



# **Second Look = Second Chance:**

## **The NACDL Model “Second Look” Legislation<sup>1</sup>**

**By**

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## Introduction

Our nation has reached a moment of reckoning. Even before this 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.<sup>3</sup>

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 freedom.<sup>4</sup> 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 often far longer than they would serve for comparable crimes elsewhere in the world. At the federal level alone, 53% are serving sentences of 10 years or more and 30% are serving sentences of 15 years or more.<sup>5</sup>

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.<sup>6</sup> In many states, the annual cost per inmate exceeds \$50,000.<sup>7</sup> These costs increase dramatically in the later stages of long sentences, when the men and women serving require increasingly expensive medical care and assistance as they age.<sup>8</sup> 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.<sup>9</sup>

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<sup>3</sup> 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)(collating data from over 50 opinion surveys).

<sup>4</sup> The Sent'g Project, *Criminal Justice Facts*, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Dec. 5, 2020).

<sup>5</sup> The Fed. Bureau of Prisons, *Inmate Stat.*, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_sentences.jsp](https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp) (last visited Dec. 5, 2020).

<sup>6</sup> 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).

<sup>7</sup> *Id.*

<sup>8</sup> 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> and 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>.

<sup>9</sup> Barack Obama. *Commentary: The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811, 816-817 (Jan. 2017).

If anything, they are harmful. When people are locked up for decades, their likelihood of creating a productive life for themselves diminishes. And the apparent hopelessness of their situation leaves them with little incentive to avoid trouble or focus on building useful skills during their time in prison. 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 advocates a simple yet powerful step states can take to safely reduce the number of individuals locked into counter-productive, decades-long sentences: guaranteeing that every inmate will get a “Second Look” once they have spent at least a decade in prison. This proposal would allow long-term incarcerated individuals, assisted by counsel, to petition courts for a sentence reduction after ten years in prison, and periodically thereafter if warranted. As this report explains, the procedure created by NACDL’s proposed legislation is flexible, allowing judges to consider a wide range of up-to-date information in assessing whether a lengthy sentence can appropriately be reduced. It gives victims a voice to whatever extent they want one, without burdening them. It includes appellate review to ensure fairness and consistency. And it includes mechanisms for channeling the resulting savings back into programs that will help make the program sustainable—and 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.

### 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, although they offered only guiding principles rather than fully fledged model legislation.<sup>10</sup> Legislators around the country have since begun heeding the call; most notably, in 2019, Senator Cory Booker introduced legislation in Congress that would create federal second look procedures similar to those NACDL proposes.<sup>11</sup> 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 minimums, changes to sentencing guidelines, and updated charging and plea-bargaining policies in prosecutors’ offices. Changes have so far been most prevalent at the front end of the criminal justice process: states have decriminalized certain conduct, encouraged alternatives to incarceration, or reduced penalties for *future* offenders.<sup>12</sup> But only some of these changes are

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<sup>10</sup> Model Penal Code § 305.6.

<sup>11</sup> S.2146, 116<sup>th</sup> Cong. (2019-2020).

<sup>12</sup> *Marijuana Overview*, Natl. Conf. of State Leg. (Oct. 17, 2019), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>; *Playbook for Change? State Reconsider Mandatory Sentences*, Vera (Feb. 2014),

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.<sup>13</sup> Use of compassionate release, executive clemency, and other measures that are accessible to all has been spotty and selective at best.<sup>14</sup> 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, and others serving long sentences with little hope of a productive life on the other side, 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 set forth in this report provides a safe and effective means for legislators to meet the challenge of the moment.

### **The Decision to Set the Trigger at Ten Years in Custody**

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).<sup>15</sup> NACDL argues 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.<sup>16</sup> 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

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<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>.

<sup>13</sup> 18 Pa. C.S. § 1102.1; N.Y. Penal Law § 60.12 (current through 2020).

<sup>14</sup> 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](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf); Ed. Board, *Gov. Cuomo’s Stingy Pardons*, New York 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).

<sup>15</sup> S.2146, 116<sup>th</sup> Cong. (2019-2020). The drafters of the Model Penal Code set the trigger at 15 years, but there was 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).

<sup>16</sup> Danielle Kaebler, *Time Served in State Prison, 2016*, U.S. Dep’t of Jus. 1-6 (Nov. 2018).

are people serving sentences for violent crimes and they also comprise the vast majority of prisoners serving sentences of twenty years or longer.<sup>17</sup> 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.

A threshold of ten years is also humane. Opportunities for rehabilitative programming in prisons are limited.<sup>18</sup> 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 cruelly 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.<sup>19</sup> A threshold of ten years offers these people immediate hope and provides a framework going forward that is consistent with these new understandings.

For example, the model legislation permits a reduction in sentence below any applicable mandatory minimum. In recent years, society's attitudes toward these blunt carceral instruments have changed, leading reform minded prosecutors to revamp their charging policies<sup>20</sup> and legislatures to rewrite decades old laws to reduce or eliminate mandatory minimum sentences.<sup>21</sup>

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 original sentence was unjustly harsh in light of the circumstances. It is more likely, especially if people are afforded counsel as recommended, that people eligible to petition 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.<sup>22</sup> A ten-year, universally applicable threshold will offer a meaningful opportunity for release in the most compelling cases and will offer a powerful incentive for those serving sentences for the most difficult crimes to remain steadfast in their rehabilitative efforts in prison, while

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<sup>17</sup> John F. Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* 188-189, 1st ed. (2017).

<sup>18</sup> 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 (March 2011).

<sup>19</sup> M. Eve Hanan, *Article: Incapacitating Sentencing and the Science of Change*, 97 *Dev. L. Rev.* 151 (2019).

<sup>20</sup> 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>.

<sup>21</sup> 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. (Jun. 23, 2020), <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it>.

<sup>22</sup> NACDL's model legislation also provides for periodic review because even if a second look is denied after 10 years, hope should be kept alive.

eliminating the need for prolonged litigation around how any categorical exceptions should be applied.

### **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 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.<sup>23</sup> Corrections departments have sophisticated inmate data management systems that permit the programming of such trigger notifications, without a significant investment of human effort.<sup>24</sup> By delegating this duty to corrections departments, the criminal legal system ensures an efficient mechanism to weed out untimely 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 it be in writing. Courts can of course create forms to ensure that all relevant information is submitted.<sup>25</sup> 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 leave 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.<sup>26</sup> 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

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<sup>23</sup> N.B. that this is matched in Senator Booker’s Second Look legislation and the Model Penal Code Second Look procedure.

<sup>24</sup> N.Y. Penal Law § 60.12 (current through 2020); Marijuana Laws, 8 Ntl. Survey of State Laws (Richard A. Leiter, ed.) 267-310 (2019).

<sup>25</sup> Dep’t of Just, *Petition for Commutation of Sentence*, <https://www.justice.gov/pardon/file/960561/download> (last visited Dec. 8, 2020).

<sup>26</sup> Mark Bennett, *Hard Time: Reflections on Visiting Federal Inmates*, 94 *Judicature* 304 (2011).



potential reluctance of a judge to second-guess their prior determination, particularly in districts where they may be politically vulnerable. A robust appellate process (as described below) nonetheless, would ameliorate inconsistent or frugal application of the remedy. States and court systems could also establish advisory panels of judges to guide and advise the second look sentencing judge.<sup>27</sup> Moreover, the second look process exposes judges to the struggles of prison life and the capacity for transformation within each offender.<sup>28</sup>

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.<sup>29</sup>

### **The Factors a "Second Look" Sentencing Court 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. 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 necessary 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 culpability 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:

- **Age at time of offense.** Courts consider the age of the petitioner when the offense was committed, including the latest data regarding cognitive development in adolescence

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<sup>27</sup> NACDL's legislation provides that this remedy is exclusive of – and does not impact – other remedies. NACDL's process intended to expand not limit opportunities for post-conviction relief.

<sup>28</sup> 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. September 30, 2020); *United States v. Panton*, 2020 WL 4505915, \*9-10 (S.D.N.Y. August 4, 2020); *United States v. Fisher*, 2020 WL 5992340, \*4 (S.D.N.Y. October 9, 2020).

<sup>29</sup> Lynn Fant & Ronit Walker, *Reflections on a Hobson's Choice: App. Waivers and Sent'g Guidelines*, 11 F.S.R. 1 (1998).

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.<sup>30</sup>

- **Age at time of petition.** Courts also consider the petitioner's current age, including the latest data on recidivism rates among older individuals. This is an important factor that courts cannot overlook. There is a growing body of evidence that criminal behavior declines as former offenders age and mature.<sup>31</sup> 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 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).
- **The nature of the offense.** Courts can and must consider the offense that led to 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 changing societal attitudes about the harmfulness of the offense or the appropriate sentence for those who commit it.<sup>32</sup> 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.
- **The 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 communities, help fellow prisoners in crisis, avoid disciplinary issues, and mature into wise and centered human beings ready to face the world.<sup>33</sup> 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 remain violent or unreformed, courts will account for that information as well.
- **The 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

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<sup>30</sup> 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).

<sup>31</sup> U.S. Sent'g Comm., *Recidivism Among Federal Offenders: A Comprehensive Overview* 1, 5 (March 2016), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism\\_overview.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf).

<sup>32</sup> Marijuana Laws, 8 Ntl. Survey of State Laws (Richard A. Leiter, ed.) 267-310 (2019).

<sup>33</sup> Obama, Barack. *Commentary: The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811, 830 (Jan. 2017).



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.<sup>34</sup> 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 the time of the offense.<sup>35</sup>

- **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.<sup>36</sup>
- **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.<sup>37</sup> 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

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<sup>34</sup> 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/>.

<sup>35</sup> 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>.

<sup>36</sup> 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).

<sup>37</sup> Ntl. 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>.

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.<sup>38</sup> NACDL's proposed legislation requires courts to account for these important developments.

- **Any evidence that the petitioner is innocent of the crime.** 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.<sup>39</sup> 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.

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.

### **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. And, advocating for one's self from a prison is an extraordinarily difficult task, if not impossible. Inmates simply aren't 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 many studies examining the efficacy of analogous resentencing and parole mechanisms which demonstrate that lawyers are crucial – not just to the

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<sup>38</sup> 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).

<sup>39</sup> Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. Pa. J.L. & Soc. Change 1, 2-3, 32-35 (2016).

success of individual petitioners (though they do, unquestionably achieve better results with the assistance of counsel), but also to the efficient implementation of an entirely new resentencing scheme.<sup>40</sup>

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. 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.

### **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 only appropriate that they also have a voice in any resentencing, and 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. By setting forth a process – and in particular, ensuring their consultation in homicide cases – the model legislation seeks to minimize the potential for resentencing to retraumatize victims, while also setting forth clear guidance for their participation.

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.<sup>41</sup> NACDL emphasizes that any participation by victims in a restorative process would be

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<sup>40</sup> See Caryn Davis, *Lessons Learned from Retroactivity Resentencing after Johnson and Amendment 782*, 10 Fed. Cts. L. Rev. 39, 79-87 (2018).

<sup>41</sup> 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).

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.

### **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, 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.

### **Funding the "Second Look" Process**

With almost two million people in state custody,<sup>42</sup> at an average annual cost of \$30,000 per prison inmate,<sup>43</sup> 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.<sup>44</sup>

The implementation of NACDL's second look program, however, is not free of cost. It will utilize already over-stretched 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.

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<sup>42</sup> Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Policy Initiative (March 24, 2020).

<https://www.prisonpolicy.org/reports/pie2020.html#:~:text=The%20American%20criminal%20justice%20system,civil%20commitment%20centers%2C%20state%20psychiatric>.

<sup>43</sup> 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).

<sup>44</sup> Statistics provided to the authors by the Clemency Project 2014 Project Manager.

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.<sup>45</sup> In addition, research shows that education in prison is one of the most meaningful factors in avoiding a return to prison upon release.<sup>46</sup>

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” 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.

### A Final Word

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.”<sup>47</sup> There are several reasons why the legal system likes finality. Primarily, finality is believed to promote deterrence.<sup>48</sup> It saves the government from reopening an old case where witnesses have passed and memories faded, and otherwise saves resources that would be spent on relitigating past chapters. It is 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.<sup>49</sup> As already pointed out, 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 rather than discouraging it.<sup>50</sup> Finally, a victim’s need for closure is real and deserving of respect, but after ten years, broader societal interests may become more salient.

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<sup>45</sup> Natl. Inst. of Jus., *Offender Reentry*, <https://nij.ojp.gov/topics/corrections/reentry> (last visited Dec. 9, 2020).

<sup>46</sup> Kathleen Bender, *Educ. Opportunities in Prison Are Key to Reducing Crime*, Ctr. for Am. Progress (March 2, 2018), <https://www.americanprogress.org/issues/education-k-12/news/2018/03/02/447321/education-opportunities-prison-key-reducing-crime/>.

<sup>47</sup> *Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality opinion).

<sup>48</sup> *Id.*

<sup>49</sup> Michael Tonry, *Remodeling Am. Sent’g: A Ten-Step Blueprint for Moving past Mass Incarceration*, 13 *Criminology & Pub. Pol’y* 503, 507 (2014).

<sup>50</sup> Alison 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*, *New York Times* (Aug. 11, 2016), <https://www.nytimes.com/2016/08/14/opinion/sunday/eric-h-holder-mandatory-minimum-sentences-full-of-errors.html>.

NACDL has laid out in the introduction to this report and throughout why states should adopt a “Second Look” mechanism, even in the face of the principle 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 all of society’s. 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.”<sup>51</sup> It is also an act of humanity – to acknowledge and, where appropriate, to reward an incarcerated individual’s personal transformation.

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<sup>51</sup> Model Penal Code § 305.6, *supra* note 10, at comment b.