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Second Look = Second Chance: Turning the Tide through NACDL's Model Second Look Legislation¹



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Introduction

Our nation has reached a moment of reckoning. Even before the past year's groundswell of demonstrations for racial justice and criminal legal system reform, there was an emerging bipartisan consensus that America's astronomical incarceration rates are unjust and unsustainable. Growing numbers of politicians, judges, prosecutors, and broad swaths of the public now recognize that the United States has locked up too many people for too long, relying on hyper-punitive criminal laws that disproportionately impact the poor and people of color.³

It has also become clear that any meaningful effort to turn the tide of mass incarceration must grapple with the epidemic of lengthy sentences that has taken hold of the U.S. prison system in recent decades. Over two million people are locked up in jails and prisons in the United States at any given time—making this nation far and away the world leader in taking away people's physical freedom. While many of these individuals are behind bars for only a short time, the backbone of mass incarceration is people serving very long sentences—often decades-long and far longer than they would serve for comparable crimes elsewhere in the world.⁴ At the federal level alone, 53% are serving sentences of 10 years or more and 30% are serving sentences of 15 years or more.⁵

Our national addiction to long sentences is costly. On average, a state will pay over \$30,000 to incarcerate each person for each year they remain behind bars.⁶ In many states, the annual cost per inmate exceeds \$50,000.⁷ These costs increase dramatically in the later stages of long sentences, when incarcerated individuals require increasingly expensive medical care and assistance as they age.⁸ And beyond the dollars and cents, incalculable social and economic costs are suffered by the families and communities of those who remain imprisoned for so long. Yet a huge body of research shows that long sentences do not have corresponding benefits to society.⁹ If anything, they are harmful. When people are locked up for decades, their likelihood of creating a productive life for themselves diminishes.¹⁰ Society as a whole ultimately bears the substantial monetary and human costs of its decision to warehouse human beings rather than rehabilitating them.

This report and accompanying model legislation advocates a simple yet powerful step states can take to safely reduce the number of individuals locked into counter-

productive, lengthy sentences: guaranteeing that every incarcerated person's sentence will get a "second look" after at least a decade in prison. It begins by describing the justifications for the second look proposal and then explains why the right to petition for a sentence reduction should apply to all incarcerated people after 10 years, and periodically thereafter if warranted. It describes the logistics of a flexible second look process, setting forth a wide range of factors judges should consider in assessing whether a lengthy sentence can appropriately be reduced. It argues that states implementing this policy should provide a right to appointed counsel and describes how victims can be given a voice in second look proceedings. It argues for appellate review of second look hearings to best promote consistency and fairness for all incarcerated people. It concludes by advocating mechanisms for channeling the resulting savings back into funding the second look process itself, as well as programs that will help the individuals who receive a second chance to succeed and become productive members of society, to the benefit of all.

"Second look" is an idea whose moment has arrived. By enacting comprehensive legislation like that proposed here, state governments can position themselves as leaders in correcting the worst and most counterproductive excesses of the mass incarceration era, delivering savings to state budgets, and a second chance to individuals and communities who have been left behind for too long.

I. Why "Second Look"?

The idea of addressing mass incarceration through a "second look" procedure has received sustained attention in recent years. In December 2018, the concept was endorsed by the drafters of the Model Penal Code, offered through guiding principles rather than fully fledged model legislation.¹¹ Legislators around the country have since begun heeding the call;¹² most notably, in 2019, Senator Cory Booker introduced legislation in Congress that would create federal second look procedures similar to those NACDL proposes.¹³ Here, NACDL takes on the work of crafting workable legislation that legislators who want to be leaders on this issue can readily adopt in their own states.

This is one brick in a bigger edifice. Society's emerging recognition that it has over-used imprisonment is exemplified in a wide range of new statutes, rollbacks of mandatory minimum sentencing regimes, changes to

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sentencing guidelines, and updated charging and plea-bargaining policies in prosecutors' offices.¹⁴ Changes have so far been most prevalent at the front end of the criminal justice process: states have decriminalized certain conduct, encouraged alternatives to incarceration, or reduced penalties for *future* offenders.¹⁵ But only some of these changes are retroactive for those already incarcerated, and some measures provide retroactive relief for only narrow categories of offenders, such as juveniles, victims of domestic violence, or those convicted under specific mandatory-minimum statutes.¹⁶ Use of compassionate release, executive clemency, and other measures that are accessible to all has been spotty and selective at best.¹⁷ As a result, many people are serving lengthy sentences right now that they would not receive today, with no effective mechanism to reward even the most extraordinary strides towards rehabilitation they have made over the course of many years behind bars.

For these individuals, there is a striking absence of any mechanism for them to get a second chance. That is why the second look process is now getting such close attention from scholars and legislators alike—it is a critical backstop that enhances other efforts to turn around mass incarceration already underway. By providing an orderly procedure for *all* sentences to be revisited after appropriate lengths of time, the model legislation proposed by NACDL provides a safe and effective means for legislators to meet the challenge of the moment.

II. Who Should be Eligible?

Like Senator Cory Booker, who introduced a second look bill at the federal level, NACDL urges a threshold of ten years for reconsideration of lengthy sentences of incarceration (or less than ten years if the prosecutor consents).¹⁸ NACDL proposes ten years as the most fair, rational, and humane threshold for a number of reasons. As a practical matter, because the right to petition for resentencing vests upon actual time served and is not reduced by earned good time, only those people sentenced to lengthy sentences, likely at least fifteen to twenty years, will be eligible for a second look.¹⁹ Because of this, the higher the threshold is set, the less likely it will be that people serving onerous sentences for non-violent offenses will see relief. Each year above that threshold eliminates more and more people from the opportunity and diminishes the potential decarcerative benefit of any second look scheme.

Significantly, under NACDL's model legislation, second look sentencing is available to all persons who have served at least ten years in prison without regard to the nature of the underlying crime. NACDL advocates against excluding from second look sentencing, or setting higher thresholds for, any category of convictions, including crimes of violence, sex offenses, child abuse, and reckless and negligent homicide. At the state level, the majority of the incarcerated population are people serving sentences for violent crimes and they also comprise the vast majority of prisoners serving sentences of twenty years or longer.²⁰ If second look

legislation is truly meant to offer an antidote for mass incarceration, it must not categorically exclude any potential petitioner based on their underlying crime of conviction. Of course, that does not mean that the nature of the underlying conviction is irrelevant to whether the person who receives a second look will actually be released sooner. As discussed below, the nature of the offense is one factor that courts should take into account when making an individualized assessment whether to grant a sentence reduction.²¹

A threshold of ten years is also humane. Opportunities for rehabilitative programming in prisons are limited.²² Ten years is a reasonable period of time to achieve this goal of sentencing while not eroding an individual's long-term prospects for life on the outside. A meaningful opportunity for reconsideration of one's sentence that considers the person's ongoing work and good behavior is a powerful incentive to invest in whatever opportunities are afforded during incarceration, and, crucially, offers hope for the future. Further, while hundreds of thousands of people have been serving painfully lengthy sentences imposed upon them decades ago, theories of sentencing have evolved, and we have learned more about the limits of rehabilitation in the carceral setting.²³ A threshold of ten years offers these people immediate hope and provides a framework going forward that is consistent with these new understandings.

Importantly, the model legislation permits a reduction in sentence below any applicable mandatory minimum sentence. In recent years, society's attitudes toward these blunt carceral instruments have changed, leading reform-minded prosecutors to revamp their charging policies²⁴ and legislatures to rewrite decades old laws to reduce or eliminate mandatory minimum sentences.²⁵

Finally, ten years signals only the earliest opportunity to petition for resentencing. Fears that people serving long sentences will rush to petition as soon as they are eligible in every case, without regard to how their petition will measure up in light of the factors to be considered (including the nature of the crime of conviction), are unlikely to be realized. It will surely be the case that the people who present the most compelling argument for the earliest possible relief will be fairly extraordinary cases, whether due to a truly exemplary record of achievement while incarcerated or a palpable sense that the original sentence was unjustly harsh in light of the circumstances. It is more likely, especially if people are afforded counsel as recommended, that eligible people will weigh when to petition carefully so as to give themselves the best chance of success on their first attempt and to avoid having their petition sent back for periodic review.²⁶ A ten-year, universally applicable threshold will offer a meaningful opportunity for release in the most compelling cases and will offer a powerful incentive to those serving sentences for the most difficult crimes to remain steadfast in their rehabilitative efforts in prison, while eliminating the need for prolonged litigation around how any categorical exceptions should be applied.

III. NACDL's Proposed "Second Look" Process

NACDL's model legislation proposes a straightforward, uniform process to ensure that every eligible incarcerated individual receives a second look at the length of their sentence. It also balances the petitioners' interests with society's interest in avoiding the costs – economic and otherwise – of multiple and prolonged revisitations of sentences, many of which may have been imposed under deeply painful circumstances.

Critically, NACDL's model legislation, like the Model Penal Code drafters, situates the second look authority in the judiciary. Sentencing is traditionally a judicial function. To quote Senator Edward Kennedy, sponsor of the 1984 Sentencing Reform Act, "[t]he *sentencing judge* is the person who commits prison beds, determining who goes to prison and for how long."²⁷ Through their engagement in the underlying case, their review of the sentencing materials, their capacity to hear testimony and their real-time experience of the evolution of sentencing practices in their district, judges are best situated to conduct an individualized assessment of penological needs and objectives in an individual case. Judges also discharge this role in a public, transparent manner, with adversarial testing and appellate review, all of which creates safeguards against arbitrary decision-making that do not constrain more secretive bodies such as parole boards.²⁸ And their judicial status and the norms of their profession insulate them – in part at least – from the political pressures that may sway elected-official decisionmakers such as governors.²⁹

Moreover, having the same actors handle both initial sentencing decisions and proceedings under the second-look safety valve will likely have a valuable educative function for individual judges, which in turn should yield systemic benefits over time. As judges participate in periodic reviews of initial sentencing decisions made by themselves and their colleagues, and as they inevitably confront cases where those sentences proved excessive in retrospect (and others where the sentence still seems justified), those experiences will provide them a valuable opportunity to reflect, calibrate their intuitions, and perhaps even recognize important patterns that would otherwise be missed. This opportunity could be particularly valuable at the federal level, where judges serve for many decades and must craft sentences that are "sufficient, but not greater than necessary" under the circumstances of each case.³⁰

Notably too, NACDL's proposed process harnesses the power of a state's department of corrections to identify eligible individuals and notify both the potential applicant and the court system that their time to apply has arrived.³¹ Corrections departments have sophisticated inmate data management systems that permit the programming of such trigger notifications without a significant investment of human effort.³² By delegating this duty to corrections departments, the criminal legal system ensures an efficient mechanism to limit premature applications and avoid the potential that eligible petitions are never filed because of incapacity, illness, or lack of education or support.

NACDL proposed process does not require any particular format for the petition, other than that it be in writing. By minimizing unnecessary formalities, NACDL prioritizes substance over form in the review process, helps ensure that differences in outcome reflect differences in the underlying merits and not differences in familiarity with the process or access to counsel, and reduces the danger that deserving petitioners will remain incarcerated (costing taxpayers many thousands of dollars per year) on the basis of mere procedural technicalities. Courts can of course create forms to ensure that all relevant information is submitted.³³ NACDL's proposed process grants considerable discretion to the decision-maker to accept all types of material in support of the petition, and to order the expansion of the record as appropriate.

NACDL's procedures do require that the court hold a hearing, which can run the gamut from a court conference with parties appearing remotely, to a full-blown in-person hearing with witness testimony and cross-examination. NACDL leaves it to the court's discretion to decide the parameters of the hearing. NACDL does, however, oppose a process whereby the "second look" determination is made entirely through paper submissions. After at least ten years in custody, the dignity principles underlying the second look proposal dictate that there be a "face to face" meeting between the incarcerated individual and the sentencing court, even if only virtual, at which the individual's ten-year or more progress is assessed.³⁴ At this hearing or thereafter, the judge must set forth on the record – orally or in writing – the reasons for the decision on the second look petition in a way that promotes appellate review.

NACDL proposes that the original sentencing judge, where available, determine the second look petition. NACDL's proposal returns the sentencing issue to the decision-maker most knowledgeable about the case. NACDL is mindful of the benefit of a fresh pair of eyes and the potential reluctance of a judge to second-guess their prior determination, particularly in districts where they may be politically vulnerable.³⁵ A robust appellate process (as described below) nonetheless, would ameliorate excessively frugal applications of the remedy. States and court systems could also establish advisory panels of judges to guide and advise the second look sentencing judge.³⁶ Moreover, as noted above, the second look process can provide judges valuable new insight into the struggles of prison life and the capacity for transformation within each offender.³⁷

Finally, because the second look process implicates the integrity of the criminal legal system and society's interest in the fairness of the sentences incarcerated individuals are serving, NACDL's legislation provides that a defendant cannot waive their "second look" rights. This ban on waivers reduces the risk that prosecutors will use lopsided bargaining power to insulate sentencing decisions from later review and modification.³⁸

IV. The Factors “Second Look” Sentencing Courts Should Consider

At the heart of NACDL’s proposed legislation is a series of factors that courts must consider when evaluating whether to grant a sentence reduction. In major part, these factors echo the factors courts typically evaluate at an initial sentencing—such as the nature of the offense and the offender’s history and personal characteristics.³⁹ Giving these traditional aspects of sentencing a fresh look will allow the court to determine whether the factors that drove the original sentencing decision have changed with the passage of time. Courts thus get a second opportunity to evaluate whether a sentence that may have seemed appropriate when the crime was fresh remains necessary to fulfill the traditional goals of sentencing, including retribution, deterrence, incapacitation, and rehabilitation.

NACDL’s proposed legislation also recognizes that additional considerations specific to resentencing may bear on the courts’ decision-making. For example, it requires courts evaluating the nature and circumstances of an offense to consider whether societal attitudes regarding the seriousness of the offense or the appropriate sentence for it have evolved over time, and, if so, to account for any such changes. By enumerating specific considerations like these, the proposed legislation provides a means to ensure that sentencing courts consider *all* potential changes in sentencing practice and policy that could bear on their decisions.

The specific factors courts must consider when evaluating a second look petition under NACDL’s proposed legislation are described below.

- **Age at time of the offense:** Courts should consider the age of the petitioner when the offense was committed, including the latest data regarding cognitive development in adolescence and early adulthood. With the passage of time, science may provide new insight into youth decision-making that could bear on an offender’s culpability.⁴⁰
- **Age at time of the petition:** Courts should also consider the petitioner’s current age, given, in particular, the latest data on recidivism rates among older individuals. There is a growing body of evidence that criminal behavior declines as former offenders age and mature.⁴¹ For this reason, NACDL’s proposed legislation also puts this factor at the forefront of the analysis for the oldest petitioners, granting a rebuttable presumption in favor of release to incarcerated individuals who are over the age of 50 when they petition (and, like all eligible petitioners, have served a minimum of ten years).
- **Nature of the offense:** Courts can and must consider the offense that led to the imposition of the original sentence. The proposed legislation also makes clear, however, that courts must revisit this factor with fresh eyes, specifically accounting for any changed societal attitudes about the harmfulness of the offense or the appropriate sentence for those who commit it.⁴² If the crime is one that the public no

longer wishes to criminalize or has decided should be punished less harshly – such as crimes related to the possession or sale of marijuana in many states – courts can and must take account of those evolving standards.

- **Petitioner’s current history and characteristics:** Like all sentencing decisions, evaluation of a second look petition will take account of the defendant’s history (including criminal record) and personal characteristics. NACDL’s proposed legislation ensures that courts will account for the latest and most accurate information, including, importantly, any track record of rehabilitation the defendant has compiled while incarcerated. Many individuals go to remarkable lengths while incarcerated to better themselves, seek out education and vocational training, reflect on their mistakes, make amends to their victims and communities, help fellow prisoners in crisis, avoid disciplinary issues, and mature into wise and centered human beings ready to face the world.⁴³ If the petitioner has taken such restorative strides, the court can and must take account of those efforts. Of course, if the defendant’s disciplinary history or other experiences while incarcerated shows that they are still prone to violence or are otherwise unreformed, courts will account for that information as well.
- **Petitioner’s role in the original offense:** The specific role the petitioner played in the crime of conviction remains relevant during the second look process. NACDL’s proposed legislation specifically requires courts to consider aspects of the offense that may benefit from reevaluation with the passage of time. For instance, society’s views may have evolved on the need to punish those who had only secondary involvement in a crime—such as “felony murder” defendants sentenced under statutes that required punishing peripheral accomplices as harshly as the actual killers themselves.⁴⁴ Or it may become clearer in retrospect that a defendant’s crime was committed under duress or related to sexual abuse or domestic violence inflicted on the defendant at or near the time of the offense.⁴⁵
- **Input from health care professionals:** If information regarding a petitioner’s physical or mental health is available, courts must consider how that information bears on the determination. Up-to-date information about any psychological or mental health problems a petitioner may have faced will often be particularly relevant, especially in light of evolving attitudes around mental illness and growing recognition that the mentally ill are often better served through treatment, not lengthy custodial sentences.⁴⁶
- **Any statement from the victim:** As discussed below, a just and effective second look process must provide opportunities for victims and their loved ones to have a voice in any resentencing decision should they want one. NACDL’s proposed legislation requires the court to consider any views a victim or their family may offer regarding the appropriateness of a sentence reduction, whether in favor or opposed.

- **Whether the original sentence penalized the exercise of constitutional rights:** There is growing recognition that some sentencing decisions unfairly penalize criminal defendants for exercising their constitutional right to have the government's evidence tested at a trial before a jury of their peers. Indeed, NACDL spotlighted this issue in a major report published in 2018.⁴⁷ NACDL's proposed legislation requires sentencing courts to consider whether a petitioner's original sentence was disproportionately longer than any sentence available upon a guilty plea, thus reflecting a trial penalty.
- **Whether the sentence reflects ineffective assistance of counsel:** NACDL's proposed legislation requires courts to consider whether the petitioner lacked effective assistance of counsel at any stage in the case leading to the original sentence, whether at trial or in the plea-bargaining process. It is especially crucial that courts consider the role of counsel when a lengthy sentence was the result of a plea bargain. There is a growing recognition that the American criminal legal system is often one of negotiated pleas, and that a defendant's constitutional right to effective counsel extends to the realm of plea bargaining. Major precedents issued within the last decade have clarified the contours of that constitutional right, and the American Bar Association undertook a comprehensive revision of its rules regarding counsel's obligations during plea bargaining in 2015.⁴⁸ NACDL's proposed legislation requires courts to account for these important developments.
- **Any evidence that the petitioner is innocent:** It is a sad reality that in the U.S. criminal legal system, innocent people are sometimes convicted or plead guilty to crimes they did not commit. Moreover, laws intended to assure the finality of criminal judgments sometimes go too far when applied to such cases – leaving even those who come forward with compelling evidence that they have been wrongly convicted unable to present that evidence in post-conviction proceedings.⁴⁹ NACDL's proposed second look legislation helps to fill that gap. Requiring sentencing courts to consider such evidence when deciding whether to reduce a sentence ensures that potential errors can be brought to light and given due weight.
- **Any other relevant information:** The list of specific factors serves to highlight important considerations and ensure they are not overlooked. But the list is not exhaustive. NACDL's proposed legislation expressly leaves courts free to consider any and all information that may bear on the propriety of a possible sentence reduction, and to make appropriate judgments about how much weight relevant considerations should receive in each case.

This is a non-exhaustive set of factors, and legislatures, of course, may supplement with additional considerations. For example, the release of any individual may be subject to the findings required by the penal code of the individual

state, which may include an explicit finding that the individual does not pose a threat to the community.⁵⁰

The goals of second look legislation must be to ensure that every defendant serving a lengthy sentence has the opportunity for careful, individualized consideration of whether that sentence continues to be warranted—and that courts take full advantage of the additional insight that a decade of new information can provide. Adopting these factors will ensure that courts effectuate those goals and reach a fair and just result in each case that comes before them under the statute.

V. Right to Appointed Counsel

NACDL's legislation, consistent with the Model Penal Code ("MPC") recommendations, includes a provision that the incarcerated individual has the right to be represented by counsel in the second look process, and that counsel will be appointed if the applicant cannot afford one. Counsel is needed to ensure the most effective and focused presentation of the relevant issues, avoiding extraneous details, investigating and uncovering relevant ones, and giving voice to the applicant's remorse and vision for their future. In particular, many petitioners will suffer from mental illness or intellectual disabilities that would prevent them from being able to meaningfully represent themselves in court.⁵¹ And, advocating for one's self from a prison is an extraordinarily difficult task, if not impossible. Inmates simply are not afforded access to the tools needed to request records, evaluations, court files, and the myriad of other materials needed to effectively present their case. The need for counsel is borne out by studies examining the efficacy of analogous resentencing and parole mechanisms which demonstrate that lawyers are crucial – not just to the success of individual petitions (though they do, unquestionably achieve better results with the assistance of counsel), but also to the efficient implementation of an entirely new resentencing scheme.⁵²

There would be an acute need for assigned counsel upon implementation of any second look scheme (particularly in the early years), but a coordinated effort by public defender offices and courts could ameliorate the pressure. Over the last several years and in both state and federal jurisdictions, the passage of criminal legal system reform measures, rulings by the United States Supreme Court and state supreme courts that called for constitutional remediation, and the need to respond to instances of systemic due process violations in light of state misconduct, have given rise to other instances where courts and the criminal defense bar rose to the occasion to ensure people were represented. These include, for example, crack disparity reductions, President Obama's clemency initiative, systematic reviews of cases in light of drug lab scandals.⁵³ The ongoing COVID-19 global pandemic also offers models for how quickly courts and public defense providers can rally to provide representation to a new cohort of clients who suddenly have a new legal remedy for which they can apply. Where jurisdictions provide for relief, public defense providers across the country have—with systematic

organization in many cases and often on a pro bono basis—raced to assist clients with medical parole and compassionate release applications.

But unlike these scenarios, with second look legislation, public defense agencies and other public defense providers will have time to gear up and to advocate for appropriate funding to meet the needs of clients at implementation and then develop standards of representation to meet the ongoing, but inevitably lessening, need. In fact, NACDL's proposed legislation recognizes both the opportunity (and need) for this sort of foresight and planning, by including a provision that would guarantee that 10% of the savings from reduced incarceration will be reinvested in implementation of the second look regime. One natural way to ensure smooth implementation would be to invest in provision of counsel where necessary.

VI. The Victim's Voice

Victims are the most profoundly affected by an incarcerated person's actions. As such, in all criminal legal systems, victims are given a voice in the prosecution process, including in the sentencing proceeding. It is not only appropriate that they also have a voice in any resentencing, but that the potential for this "second look" at the original sentence to reopen old traumas is minimized.

As proposed by the MPC, NACDL's model legislation includes an orderly process to give any victims of the incarcerated individual's crime a voice in the second look process, if they want one. By setting forth clear procedures to enable their participation – and in particular, ensuring consultation with immediately affected individuals such as close family members in homicide cases – the model legislation guarantees those victims who want to weigh in for or against resentencing that they will have the right to do so. At the same time, the model legislation leaves the choice with victims to decide whether and how they want to participate, in order to protect victims from the retraumatization that can occur when they are forced to participate in ways that make them uncomfortable.

Thoughtfully implemented, where victims and their families are receptive, second look resentencing also presents a rare opportunity to facilitate application of emerging restorative justice theories and initiatives in some of the hardest cases. With the passage of time, many victims' impulse for retribution diminishes. Restorative justice programs in which offenders are held accountable to their victims have documented success in reducing post-traumatic stress disorder.⁵⁴ NACDL emphasizes that any participation by victims in a restorative process would be voluntary. NACDL notes also that the sentencing court has considerable discretion in deciding the extent of the hearing to be granted to a second look petitioner and can fashion the procedure to protect victims' well-being.

VII. Consistency and Fairness in Application

An effective second look sentencing regime should include safeguards against arbitrary and unreasonable decision-

making and promote consistency so that like cases are treated alike. For that reason, NACDL's proposal includes a right for both defendants and prosecuting authorities to appeal resentencing decisions they believe are unlawful or inappropriate. To ensure robust appellate advocacy, it extends the right to counsel in the second look process to the appellate stage.

This appellate review process is critical not only to promote fairness and consistency,⁵⁵ but to ensure that the legislature's intent in passing second look legislation is honored. Without appellate review, individual judges may frustrate the intent of the statute by giving a cursory review to petitions under this section, failing to take account of the sentencing factors highlighted above, or denying relief despite changed circumstances that the legislature would have considered significant. Although sentencing courts have considerable discretion to tailor their resentencing decisions to the unique circumstances of each case, granting unfettered and unreviewable discretion to individual judges would risk divergent outcomes and undermine the perceived fairness and legitimacy of the second look process. Allowing panels of appellate judges to review the work of sentencing courts is thus essential to a just and effective second look regime.

VIII. Funding the "Second Look" Process

With almost two million people in state custody,⁵⁶ at an average annual cost of \$30,000 per prison inmate,⁵⁷ a "second look" sentencing program potentially saves billions in incarceration costs. For example, NACDL estimated that the commutations secured by Clemency Project 2014 (the *pro bono* consortium that recruited and trained volunteers to submit clemency applications to President Obama) saved over 13,000 years of imprisonment and in excess of \$430 million in incarceration costs.⁵⁸

The implementation of NACDL's second look program, however, is not free of cost. It will utilize already overstretched judicial, prosecutorial and public defender resources at the trial and appellate level. To offset this increased demand, NACDL proposes a unique reinvestment provision involving the savings the program generates.

First, NACDL proposes that 10% of the savings realized by the second look process will be used to fund its implementation, such as supporting salaries of dedicated administrative personnel and lawyers, or a general contribution to a court system's salary costs.

Second, NACDL also proposes investing 25% of the second look savings in prison-based and community-based programs to counter recidivism and promote successful re-entry. As society embraces the drive to decarcerate, the shortcomings in the re-entry process are becoming painfully clear. From housing to employment to health services to support in family reunification support, the obstacles former offenders face are numerous and daunting.⁵⁹ In addition, research shows that education in prison is one of the most meaningful factors in avoiding a return to prison upon release.⁶⁰

Accordingly, NACDL includes in its model legislation the proposal that a substantial portion of the savings in incarceration costs be funneled back into the kinds of programs that will make “second look” resentencing a success. For too long, ameliorative programs come with lofty pronouncements but little of the currency necessary to realize them. This legislation aims to redress that balance. Essentially, it demands that legislatures “walk the walk.” These proposed allocations can be adjusted based on a state’s particular needs, and based on data developed as a state’s second look program is implemented and analyzed.

Conclusion

The principle of “finality”—the idea that a criminal sentence should be considered final or settled once all appeals are concluded—has been described by the Supreme Court as “essential to the operation of our criminal justice system.”⁶¹ There are several reasons why the legal system likes finality. Primarily, finality is believed to promote deterrence.⁶² It saves the government from reopening an old case where witnesses have passed away and memories faded, and otherwise saves resources that would be spent on relitigating past chapters. It is (patronizingly) alleged that finality promotes rehabilitation by focusing the defendant on the future. And it gives victims closure.

But research has shown that long sentences do not deter.⁶³ It is more costly to incarcerate people than it is to release and support them. Moreover, the hope of a reduction through stellar prison conduct incentivizes rehabilitation.⁶⁴ Finally, a victim’s need for closure is real and deserving of respect, but after ten years, broader societal interests may become more salient.

This report has explained why states should adopt a “second look” mechanism, despite the long-standing allure of finality. But perhaps the most powerful reason is the humanitarian one. Part of being human is the capacity to make conscious choices, including to adopt new paths in life, to admit we were wrong, to forgive. When society consigns prisoners to long sentences – often decades-long sentences – without recourse, it negates their humanity and our own. As the drafters of the Model Penal Code acknowledge, the second look process is an act of humility: “It would be an error of arrogance and ahistoricism to believe that the criminal codes and sentencing laws of our era have been perfected to reflect only timeless values.”⁶⁵ It is also an act of humanity—to acknowledge and, where appropriate, to reward an incarcerated individual’s personal transformation.

Notes

¹ The NACDL Model “second look” legislation and this report emanated from NACDL’s Second Look Task Force, co-chaired by JaneAnne Murray and Nanzella ‘Nan’ Whitfield and made up of the following members: Alisa Blair, Jeremy Delicino, Marissa Elkins, Nina Ginsberg, Sean Hecker, Shon Hopwood, Steven Morrison, Robert Patillo, Marjorie Pearce, Todd Pugh, Gabriel Reyes, Christina Swarns, and Bruce Udolf. The report accompanying the proposed Second Look

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² The authors wish to thank Brianna Newcomb and Thomas Huling, students at the University of Minnesota Law School, for their research assistance.

³ Eric Holder, Att’y Gen., Keynote Address at the Brennan Center conf. (Sept. 23, 2014), <https://www.brennancenter.org/our-work/analysis-opinion/eric-holders-keynote-address-shifting-law-enforcement-goals-reduce-mass>; Jud. Conf., *Rep. of the Proc. of the Jud. Conf. of the United States* (Mar. 15, 2016); Bennett, Mark, *Addicted to Incarceration: A Fed. Judge Reveals Shocking Truths About Fed. Sent’g and Fleeting Hopes for Reform*, 87 UMKC L. Rev. 3 (2018); Sen. Cory Booker statement, *Booker Instrumental in Pushing for Inclusion of Sent’g Reform Provisions of Senate-Introduced Reform Bill*, (Dec. 18, 20018), <https://www.booker.senate.gov/news/press/booker-statement-on-senate-passage-of-landmark-criminal-justice-reform-bill>; Loren Siegal, *A New Sensibility: an Analysis of Public Opinion Research on Attitudes Towards Crime and Criminal Justice Policy*, 16–20 (The Opportunity Agenda, June 2016), <https://www.opportunityagenda.org/sites/default/files/2018-04/A-New-Sensibility-Report.pdf> (collating data from over 50 opinion surveys).

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⁵ The Fed. Bureau of Prisons, *Inmate Stat.*, https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp (last visited April 10, 2021).

⁶ Vera, *Prison spending in 2015*, <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> (last visited Dec. 5, 2020).

⁷ *Id.*

⁸ Office of the Inspector Gen., U.S. Dep’t of Just., *The Impact of an Aging Inmate Population on the Fed. Bureau of Prisons* 1–63 (2016), <https://oig.justice.gov/reports/2015/e1505.pdf>; Ashely Demyan, *Elderly people in prison present little risk, but staggering costs*, Think Just. Blog (Jul. 6, 2015), <https://www.vera.org/blog/elderly-people-in-prison-present-little-risk-but-staggering-costs>.

⁹ Obama, Barack, *Commentary: The President’s Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811, 830 (Jan. 2017).

¹⁰ See, e.g., Tucker et al, *Successful Re-entry: A Community-Level Analysis*, Harvard University Institute of Politics, December 2019 at 28, https://iop.harvard.edu/sites/default/files/sources/program/IOP_Policy_Program_2019_Reentry_Policy.pdf.

¹¹ Model Penal Code § 305.6.

¹² See, e.g., Colleen Grablick, *D.C. Council Gives Final Approval To Second Look Act*, DCist.com, Dec. 15, 2020, <https://dcist.com/story/20/12/01/dc-council-approves-criminal-justice-reform-bill/>.

¹³ S.2146, 116th Cong. (2019–2020).

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- 15 *Marijuana Overview*, Nat'l Conf. of State Leg. (Oct. 17, 2019), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>; *Playbook for Change? States Reconsider Mandatory Sentences*, Vera (Feb. 2014), <https://www.vera.org/publications/playbook-for-change-states-reconsider-mandatory-sentences>; *To Safely Cut Incarceration, States Rethink Responses to Supervision Violations*, PEW (Jul. 16, 2019), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/07/to-safely-cut-incarceration-states-rethink-responses-to-supervision-violations>.
- 16 18 Pa. C.S. § 1102.1; N.Y. Penal Law § 60.12 (current through 2020).
- 17 U.S. Sent'g Comm., *An Analysis of the Implementation of the 2014 Clemency Initiative* 1, 2, 34 (Sept. 2017), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf; Ed. Board, *Gov. Cuomo's Stingy Pardons*, N.Y. Times (Jan. 3, 2014), <https://www.nytimes.com/2014/01/04/opinion/governor-cuomos-stingy-pardons.html>; Report to Cong. Comm., GAO-15-454 1, 11 (June 2015).
- 18 S2.146, 116th Cong. (2019–2020). The drafters of the Model Penal Code set the trigger at 15 years, but there were those on the drafting committee who advocated for 10 years. See Margaret Love, *No Second Thoughts about Second Look Sent'g*, *The ALI Advisor* (Dec. 13, 2016).
- 19 Danielle Kaeble, *Time Served in State Prison, 2016*, U.S. Dep't of Jus. 1–6 (Nov. 2018).
- 20 John F. Pfaff, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM*, 188–189, 1st ed. (2017).
- 21 Notably, adopting a ten-year threshold across the board also streamlines the process by avoiding potentially costly litigation over which convictions fall into carveouts and which do not.
- 22 Michelle S. Phelps, *Article: Rehabilitations in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 *Law Soc'y Rev.* 33, 37–38 (Mar. 2011).
- 23 M. Eve Hanan, *Article: Incapacitating Sentencing and the Science of Change*, 97 *Dev. L. Rev.* 151 (2019).
- 24 Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, *New Yorker* (Oct. 22, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration>.
- 25 N.Y. Penal Law § 60.12 (current through 2020); Ames Grawert, *What Is the First Step Act—And What's Happening With It?* Brennan Ctr. for Jus. (June 23, 2020), <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it>.
- 26 NACDL's model legislation also provides for periodic review at no later than five-year intervals because even if a second look is denied after 10 years, hope should be kept alive.
- 27 Edward M. Kennedy, *Prison Overcrowding: The Law's Dilemma*, 478 *Ann. Am. Acad. Pol. & Soc. Sci.* 113, 118 (Mar. 1985) (laying out the reasoning behind the Sentencing Reform Act of which he was the chief sponsor) (emphasis added).
- 28 See, e.g., Aaron Rappaport, *The Institutional Design of Punishment*, 60 *Ariz. L. Rev.* 913, 951 (2018) (noting that the “politicization of parole boards” tends to “harden board members against criminal offenders,” and arguing that a parole board “lacks the same kind of independence possessed by federal judges, making it vulnerable to political pressures and neglectful of the defendant's liberty interests”).
- 29 See Lee Kovarsky, *The American Execution Queue*, 71 *Stan. L. Rev.* 1163, 1181 & n.113 (2019) (collecting sources documenting the politicization and arbitrariness of clemency); Anthony C. Thompson, *Clemency for Our Children*, 32 *Cardozo L. Rev.* 2641, 2688–89 (2011) (discussing the political incentives for governors to deny clemency, including anecdotal evidence that “grants of clemency remain rich sources of attack in campaign ads,” and noting that the National Governors' Association “has recommended that governors use clemency power only ‘sparingly’”).
- 30 See 18 U.S.C. § 3553(a); see also Stephanie Clifford, *From the Bench, a New Look at Punishment*, N.Y. Times (Aug. 26, 2015), <https://www.nytimes.com/2015/08/27/nyregion/from-the-bench-a-new-look-at-punishment.html> (collecting examples); *United States v. Kupa*, 976 F. Supp. 2d 417, 419 (E.D.N.Y. 2013) (Gleeson, J.) (laying out an argument from experience that “the government abuses its power to file prior felony informations in drug trafficking cases” and thereby “dramatically increase[s] already-harsh mandatory minimum sentences”); *United States v. Young*, 960 F. Supp. 2d 881, 882 (N.D. Iowa 2013) (Bennett, J.) (“This case presents a deeply disturbing, yet often replayed, shocking, dirty little secret of federal sentencing: the stunningly arbitrary application by the Department of Justice (DOJ) of § 851 drug sentencing enhancements.”)
- 31 Note that Senator Booker's second look legislation similarly harnesses the Bureau of Prisons to identify eligible petitioners.
- 32 N.Y. Penal Law § 60.12 (current through 2020); *Marijuana Laws*, 8 *Ntl. Survey of State Laws* (Richard A. Leiter, ed.) 267–310 (2019).
- 33 Dep't of Just., *Petition for Commutation of Sentence*, <https://www.justice.gov/pardon/file/960561/download> (last visited Dec. 8, 2020).
- 34 Mark Bennett, *Hard Time: Reflections on Visiting Federal Inmates*, 94 *Judicature* 304 (2011).
- 35 See, e.g., Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 *Harv. L. Rev.* 80, 103 n.69 (2009) (collecting examples of the “rich empirical and anecdotal literature suggesting” that the need to stand for reelection influences judges' sentencing decisions); Joseph R. Grodin, *Developing A Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 *S. Cal. L. Rev.* 1969, 1980 (1988) (“Justice Otto Kaus, my former colleague on the California Supreme Court, has candidly stated in public that he cannot be sure whether his vote on an important case in 1982 may have been influenced subconsciously by his awareness that the outcome could affect his chances in the retention election being conducted that year. I would have to say that the same is true of my votes in critical cases during 1986; I just can't be sure. In any event, the potential that the pendency or threat of a judicial election is like to have for distorting the proper exercise of the judicial function is substantial, and palpable.”).
- 36 NACDL's legislation provides that this remedy is exclusive of – and does not impact – other remedies. NACDL's process is intended to expand not limit opportunities for post-conviction relief.
- 37 Excellent examples of this can be found in recent federal “compassionate release” grants citing a defendant's extraordinary rehabilitation. See, e.g., *United States v. Rodriguez*, 2020 WL 5810161, *4 (S.D.N.Y. Sept. 30, 2020); *United States v. Panton*, 2020 WL 4505915, *9–10 (S.D.N.Y. Aug. 4, 2020); *United States v. Fisher*, 2020 WL 5992340, *4 (S.D.N.Y. Oct. 9, 2020).
- 38 Lynn Fant & Ronit Walker, *Reflections on a Hobson's Choice: App. Waivers and Sent'g Guidelines*, 11 *F.S.R.* 1 (1998).

- ³⁹ See, e.g., 18 U.S.C. 3553; see also Pennsylvania: 42 Pa. Stat. and Cons. Stat. Ann. § 9721(b) (“the gravity of the offense as it relates to the impact on the life of the victim and on the community”); *id.* (“the rehabilitative needs of the defendant”); *Com. v. Santoro*, No. 1066 MDA 2014, 2015 WL 7573013, at *2 (Pa. Super. Ct. Feb. 9, 2015) (noting that “the nature and circumstances of the offense and the history and characteristics of” the defendant are “requisite sentencing factors” in Pennsylvania); Hawaii: *State v. Cattaneo*, 149 Haw. 79 (Ct. App. 2021) (quoting a sentencing transcript where the trial court judge discussed “the nature and circumstances of the offense and the history and characteristics of this defendant, especially the history and characteristics of the defendant”); Connecticut: *State v. Denson*, No. CR98475862, 2003 WL 22205661, at *2 (Conn. Super. Ct. Sept. 5, 2003) (discussing the nature of the offense and describing “the social history of the petitioner” as a “salient sentencing factor[]”); Wisconsin: *State v. Douglas*, 347 Wis. 2d 407, 423 (Ct. App. 2013) (noting that two of “the three primary factors material to a rational sentence” in Wisconsin are “(1) the seriousness of the crime” and “(2) the defendant’s character”).
- ⁴⁰ Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 Ohio St. J. Crim. L. 107, 108 (2013).
- ⁴¹ U.S. Sent’g Comm., *Recidivism Among Federal Offenders: A Comprehensive Overview* 1, 5 (Mar. 2016), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.
- ⁴² Marijuana Laws, 8 Ntl. Survey of State Laws (Richard A. Leiter, ed.) 267–310 (2019).
- ⁴³ Obama, Barack. *Commentary: The President’s Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811, 830 (Jan. 2017).
- ⁴⁴ Robbi Cook, *Felony Murder Law in Cal.—How has it Changed?* Robbi Cook Law (July 6, 2019), <https://robbicooklaw.com/1007/felony-murder-law-in-california-how-has-it-changed/>.
- ⁴⁵ N.Y. Penal Law § 60.12 (current through 2020); Press Release, Andrew Cuomo, Gov. N.Y., Gov. Cuomo Signs Domestic Violence Survivors Just. Act (May 14, 2019), <https://www.governor.ny.gov/news/governor-cuomo-signs-domestic-violence-survivors-justice-act>.
- ⁴⁶ Mental Health America, *Mental Health and Criminal Jus. Issues*, <https://www.mhanational.org/issues/mental-health-and-criminal-justice-issues> (last visited Dec. 9, 2020).
- ⁴⁷ Natl. Assoc. of Crim. Defense Lawyers, *The Trial Penalty: The Sixth Amend. Right to Trial on the Verge of Extinction and How to Save It* (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf>.
- ⁴⁸ Now memorialized as standard 4–6.2, Negotiated Disposition Discussions, in standards for defense function: *Standards of Defense* 3–6.2 (Am. Bar Ass’n 2017).
- ⁴⁹ Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. Pa. J.L. & Soc. Change 1, 2–3, 32–35 (2016).
- ⁵⁰ See., e.g., D.C. Code § 24-403.03(a) (providing that a trial court “may reduce a term of imprisonment” if, after “considering” the broad array of enumerated factors, it finds “the defendant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification”); Ill. Comp. Statutes, 730 Ill. Comp. Statutes 5-4-1(c-1.5) (authorizing sentencing court in certain circumstances to sentence below an applicable mandatory minimum sentence, where, *inter alia*, “the court finds that the defendant does not pose a risk to public safety”). The NACDL model legislation does not endorse dangerousness findings because of the unreliability and discriminatory potential of such predictions and the new risk assessment tools. See generally Melissa Hamilton, *Risk Assessment Tools in the Criminal Legal System – Theory and Practice* at pp. 53-73 (NACDL 2020), available at <https://www.nacdl.org/getattachment/a92d7c30-32d4-4b49-9c57-6c14ed0b9894/riskassessmentreportnovember182020.pdf>.
- ⁵¹ See, e.g., Rebecca Vallas, Center for American Progress, *Disabled Behind Bars: The Mass Incarceration of People with Disabilities in America’s Jails and Prisons* (July 2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/07/15103130/CriminalJusticeDisability-report.pdf> (“Prison inmates are four times as likely . . . to report a cognitive disability than the general population. People with mental health conditions comprise a large proportion of those behind bars, as well. The Bureau of Justice Statistics reports that fully 1 in 5 prison inmates have a serious mental illness.”); Jennifer Bronson, et al., “Disabilities Among Prison and Jail Inmates, 2011–2012” (Washington: Bureau of Justice Statistics, 2015), available at <http://www.bjs.gov/content/pub/pdf/dpjj1112.pdf>).
- ⁵² See, e.g., Caryn Davis, *Lessons Learned from Retroactivity Resentencing after Johnson and Amendment 782*, 10 Fed. Cts. L. Rev. 39, 71, 74 (2018) (rich empirical study of resentencing in crack cases at federal level, finding that stakeholders reported it was “for the most part, smooth and orderly,” with judges often working with “probation officers and representatives from the U.S. Attorney’s Office and federal defender organizations in order to create expedited sentencing processes”) (“Lessons Learned”).
- ⁵³ See, e.g., *Lessons Learned*, *supra*, n.52; Norman L. Reimer, *The Commutation Legacy of President Barack Obama: Reflections on Clemency Project 2014 - the Legal Profession’s Response to a Call for Help*, 40 CHAMPION, December 2016, at 18; (the volunteer initiative known as Clemency Project 2014 “was the single most ambitious pro bono project ever undertaken by the legal profession”); Jon Schuppe, *Epic Drug Lab Scandal Results in More Than 20,000 Convictions Dropped* (NBC News, April 18, 2017) (noting that in the Annie Dookhan Massachusetts laboratory scandal, prosecutors reviewed 15,570 closed cases, and elected to pursue only 117 of them again), available at <https://www.nbcnews.com/news/us-news/epic-drug-lab-scandal-results-more-20-000-convictions-dropped-n747891>.
- ⁵⁴ Kathleen Bender, *Educ. Opportunities in Prison are Key to Reducing crime*, Ctr. for Am. Progress (Mar. 2, 2018), <https://www.americanprogress.org/issues/education-k-12/news/2018/03/02/447321/education-opportunities-prison-key-reducing-crime/>.
- ⁵⁵ Sarah Krasnostein and Arie Frieberg, *Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You’re going, How Do You Know When You’ve Got There?*, 76 Law and Contemp. Probs. 266, 274 (2013).
- ⁵⁶ Vera, *Prison Spending in 2015*, <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> (last visited Dec. 5, 2020).
- ⁵⁷ Statistics provided to the authors by the Clemency Project 2014 Project Manager.
- ⁵⁸ See Caryn Davis, *Lessons Learned from Retroactivity Resentencing after Johnson and Amendment 782*, 10 Fed. Cts. L. Rev. 39, 79–87 (2018).
- ⁵⁹ Alex Lloyd & Jo Borrill, *Examining the Effectiveness of Restorative Jus. in Reducing Victims’ Post-Traumatic Stress*, 13 Psych. Injury and Law 77 (Dec. 9, 2019).
- ⁶⁰ Natl. Inst. Of Jus., *Offender Reentry*, <https://nij.ojp.gov/topics/corrections/reentry> (last visited Dec. 9, 2020).
- ⁶¹ *Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality opinion).

⁶² *Id.*

⁶³ Michael Tonry, *Remodeling Am. Sent'g: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 *Criminology & Pub. Pol'y* 503, 507 (2014).

⁶⁴ Allison Lawrence, *Cutting Corrections Costs: Earned Time Policies for State Prisoners*, Ntl. Conf. of State Leg. 1–15 (Jul.

2009); Eric Holder, *We Can Have Shorter Sentences and Less Crime*, N.Y. Times (Aug. 11, 2016), <https://www.nytimes.com/2016/08/14/opinion/sunday/eric-h-holder-mandatory-minimum-sentences-full-of-errors.html>.

⁶⁵ Model Penal Code § 305.6, *supra* note 10, at comment b.