the earliest—and also one of the most far-reaching—second look provisions appeared in the Model Penal Code's 2007 proposed revisions.[29] In response to the rise of "extraordinarily long sentences,"[30] the proposal

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23. *Criminal Justice Facts*, THE SENT'G PROJECT, https://www.sentencingproject.org/criminal-justice-facts/ (last visited Aug. 2, 2022).

24. *See, e.g.*, Teresa Mathew, *How Over-Incarceration Is Driving a Push for Criminal Justice Reform*, PAC. STANDARD (May 8, 2018), https://psmag.com/social-justice/americas-changing-sentiment-toward-prisons (discussing a shift in American public sentiment away from incarceration policy).

25. GHANDNOOSH, A SECOND LOOK AT INJUSTICE, *supra* note 22, at 7; NAZGOL GHANDNOOSH, THE SENT'G PROJECT, CAN WE WAIT 60 YEARS TO CUT THE PRISON POPULATION IN HALF? 1 (2021), https://www.sentencingproject.org/wp-content/uploads/2021/01/60-Years-to-Cut-the-Prison-Population-in-Half.pdf (indicating the U.S. prison population has declined 11% since 2009).

26. *See, e.g.*, ACLU, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES 10–12 (2011).

27. *See* O'Leary, *supra* note 11, at 633.

28. *See, e.g.*, ACLU, *supra* note 26 (proposing back-end reforms such as parole eligibility for elderly prisoners).

29. *See* Richard F. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT'G REP. 194, 196–97 (2009); *Monday Morning Session - May 17, 2010*, 87 A.L.I. PROC. 3, 33 (2010) [hereinafter *Monday Morning Session*] ("The second-look provision, which would go back to a judicial decisionmaker of some kind in the current draft, is something that is new, that is not based on close examples in existing legislation anywhere in the United States.").

30. MODEL PENAL CODE: SENTENCING § 305.6 cmt. a (AM. L. INST., Tentative Draft No. 2 2011).

recommended permitting any defendant to petition for resentencing based on "changed circumstances" following fifteen years of incarceration.[31] At the time, no state had anything like the Model Penal Code's second look provision.[32] Six years later, the provision made it into the revised Model Penal Code—alongside an additional provision allowing for the resentencing of child defendants after ten years of incarceration.[33]

Debate over the Model Penal Code proposal framed future second look conversations. The Code's commentary emphasized the need to reexamine lengthy sentencing decisions, as norms and laws change over time, and sought to ensure these decisions remained "intelligible and justifiable at a point in time far distant from their original imposition."[34] The drafters stressed the normative position that the government should approach sentencing with humility and exercise caution before imposing sentences that detain people for most of their adult lives.[35] While they admitted possible shortcomings, including administrative costs,[36] the risk of placing potentially unpopular decisions in the hands of elected judges,[37] and the limited impact on incarceration rates,[38] they concluded that the potential benefit outweighed the costs.[39]

Critics attacked the drafters' utilitarian aims, emphasizing the burden that routine resentencing hearings could place on trial courts.[40] They also contended that the provision undermined finality, causing four potential harms.[41] First, they argued that finality is what gives punishment its deterrent

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31. Frase, *supra* note 29, at 196; MODEL PENAL CODE: SENTENCING § 305.6 (AM. L. INST., Tentative Draft No. 2 2011).

32. *See* Frase, *supra* note 29, at 197 (noting that the provision was almost deleted in drafting "because it has almost no existing state or federal counterpart").

33. MODEL PENAL CODE: SENTENCING §§ 305.6, 6.11A(h) (Am. L. Inst., Proposed Final Draft 2017); Debra Cassens Weiss, *Momentum Builds for 'Second Look' Legislation That Allows Inmates to Get Their Sentences Cut*, ABA J. (May 19, 2021, 2:41 PM CDT), https://www.
abajournal.com/news/article/momentum-builds-for-second-look-legislation-that-allows-inmates-to-get-their-sentences-cut.

34. MODEL PENAL CODE: SENTENCING § 305.6 cmts. a–b (AM. L. INST., Tentative Draft No. 2, 2011).

35. *Id.* § 305.6 cmt. a.

36. *Id.*

37. *Id.* § 305.6 cmts. a, d.

38. *Id.* § 305.6 cmt. a.

39. *Id.* § 305.6 cmt. a, d.

40. *Monday Morning Session*, *supra* note 29, at 37–38, 39 (remarks of Judge Jon S. Tigar and William J. Leahy).

41. Ryan, *Taking Another Look*, *supra* note 19, at 156–57.

effect, suggesting that, without finality, punishment can be seen as less final or less severe.[42] Second, they maintained that finality promotes rehabilitation by requiring defendants to accept their situation and begin to move forward, instead of distracting themselves with litigating aspects of their case.[43] Third, they emphasized that finality limits expenditure of court resources.[44] Finally, these critics stressed that finality provides closure to victims.[45]

Critics also complained that the new provision did nothing to further retributivist aims.[46] They argued that the original sentencing judge was in a better position to assess the harm the crime had caused the community and that there was no reason to conclude that future sentencing was more "accurate" simply because it was less harsh.[47] One scholar observed that "concluding that today's moral values are somehow more true or correct than yesteryear's moral values seems problematic."[48]

Although the Model Penal Code's resentencing provision was initially an outlier, support for second look legislation grew throughout the next decade. The D.C. Council passed its original Incarceration Reduction Amendment Act in 2016, predating the final revision of the Model Penal Code.[49] In 2018, the U.S. Congress passed the First Step Act with bipartisan support.[50] In addition to liberalizing the compassionate release process,[51] the Act provided a narrowly targeted second look, allowing individuals convicted of certain crack cocaine offenses to petition for resentencing.[52] That same year, California permitted prosecutors to seek resentencing themselves, prompting

42. *Id.* at 156.
43. *Id.* at 156–57.
44. *Id.*
45. *Id.*
46. *Id.* at 152.
47. *Id.* at 151–52.
48. *Id.* at 162.
49. The proposed final draft of *Model Penal Code: Sentencing* was approved in May of 2017. *Model Penal Code: Sentencing, Proposed Final Draft (Approved May 2017)*, UNIV. OF MINN.: ROBINA INST. OF CRIM. L. & CRIM. JUST., https://robinainstitute.umn.edu/publications/model-penal-code-sentencing-proposed-final-draft-approved-may-2017 (last visited Aug. 2, 2022).
50. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194; Nicole Ezeh, *Bipartisan Criminal Justice Bill Would Bolster Sentencing Reforms* (Nov. 3, 2021), NCSL, https://www.ncsl.org/ncsl-in-dc/publications-and-resources/bipartisan-criminal-justice-bill-would-bolster-federal-sentencing-reforms-magazine2021.aspx.
51. *Id.* § 603(b), 132 Stat. at 5239 (amending 18 U.S.C. § 3582(c)(1)(A)).
52. The Act permitted courts to retroactively apply the provisions of the Fair Sentencing Act of 2010 to reduce these sentences. *Id.* § 404, 132 Stat. at 5222.

Los Angeles District Attorney George Gascón to create a sentencing-review unit for those incarcerated at least fifteen years.[53]

In 2019, Senator Cory Booker and Representative Karen Bass introduced federal second look legislation, which included a resentencing threshold of ten years of served incarceration and a rebuttable presumption of release for those over age fifty.[54] In 2021, the National Association of Criminal Defense Lawyers proposed its own model legislation, mirroring key terms of the Booker/Bass bill.[55] As of that same year, legislators in over twenty-five states had introduced second look bills, and over sixty prosecutors and law enforcement officers had publicly supported resentencing mechanisms.[56]

Proponents of second look legislation argue that these laws have the potential to reduce the prison population (typically by freeing older prisoners who no longer pose a public safety risk[57]), to align sentences with contemporary mores,[58] and to even redress historical racially discriminatory sentencing.[59] Professor Shon Hopwood has argued that shorter sentences guard against recidivism, as lengthy incarceration has a criminogenic effect.[60] Other proponents believe that the opportunity for a second look would incentivize rehabilitation.[61] Professor Sarah French Russell has argued that second look sentencing hearings would permit those serving long sentences to offer narratives of rehabilitation that would humanize them and provide evidence of their capacity to change.[62]

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53. Assemb. B. 2942, 2018 Leg., Reg. Sess. (Cal. 2018); GHANDNOOSH, A SECOND LOOK AT INJUSTICE, *supra* note 22, at 4.

54. Second Look Act of 2019, S. 2146, 116th Cong. (2019); Press Release, Sen. Cory Booker, Booker, Bass to Introduce Groundbreaking Bill to Give "Second Look" to Those Behind Bars (July 15, 2019), https://www.booker.senate.gov/news/press/booker-bass-to-introduce-groundbreaking-bill-to-give-and-ldquosecond-look-and-rdquo-to-those-behind-bars.

55. JaneAnne Murray et al., *Second Look = Second Chance: Turning the Tide Through NACDL's Model Second Look Legislation*, 33 FED. SENT'G REP. 341, 341 (2021).

56. GHANDNOOSH, A SECOND LOOK AT INJUSTICE, *supra* note 22, at 6.

57. Hopwood, *supra* note 15, at 88–89; *see* GHANDNOOSH, A SECOND LOOK AT INJUSTICE, *supra* note 22, at 29.

58. MODEL PENAL CODE: SENTENCING § 305.6 cmts. a–b (AM. L. INST., Tentative Draft. No. 2 2011).

59. Hopwood, *supra* note 15, at 94–95.

60. *Id.* at 93–94.

61. *See, e.g.*, Sarah French Russell, *A "Second Look" at Lifetime Incarceration: Narratives of Rehabilitation and Juvenile Offenders*, 31 QUINNIPIAC L. REV. 489, 514 (2013) (describing how evidence of one's rehabilitation in prison could provide persuasive support at a future hearing for one's release); Hopwood, *supra* note 15, at 97.

62. Russell, *supra* note 61, at 519.

Opponents echo their predecessors' concerns about finality and retribution, but they have also expressed concerns about jeopardizing public safety,[63] devaluing victims' voices,[64] and eroding the deterrent effect of harsh punishment.[65]

While scholars generally agree that second look legislation has the potential to be a meaningful decarceral tool, it remains unclear whether it will function as such in practice. Richard Frase has questioned whether the Model Penal Code's second look provision will achieve decarceration: "Even if hearings are granted with some frequency (and especially if they are not), will inmates rarely see much (or any) reduction in their sentences?"[66] Even D.C.'s far-reaching Incarceration Reduction Amendment Act of 2016 had only led to the release of eighteen people by the end of 2020.[67]

Professor Renagh O'Leary has argued that the second look mechanism of compassionate release, which theoretically enables those with significant medical vulnerabilities to petition for early release, has failed to achieve meaningful decarceration, with states typically releasing only four to seven people per year.[68] O'Leary attributes this, in part, to exemptions in these statutes for those convicted of certain violent crimes.[69] O'Leary also notes, however, that compassionate release decision makers often fall prey to an "anti-release default," resulting from their commitment to retributivism and "extreme risk-aversion."[70]

O'Leary explains that decision makers emphasize the nature of the crime and the perceived risk to public safety at the expense of other factors.[71] Because compassionate release statutes often fail to define risk, "[*a*]*ny* level of risk that the person will commit *any* crime after release will be seen as intolerable."[72] Paradoxically, this instinct is especially true for those

63. *See supra* note 6.

64. *See supra* note 5.

65. Ryan, *Taking Another Look*, *supra* note 19, at 156 ("The severity, certainty, and swiftness of punishment have been said to be central components of deterrence, so undermining the severity and certainty of punishment—or even maybe the certainty of the extent of punishment—could undermine the deterrence value of punishment.").

66. Frase, *supra* note 29, at 200.

67. Howard, *supra* note 1.

68. O'Leary, *supra* note 11, at 624.

69. *Id.* at 651–52. O'Leary notes that while no state exempts all violent crimes from consideration, most include exemptions for some violent crimes, typically based on sentence length, offense severity, or offense type. *Id.* at 652.

70. *Id.* at 646.

71. *Id.* at 646–48.

72. *Id.* at 658.

convicted of violent crimes, even though the risk of violent-crime recidivism is low.[73]

For second look sentencing generally, immediate release is not always at issue. Instead, the question becomes, to what extent are decision makers predisposed to reimpose the original sentence? Scholars in an array of disciplines have written of an "anchoring effect," where a decision maker asked to determine a numerical value tends to ground their decision on the first or most significant numerical value that they encounter.[74] Both judges and jurors are susceptible to anchoring.[75] International research has shown that anchoring is at play in courtroom decision-making, including in determination of civil damages,[76] bail amounts,[77] and criminal sentence lengths.[78] Judicial sentencing decisions have been influenced by anchor values appearing in pretrial motions,[79] a prosecutor's request,[80] sentencing

73. *See id.*

74. Piotr Bystranowski et al., *Anchoring Effect in Legal Decision-Making: A Meta-Analysis*, 45 LAW & HUM. BEHAV. 1, 2 (2021).

75. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 816 (2001).

76. *See, e.g.*, Reid Hastie et al., *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445 (1999); Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCH. 519, 522 (1996); John Malouff & Nicola S. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCH. 491 (1989); Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 756–57 (1959).

77. *See* Mandeep K. Dhami, *Psychological Models of Professional Decision Making*, 14 PSYCH. SCI. 175 (2003).

78. *See, e.g.*, Birte Englich, *Blind or Biased? Justitia's Susceptibility to Anchoring Effects in the Courtroom Based on Given Numerical Representations*, 28 LAW & POL'Y 497, 497 (2006) (studying German judges).

79. Guthrie et al., *supra* note 75, at 792–93.

80. *See, e.g.*, Englich, *supra* note 78, at 500; Birte Englich et al., *The Last Word in Court—A Hidden Disadvantage for the Defense*, 29 LAW & HUM. BEHAV. 705, 707 (2005) (discussing studies of German judges); Francisca Fariña et al., *Anchoring in Judicial Decision-Making*, 7 PSYCH. SPAIN 56, 57 (2003) (studying Spanish judges); Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCH. 1535, 1547 (2001) (studying German judges).

guidelines,[81] a probation officer's recommendation,[82] and even a literal roll of dice.[83] At least one study has shown that a trial court's initial sentence serves as an anchor for reviewing courts.[84] With second look legislation, the concern is that the defendant's initial sentence could serve as an anchor for the re-sentencer, resulting in resentencing hearings that do not carry meaningfully different results. As no studies have yet addressed this specific scenario, more research is required before the impact of the anchoring effect on second look resentencing is clear.

Second look sentencing is rising in popularity as states respond to climbing prison costs and a renewed interest in rehabilitation.[85] While proponents emphasize its potential as a meaningful decarceral tool, should decision makers reflexively impose the original sentence, the impact of second look legislation on mass incarceration will be limited.

II. Child Defendants as Ideal Beneficiaries

A few states have enacted second look legislation that applies specifically to defendants who were sentenced for acts committed as children. Children make a natural beneficiary for these types of laws because the Supreme Court has repeatedly acknowledged that they are less blameworthy than adults and have a greater capacity for change.

In 2005's *Roper v. Simmons*,[86] the Supreme Court banned the death penalty for defendants who were under eighteen at the time of their crime.[87] Five years later, in *Graham v. Florida*,[88] the Court did the same for children sentenced to life without parole for nonhomicide crimes, holding that these

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81. Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 519–24 (2014); Nancy Gertner, Essay, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137, 138 (2006) (discussing anchoring effect of the Federal Sentencing Guidelines).

82. *See* Ebbe B. Ebbesen & Vladimir J. Konečni, *The Process of Sentencing Adult Felons: A Causal Analysis of Judicial Decisions*, *in* THE TRIAL PROCESS 413, 434, 442 (Bruce Dennis Sales ed., 1981) (studying San Diego judges).

83. Birte Englich et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCH. BULL. 188, 194 (2006).

84. Fariña et al., *supra* note 80, at 60.

85. *See supra* Part I.

86. Roper v. Simmons, 543 U.S. 551 (2005).

87. *Id.* at 578.

88. Graham v. Florida, 560 U.S. 48 (2010).

defendants were entitled to a "meaningful opportunity to obtain release."[89] Both of these cases rested on the premise that children have qualities that make them less culpable than adults, namely immaturity, vulnerability, and capacity for change.[90] In 2012, the Court held in *Miller v. Alabama*[91] that individualized sentencing was required for children convicted of homicide crimes before they could be sentenced to life without parole.[92] The Court required that a defendant's "youth and attendant characteristics" be taken into account at sentencing, emphasizing the same three categories that indicate reduced culpability: immaturity, vulnerability, and capacity for change.[93] *Miller* also noted that, in light of these categories, life-without-parole sentences should be "uncommon."[94]

Following the Supreme Court's decisions in *Graham* and *Miller*, states explored a variety of legislative solutions to eliminate or limit life without parole as a punishment for children. Some states simply converted life-without-parole sentences to life-with-parole sentences.[95] Others went a step further and created special guidelines for parole boards to consider in cases involving child defendants.[96] Three states enacted early second look statutes for these groups.[97]

Beginning in 2013, the California legislature permitted children sentenced to life without parole to petition for resentencing after serving fifteen years

89. *Id.* at 75.

90. *Id.* at 68 (citing *Roper*).

91. Miller v. Alabama, 567 U.S. 460 (2012).

92. *Id.* at 483.

93. *Id.* at 471, 483.

94. *Id.* at 479. The Court attempted to differentiate between the majority of children whose crimes had resulted from "transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption," indicating that life without parole should be reserved for the latter group. *Id.* at 479–80 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005), and *Graham*, 560 U.S. at 68).

95. *See Legislation Eliminating Life-Without-Parole Sentences for Juveniles*, JUV. SENT'G PROJECT, https://juvenilesentencingproject.org/legislation-eliminating-lwop (last visited Aug. 2, 2022) (cataloguing legislative changes in the states since *Miller*).

96. *See, e.g.*, ARK. CODE ANN. § 16-93-621(b) (West 2021) (directing the parole board to consider ten enumerated factors in assessing "how a minor offender is different from an adult offender").

97. CAL. PENAL CODE § 1170(d)(1)(A) (West 2022) (permitting defendants sentenced to life without parole for a crime committed under age eighteen to petition for resentencing after serving fifteen years); DEL. CODE ANN. tit. 11, § 4204A(d)(1)–(3) (West 2022) (permitting child defendants convicted of murder to petition for resentencing after serving thirty years and those convicted of lesser crimes to do so after twenty years); FLA. STAT. § 921.1402 (2015) (allowing a "juvenile offender" to petition for resentencing after twenty-five years, provided they did not have a prior conviction for certain violent crimes).

of their sentence.[98] If denied, the defendant had three more chances: they could re-petition the court after serving twenty, twenty-four, and twenty-five years.[99] Delaware's second look statute was more modest, allowing child defendants convicted of murder to twice petition for resentencing: once after serving thirty years and, if denied, again after five more years—although the sentencing court retained discretion to prohibit the second petition.[100] Florida allowed for a single petition after twenty-five years of incarceration.[101]

Second look legislation aimed at child defendants with lengthy sentences might be more palatable to legislators for several reasons. First, the Supreme Court's findings that children are less culpable and have a greater capacity for positive change than adult defendants appear to reflect public opinion. Two national polls conducted in 2020 showed that more than two-thirds of voters, including more than two-thirds of Republicans, agree that all children are capable of change.[102] More than half of voters, including more than 50% of Republicans, believe that life without parole is not an appropriate sentence for someone who committed a crime as a child.[103] Importantly, two-thirds of voters supported the sentence review for these defendants after fifteen years of incarceration with the possibility of release if they were found to no longer threaten public safety.[104] The qualities of reduced culpability and greater capacity for change also provide a response for those concerned that second look sentencing undermines retributivist aims: the adult seeking resentencing is truly a different person, in a different position, from the child who received the original sentence.

Second, the limited number of child defendants sentenced to life or constructive life sentences lessens the concern that resentencing opportunities will open the floodgates of litigation. As of 2020, there were only 1,465 people serving life without parole for crimes committed as children and an additional 1,716 people serving virtual life sentences—

98. CAL. PENAL CODE § 1170(d)(1)(A).

99. CAL. PENAL CODE § 1170(d)(10).

100. DEL. CODE ANN. tit. 11, § 4204A(d)(2), (3).

101. FLA. STAT. § 921.1402(2)(a).

102. DATA FOR PROGRESS, THE JUST. COLLABORATIVE INST. & FAIR & JUST PROSECUTION, A MAJORITY OF VOTERS SUPPORT AN END TO EXTREME SENTENCES FOR CHILDREN 7–8 (2020), https://www.filesforprogress.org/memos/juvenile_life_without_parole.pdf.

103. *Id.* at 7–9.

104. *Id.* at 9.

sentences that exceed average life expectancy.[105] These numbers are roughly 3% of the overall life-without-parole and virtual life-without-parole sentences nationwide.[106]

Third, while nearly all child defendants with life sentences are serving time for violent crimes,[107] there is reason to believe that their release would not present a significant risk to public safety. Contrary to popular belief, individuals convicted of more violent crimes tend to have lower recidivism rates.[108] More specifically, the early data on child defendants released

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105. JOSH ROVNER, THE SENT'G PROJECT, POLICY BRIEF: JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 1, 4 (2021), https://www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf.

106. *See* ASHLEY NELLIS, THE SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 9–10 (2021), https://www.sentencingproject.org/wp-content/uploads/2021/02/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf (indicating that, as of 2020, 55,945 people were serving sentences of life without parole and 42,353 people were serving virtual life sentences). An additional 105,567 people were serving sentences of life with the possibility of parole. *Id.* As of 2016, 7,346 people were serving sentences of life with parole for crimes committed as children. THE SENT'G PROJECT, YOUTH SENTENCED TO LIFE IMPRISONMENT 1 (2019), https://www.sentencingproject.org/wp-content/uploads/2019/10/Youth-Sentenced-to-Life-Imprisonment.pdf. These individuals do not become eligible for parole until they have served a period of incarceration ranging from twenty-five to fifty-one years. *Id.* at 1–2.

107. In *Graham v. Florida*, the Supreme Court declared formal sentences of life without parole unconstitutional for children convicted of nonhomicide crimes. 560 U.S. 48, 82 (2010). While many states have applied *Graham* to virtual life sentences, not all have found that the Eighth Amendment prohibits these sentences. *See, e.g.*, Lucero v. People, 394 P.3d 1128, 1130 (Colo. 2017) (finding *Graham* and *Miller* do not apply to children sentenced to consecutive terms of years for multiple offenses, even if the terms exceed expected lifespan). Accordingly, it is possible for an individual to receive a virtual life sentence for commission of a nonviolent crime.

108. J.J. Prescott et al., *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1668–70 (2020) (stating that a review of research consistently shows that "those incarcerated for serious violent offenses reoffend at relatively low rates compared to other released individuals" and that repeat-homicide recidivism is equal to or below 1%); JUST. POL'Y INST., THE UNGERS, 5 YEARS AND COUNTING: A CASE STUDY IN SAFELY REDUCING LONG PRISON TERMS AND SAVING TAXPAYER DOLLARS 9, 17 (2018), https://abell.org/wp-content/uploads/2022/02/JPI_The20Ungers20520Years20and20Counting_Nov_2018.pdf (finding that only one of the 188 life-sentenced individuals released from prison due to an illegal jury instruction was reincarcerated after five years); BARBARA LEVINE & ELSIE KETTUNEN, CITIZENS ALL. ON PRISONS & PUB. SPENDING, PAROLING PEOPLE WHO COMMITTED SERIOUS CRIMES: WHAT IS THE ACTUAL RISK? 3–4 (2014), https://www.prisonpolicy.org/scans/cappsmi/CAPPS_Paroling_people_who_committed_serious_crimes_11_23_14.pdf (finding individuals with convictions for second-degree murder, manslaughter, or a sex crime who received parole in Michigan were approximately two-thirds less likely than the total paroled population to be reincarcerated for a new crime within three years of release).

following resentencing hearings after *Graham* and *Miller* shows extremely low recidivism rates. A study by Montclair State University showed that of the 174 "juvenile lifers" released in Philadelphia since *Miller*, only six were rearrested, with only two of those arrests resulting in convictions.[109] In Michigan, only one of the 142 people released following *Miller* resentencing hearings has been rearrested.[110] In Louisiana, none of the sixty-eight people who have received parole have been rearrested.[111] Similarly, of the eighteen individuals released under D.C.'s Incarceration Reduction Amendment Act, not one has been rearrested.[112] Accordingly, focusing second look legislation on children sentenced to die in prison has the potential to satisfy both progressives, who believe the laws must apply to those convicted of violent crimes, and conservatives, who emphasize public safety concerns.

III. An Opportunity to Redress Sentencing Flaws for Child Defendants

Second look legislation also has the potential to redress the following significant sentencing flaws that persist in the juvenile realm. First, despite *Miller*'s mandate, evidence of a child defendant's capacity for change is difficult to accurately assess at the time of sentence. Second, arbitrary and racially discriminatory outcomes pervade juvenile sentencing—a reality that will likely be exacerbated by the discretion conferred on sentencing judges in *Jones v. Mississippi*,[113] the Court's most recent Eighth Amendment case.

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109. TARIKA DAFTARY-KAPUR & TINA M. ZOTTOLI, MONTCLAIR ST. UNIV., RESENTENCING OF JUVENILE LIFERS: THE PHILADELPHIA EXPERIENCE 2 (2020), https://digitalcommons.montclair.edu/cgi/viewcontent.cgi?article=1084&context=justice-studies-facpubs. The two convictions were for Contempt and Robbery in the Third Degree. *Id.*

110. *A Study of Michigan Suggests Released 'Juvenile Lifers' Rarely Reoffend*, THE IMPRINT (Aug. 23, 2021, 11:44 AM), https://imprintnews.org/news-briefs/michigan-released-juvenile-lifers-rarely-reoffend/58122. The first of these individuals was released in 2016. *See For Juvenile Offenders, Supreme Court Ruling Opens Door to Parole*, NPR (Feb. 15, 2016, 4:28 PM ET), https://www.npr.org/2016/02/15/466848817/for-juvenile-offenders-supreme-court-ruling-opens-door-to-parole?t=1659534198736. Prior to 2016, Michigan contended that *Miller* did not apply retroactively; however, the Court found to the contrary in that year's *Montgomery v. Louisiana*, 577 U.S. 190 (2016). *See For Juvenile Offenders, Supreme Court Ruling Opens Door to Parole*, *supra*.

111. Demario Davis & Stan Van Gundy, *It's Time for Louisiana to End Juvenile Life Without Parole*, LA. ILLUMINATOR (Apr. 29, 2021, 11:01 AM), https://lailluminator.com/2021/04/29/its-time-for-louisiana-to-end-juvenile-life-without-parole-demario-davis-stan-van-gundy.

112. Howard, *supra* note 1.

113. Jones v. Mississippi, 141 S. Ct. 1307 (2021); *see infra* notes 130–37 and accompanying text.

A. Assessing Capacity for Change

The first sentencing flaw is straightforward. The difficulty with assessing an individual's capacity for change is that it requires the court to make a prediction; however, there is no indication that the future criminal behavior of children can be predicted accurately.[114] In fact, research has consistently shown that the same risk factors can appear in children who became law-abiding adults as in those who later exhibited violent conduct.[115] Not only are these judicial determinations inaccurate, but they tend to overpredict future criminality,[116] particularly for Black children and other children of

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114. *See, e.g.*, Sarah French Russell, *Second Looks at Sentences Under the First Step Act*, 32 FED. SENT'G REP. 76, 78 (2019) ("[I]t is virtually impossible to determine at the time of sentencing that a child is incapable of reform."); Mary Marshall, Note, Miller v. Alabama *and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1657 (2019) ("All the limitations of predicting future dangerousness in adults become more pronounced when making predictions about whether a juvenile is capable of rehabilitation. There is substantial evidence to suggest that such predictions are impossible."); Kimberly Larson et al., Miller v. Alabama*: Implications for Forensic Mental Health Assessment at the Intersection of Social Science and the Law*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 319, 335–36 (2013) ("[T]here is currently no basis in current behavioral science nor well-informed professional knowledge that can support any reliable forensic expert opinion on the relative likelihood of a specific adolescent's prospects for rehabilitation at a date that may be years to decades in the future."); Alex R. Piquero, *Youth Matters: The Meaning of* Miller *for Theory, Research, and Policy Regarding Developmental/Life-Course Criminology*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 347, 355 (2013) ("[I]t is very difficult to predict early in the life-course which individual juvenile offender will go on to become a recidivistic adult offender."); Elizabeth Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 684 (2016) ("[P]rediction of future violence from adolescent criminal behavior, even serious criminal behavior, is unreliable and prone to error.").

115. *See, e.g.*, JOHN H. LAUB & ROBERT J. SAMPSON, SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70, at 276, 289–90 (2003) (study observing five hundred American men from childhood to age seventy that found future criminal behavior difficult to predict despite isolating risk factors); Rolf Loeber et al., *Findings from the Pittsburgh Youth Study: Cognitive Impulsivity and Intelligence as Predictors of the Age-Crime Curve*, 51 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1136, 1146–47 (2012) (finding study of Pittsburgh youth unsuccessful at predicting who would continue to offend into adulthood); Lila Kazemian et al., *Can We Make Accurate Long-Term Predictions About Patterns of De-Escalation in Offending Behavior?*, 38 J. YOUTH & ADOLESCENCE 384, 397 (2009) (noting that while the study predicted short-term behavior change, it did not indicate an ability to predict changes in offending behavior within individuals over long periods of time).

116. *See* LAUB & SAMPSON, *supra* note 115, at 290 (discussing "the false positive problem," where prediction scales substantially overpredict future criminality); Loeber et al., *supra* note 115, at 1139 (revealing a high false-positive error rate for their study).

color.[117] Thus, capacity for change as a forward-looking inquiry encourages the presentation of and reliance on predictive methods that constitute junk science.[118]

Second look legislation shifts the forward-looking capacity-for-change inquiry to a backward-looking determination of an individual's rehabilitation, replacing speculation with credible evidence. By doing so, it both creates incentives for enrollment in rehabilitative programs and provides a corrective mechanism for the inaccurate predictions of sentencing judges.

B. Arbitrary and Racially Discriminatory Sentencing Outcomes

A common critique of individualized sentencing is that it results in arbitrary and racially discriminatory outcomes.[119] These problems are heightened in the cases of children given life or virtual life sentences. Scholars have emphasized that the racialized myth of the teen "super-predator"[120] in the 1990s spurred a dramatic increase in juvenile

117. This has repeatedly been observed in the analogous inquiry in the capital context: future dangerousness. *See, e.g.*, Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 327–28 (2012) (discussing how data from the Capital Jury Project reveals racial bias in future dangerousness assessments); TEX. DEF. SERV., DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS 42 (2004), https://web.archive.org/web/20050310085640/https://www.texasdefender.org/DEADLYSP.PDF (arguing that the jurors' races and the defendant's race have an "undeniable effect on determinations of future dangerousness"); Kathryn Roe Eldridge, *Racial Disparities in the Capital System: Invidious or Accidental?*, 14 CAP. DEF. J. 305, 317 (2002) ("[A]n African American is more likely to face a jury which will be more prone to sentence him to death on the future dangerousness predicate out of subconscious fears based on his race.").

118. Critics have made similar arguments concerning the predictive "future dangerousness" standard employed in Texas capital cases with adult defendants. Ana M. Otero, *The Death of Fairness: Texas's Future Dangerousness Revisited*, 4 U. DENV. CRIM. L. REV. 1, 2 (2014); Mark Hansen, *A Dangerous Assessment*, ABA J. (Oct. 11, 2004, 7:26 AM CDT), https://www.abajournal.com/magazine/article/a_dangerous_assessment.

119. *See, e.g.*, M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320 (2014); Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. (SUPPLEMENT) 87S (2011); TUSHAR KANSAL, THE SENT'G PROJECT, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE (Marc Mauer ed., 2005); Kathryn E. Miller, *The Eighth Amendment Power to Discriminate*, 95 WASH. L. REV. 809, 815–16 (2020) (arguing that the individualized sentencing requirement in capital cases has contributed to racially discriminatory sentencing outcomes).

120. John DiIulio, *The Coming of the Super -- Predators*, WASH. EXAMINER (Nov. 27, 1995, 12:00 AM), https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators. DiIulio and others argued that "super-predators" were more likely to be

incarceration, sentence length, and trying children as adults.[121] In the years leading up to *Miller*, 77% of the children receiving life sentences were children of color.[122] The victim's race also factored into sentencing. One study found that African American children were sentenced to life without parole for killing a white person at nearly twice the rate they were arrested for this crime.[123] On the other hand, white children were only half as likely to receive a life-without-parole sentence for killing a Black victim as their arrest rate for this crime.[124] Geography was also a determinant. Five states—California, Florida, Louisiana, Michigan, and Pennsylvania—were responsible for two-thirds of all life-without-parole sentences imposed for children in the United States before 2016.[125] Thirty-five percent of these life-without-parole sentences came from ten counties, while 20% of them came from just three of these counties.[126]

Following *Miller*'s prohibition of mandatory life without parole for children, racial disparities in life-without-parole sentences increased—

Black and Brown children who grew up in so-called "criminogenic communities." WILLIAM J. BENNETT, JOHN J. DIIULIO, JR. & JOHN P. WALTERS, BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 22, 28 (1996). The theory was widely rejected, and DiIulio himself has disavowed it. Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html; Brief of Jeffrey Fagan et al. as Amici Curiae in Support of Petitioners at 37, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647).

121. Kristin Henning, *The Challenge of Race and Crime in a Free Society: The Racial Divide in Fifty Years of Juvenile Justice Reform*, 86 GEO. WASH. L. REV. 1604, 1620–22 (2018); John R. Mills et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 538, 560–62, 581–86 (2016); Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 850–57, 860–75 (2010); Kenneth B. Nunn, *The Child As Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 711–12 (2002); Franklin E. Zimring, *The 1990s Assault on Juvenile Justice: Notes from an Ideological Battleground*, 11 FED. SENT'G REP. 260, 260–61 (1999).

122. ASHLEY NELLIS & RYAN S. KING, THE SENT'G PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 3 (2009), https://www.sentencingproject.org/wp-content/uploads/2016/01/No-Exit-The-Expanding-Use-of-Life-Sentences-in-America.pdf.

123. ASHLEY NELLIS, THE SENT'G PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 5 (2012), https://www.sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf ("The proportion of African Americans serving JLWOP sentences for the killing of a white person (43.4%) is nearly twice the rate at which African American juveniles are arrested for taking a white person's life (23.2%) . . . .").

124. *Id.*

125. Mills et al., *supra* note 121, at 563.

126. *Id.* at 571–72.

particularly with respect to African Americans—with the percentage of life-without-parole sentences imposed on Black children increasing from 61% to 72%.[127] Geographic inequities persisted, as new prosecutions in Michigan and Louisiana exceeded those in other states in seeking life without parole.[128] In resentencing hearings conducted after the Supreme Court held *Miller* applied retroactively,[129] Michigan prosecutors sought to reimpose life without parole in 60% of cases, while Louisiana prosecutors did so in 30% of cases.[130] The *Associated Press* summed up the post-*Miller* sentencing landscape: "The odds of release or continued imprisonment vary from state to state, even county to county, in a pattern that can make justice seem arbitrary."[131]

In 2021, the Court decided *Jones v. Mississippi*,[132] a decision that I have argued is only likely to exacerbate these sentencing disparities.[133] Not only did *Jones* explicitly reject the notion that sentencing judges must find that a child defendant is "permanently incorrigible" before sentencing them to life without parole for homicide,[134] but it also held that sentencing judges need not make factual findings before imposing sentences.[135] *Jones* reduced *Miller*'s mandate to the pithy "youth matters," finding juvenile life-without-parole sentences were consistent with the Eighth Amendment so long as the sentencer did not explicitly reject youth as a factor.[136] The decision unfettered the discretion of sentencing judges and rendered their decisions nearly unreviewable—creating maximal conditions for arbitrary and racially discriminatory outcomes.[137]

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127. THE CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, TIPPING POINT: A MAJORITY OF STATES ABANDON LIFE-WITHOUT-PAROLE SENTENCES FOR CHILDREN 10 (2018), https://cfsy.org/wp-content/uploads/Tipping-Point.pdf. A larger study is necessary to conclude that white defendants sentenced to life without parole were not disproportionately found in states that abolished these sentences following *Miller*, which is an alternative, and less invidious, explanation for the increase in the sentencing rate of Black children to life without parole.

128. *Id.* at 7.

129. Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).

130. THE CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, *supra* note 127, at 7.

131. Sharon Cohen & Adam Geller, *AP Exclusive: Parole for Young Lifers Inconsistent Across US*, AP NEWS (July 31, 2017), https://apnews.com/article/mo-state-wire-courts-ar-state-wire-mi-state-wire-north-america-a592b421f7604e2b88a170b5b438235f.

132. Jones v. Mississippi, 141 S. Ct. 1307 (2021).

133. Kathryn E. Miller, *Resurrecting Arbitrariness*, 107 CORNELL L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3942881.

134. *Jones*, 141 S. Ct. at 1311.

135. *Id.* at 1314–16.

136. *Id.* at 1314, 1320 n.7.

137. Miller, *supra* note 133.

In her dissenting opinion in *Jones*, Justice Sotomayor compared sentencing outcomes in two states—Mississippi and Pennsylvania—to illustrate how unfettered discretion can exacerbate sentencing disparities.[138] In Mississippi, where judicial discretion lacked explicit boundaries, more than 25% of resentencings resulted in reimposing life without parole; whereas, in Pennsylvania, which adopted sentencing guidelines including a rebuttable presumption against life without parole, only 2% of defendants were resentenced to life without parole.[139] While more research is needed to determine if arbitrary and racially discriminatory outcomes will increase following *Jones*, it is clear that these outcomes remain a significant obstacle to juvenile sentencing.

IV. Procedural Recommendations

To redress arbitrary and racially discriminatory sentencing outcomes, and to avoid reflexive impositions of original sentences, this Essay proposes three additions to second look legislation aimed at children sentenced to die in prison: automatic eligibility for resentencing at age twenty-five, jury resentencing, and shielding the defendant's original sentence from the decision maker.

A. A Research-Based Incarceration Threshold

Rather than adopt a term of years as a threshold period of incarceration, I propose that children sentenced to die in prison become automatically eligible for resentencing when they reach the age of twenty-five.

The threshold incarceration amount for second look resentencing varies. Although the Model Penal Code recommends that juveniles become eligible for resentencing after ten years of incarceration,[140] even the most ambitious legislation has required at least fifteen years.[141] Other proposed legislation demands as many as thirty years.[142] The problem with these varying thresholds is that they are arbitrary, lacking scientific grounding and likely resulting from compromise among various constituencies.

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138. *Jones*, 141 S. Ct. at 1333–34 (Sotomayor, J., dissenting).

139. *Id.*

140. MODEL PENAL CODE: SENTENCING § 6.11(A)(h) (AM. L. INST., Proposed Final Draft 2017) (permitting petition for resentencing after ten years for child defendants).

141. *See, e.g.*, D.C. CODE ANN. § 24-403.03(a)(1) (West 2021) (requiring fifteen years of incarceration for resentencing eligibility); *see also Second Chances Agenda*, *supra* note 12 (compiling pending second look legislation).

142. *E.g.*, H.B. 2451, 58th Leg., 1st Reg. Sess. (Okla. 2021) (allowing child defendants to petition for resentencing after thirty years of incarceration).

Although not extensive, research indicates that periods of criminality tend to last for much shorter time periods—only five to ten years—with the greatest frequency of criminal activity typically occurring in the late teenage years.[143] Increases in already lengthy sentences—for example, from twenty years to life—do not have a significant deterrent effect.[144] Explanations for why this is the case include that most people committing crimes do not know the details of the law;[145] that many crimes are committed impulsively, without rigorous cost-benefit analysis;[146] that other crimes result from mental illness or substance abuse that distorts reasoning;[147] that many people committing crimes do not believe they will be caught;[148] and that many people discount future consequences as compared to present benefits.[149]

Importantly, for child defendants, additional research provides guidance on when sentences should be eligible for reevaluation—one that complements the data on shorter sentences. Neuroscientific research indicates that brain development continues until approximately age twenty-five.[150] This includes development of the prefrontal cortex, which regulates impulses and emotions, assesses risk, and engages in long-term planning.[151]

Because neuroscientists agree that most people achieve maturity of the prefrontal cortex at age twenty-five, I propose that second look legislation

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143. *See* Alex R. Piquero et al., *Criminal Career Patterns*, *in* FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION 14, 14–17 (Rolf Loeber & David P. Farrington eds., 2012).

144. Daniel S. Nagin, *Guest Post: Reduce Prison Populations by Reducing Life Sentences*, WASH. POST (Mar. 21, 2019, 6:30 AM EDT), https://www.washingtonpost.com/crime-law/2019/03/21/guest-post-reduce-prison-populations-by-reducing-life-sentences.

145. Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 175–78 (2004).

146. *Id.* at 179.

147. *Id.* at 179–80.

148. *Id.* at 185.

149. *Id.* at 194–95.

150. Andy Murdock, *The Evolutionary Advantage of the Teenage Brain*, UNIV. OF CAL. (Mar. 25, 2020), https://www.universityofcalifornia.edu/news/evolutionary-advantage-teenage-brain; Stephen Johnson, *Why Is 18 the Age of Adulthood If the Brain Can Take 30 Years to Mature?*, BIG THINK (Jan. 31, 2022), https://bigthink.com/neuropsych/adult-brain; Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 451 (2013); *Brain Maturity Extends Well Beyond Teen Years*, NPR (Oct. 10, 2011, 12:00 PM ET), https://www.npr.org/templates/story/story.php?storyId=141164708.

151. Murdock, *supra* note 150; Johnson, *supra* note 150; Arain et al., *supra* note 150, at 453. Age twenty-five is not a bright line for the pre-frontal cortex's cessation of development; some individuals continue development past this point, while others develop more quickly. *See* Johnson, *supra* note 150.

adopt this age as its eligibility requirement. This will permit defendants to seek resentencing as fully mature adults and to provide evidence of their capacity for change. Adopting this proposal will create varying periods of incarceration thresholds for child defendants of different ages, with thirteen-year-old defendants serving as much as twelve years of incarceration and nineteen-year-old defendants serving only six years. This difference roughly corresponds with the five to ten years of criminality that most people exhibit and requires incarceration during the late teenage years, when crimes are committed most frequently.[152] Moreover, grounding eligibility requirements in neuroscience, as opposed to sentence lengths, may prove more acceptable for different political constituencies, as it avoids debates on how long is long enough.

While under this proposal a child defendant becomes eligible for resentencing at age twenty-five, they are not *required* to seek resentencing at that point. This flexibility allows those who have difficulty adjusting to incarceration to take more time to demonstrate rehabilitation if desired. Additionally, any second look legislation should include a renewal period, where those who fail to achieve a sentence reduction can petition again for resentencing after an intervening time. Not only does this continue to incentivize rehabilitation, but it also provides opportunities for defendants who are late to mature and for those who suffer significant institutional trauma during their incarceration. Considering research on criminality periods, this renewal threshold should be no more than ten years.

B. Jury Sentencing

I have argued in a previous work that child defendants faced with possible life sentences should be entitled to jury sentencing.[153] There, I make the case that, although imperfect, jury sentencing is a better route than judicial sentencing when seeking to avoid racially discriminatory outcomes.[154] I note that both judges and juries fall prey to implicit biases, but emphasize that there is no indication that judges are better at avoiding these biases than jurors.[155] I also acknowledge that juries contain far fewer people of color than they should—due, in part, to structural defects that base jury pool selection on voter registration, that disqualify individuals with felony convictions from

152. *See supra* note 143 and accompanying text.
153. Miller, *supra* note 133, at 47–52.
154. *Id.*
155. *Id.* at 48.

service, and that permit prosecutors to engage in the racially discriminatory use of peremptory strikes.[156]

Despite these limitations, I conclude that jury sentencing has the potential to lead to less racially discriminatory outcomes for two reasons. First, most state court trial-level judges are elected[157] and often campaign on being "tough on crime."[158] Because they do not seek election, jurors lack the political pressure that judges may feel to punish harshly.[159] Second, research shows that decision-maker identity plays a significant role in sentencing.[160] Because juries are inherently more likely to contain diverse viewpoints and identities than that of a single judge, they are less likely to fall prey to racial bias, particularly when given the same sentencing guidelines that judges receive.[161]

Jury sentencing is preferable for a second reason. It typically results in a more robust development and introduction of mitigation evidence, including the presentation of witnesses, as opposed to judicial sentencing, which often merely consists of oral argument by the parties.[162]

The arguments that favor jury sentencing apply equally to jury resentencing; however, an additional advantage exists in the resentencing context. Most states' statutory schemes, when possible, assign the defendant's original sentencing judge to conduct their resentencing. In these scenarios, the judge is likely to be influenced by their original sentencing determination. Even if the resentencing judge did not impose the original sentence, they may feel pressure to defer to a colleague's determination. These influences would not apply to jurors.

A typical objection to jury sentencing is that it is more resource intensive;[163] however, given the small number of children sentenced to die in prison, this argument is less weighty in the context of resentencing this group.

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156. *Id.* at 46–47.

157. *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures.

158. Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments Clause Determinations*, 64 FLA. L. REV. 549, 550 (2012).

159. *See* Miller, *supra* note 133, at 28–29.

160. *Id.* at 26–32, 48.

161. *Id.* at 47–52.

162. Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. REV. 553, 611–12 (2015) ("With a jury empaneled, judges are likely to allow more time for the presentation of evidence, and defense lawyers may more readily recognize the need for a higher level of development of mitigating evidence.").

163. *See id.* at 612.

Moreover, some states, including more politically conservative states like Arkansas and Oklahoma, already permit jury resentencing for these child defendants.[164]

Because juries are less likely to engage in racially discriminatory sentencing than judges, and because jury sentencing promotes a rich evidentiary record, second look legislation for child defendants should provide a right to jury resentencing.[165]

C. Sentence Shielding

Finally, to avoid reflexive imposition of the original sentence, second look legislation should prevent re-sentencers from knowing the original sentence. At least one court has already found that the introduction of this information is more prejudicial than probative because it diminishes re-sentencers' sense of responsibility and encourages them to improperly consider the original sentence in determining a new sentence.[166] Shielding decision makers from the original sentence also prevents them from relying on that sentence as an anchoring amount, which is particularly problematic in the context of children sentenced to die in prison—in which original sentences are often of dubious constitutionality.[167]

Shielding is more achievable in the context of jury resentencing. It can be difficult, if not impossible, to prevent judges from knowing the original sentence of a defendant appearing before them for resentencing—particularly

164. *See* Kitchell v. State, 594 S.W.3d 848, 850 (Ark. 2020) (discussing jury resentencing of a seventeen-year-old defendant who was originally sentenced to life without parole); 22 OKLA. STAT. ANN. § 929(B)–(C) (West 2022).

165. Because research on noncapital jury sentencing is somewhat limited, second look legislation should also permit defendants to waive their right to jury resentencing without requiring prosecutorial approval, should the defendant prefer judicial resentencing. *See* Guha Krishnamurthi, *The Constitutional Right to Bench Trial*, 100 N.C. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4013938.

166. *Kitchell*, 594 S.W.3d at 853; *see also* People v. Woolley, 793 N.E.2d 519, 520 (Ill. 2002) (finding a defendant's original death sentence inadmissible at a capital resentencing hearing); Hammond v. State, 776 So. 2d 884, 889 (Ala. Crim. App. 1998) (same).

167. *See* Graham v. Florida, 560 U.S. 48, 82 (2010) (finding life without parole sentences unconstitutional for child defendants convicted of nonhomicide crimes); Miller v. Alabama, 567 U.S. 460, 465 (2012) (holding that mandatory life-without-parole sentences are unconstitutional for child defendants convicted of homicide); Montgomery v. Louisiana, 577 U.S. 190, 212 (2016) (finding *Miller* retroactively applicable); People v. Contreras, 411 P.3d 445, 447, 462 (Cal. 2018) (finding a sentence of fifty to life for a child defendant convicted of nonhomicide crime unconstitutional under *Graham*).

if the judges themselves imposed that sentence.[168] But this is also the case if a close colleague imposed the original sentence or if the case generated a high profile. Because documents from the defendant's original casefile might be relevant to resentencing, third-party redaction would be required to ensure adequate shielding from judicial eyes.[169]

Opponents might complain that shielding may also limit the testimony of victim impact statements to the effects of the crime itself, prohibiting statements related to any emotional anguish caused by the uncertainty of the resentencing process.[170] However, victim impact testimony has always had substantive limitations, and at least one state has found comment on the original sentence to be one of them.[171]

Because preventing re-sentencers from learning a child defendant's original sentence prevents them both from reflexively reimposing it and from using it as a flawed standard of reference, second look legislation should require sentence shielding.

Conclusion

Second look legislation aimed at children sentenced to die in prison has significant promise as an entry point to achieving meaningful decarceration, provided states adopt three procedural safeguards. First, research suggests that eligibility for resentencing should coincide with neurological maturation, which occurs at age twenty-five. Second, mandating jury resentencing will incentivize robust presentations of evidence and will reduce the risk racially discriminatory outcomes. Finally, shielding the sentencer from knowledge of the defendant's original sentence reduces the likelihood of reflexive reimposition of that sentence.

Although only a small number of defendants would be eligible for resentencing, this limited application could make the legislation politically feasible in more conservative states. Because each of these defendants would almost certainly have convictions for violent crimes, the legislation would also appeal to progressive groups who wish to build the case for expanding

168. *See* Guthrie et al., *supra* note 75, at 827 ("Another important advantage of a jury trial is that it creates a mechanism for keeping potentially misleading information away from the fact finder.").

169. Even with sentence shielding, judges would likely be aware that in order for a resentencing to be occurring at all, the defendant must have initially received a life sentence. This judicial awareness is another reason that states should mandate jury resentencing.

170. *See Kitchell*, 594 S.W.3d at 853 (finding victim impact testimony of this type irrelevant and prejudicial).

171. *See id.*

this legislation. Likelihood for success is high, as early data indicates that children convicted of homicide who are released as adults have very low recidivism rates. Should the legislation's success eventually result in a second look for adults convicted of violent crimes, the opportunity for decarceration is significant.