

Second Look = Second Chance: Reconsidering Lengthy & Other Extreme Sentences



STATE
CRIMINAL
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NETWORK

Featured Panelists:
Nicole D. Porter, James Zeigler,
Greg Newburn & JaneAnne Murray



Part 1: Advocating for a Second Look

Nicole Porter
*Director of Advocacy,
The Sentencing Project*

No End in Sight: Growth in Life Imprisonment

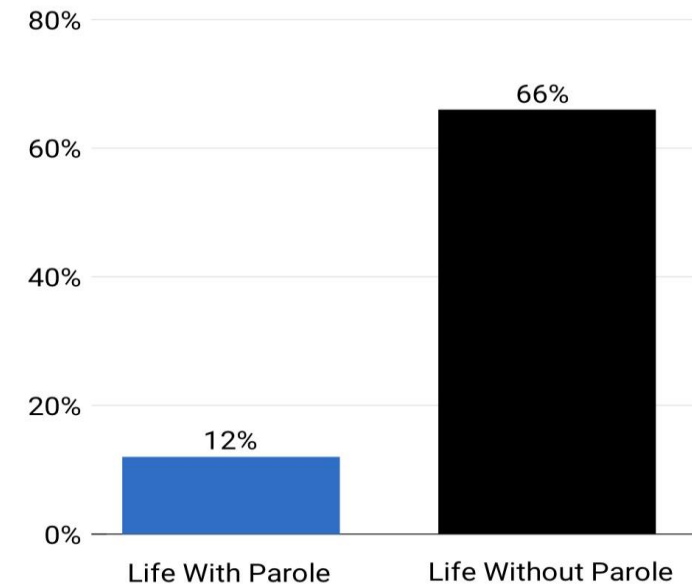
- One in 7 people in U.S. prisons is serving a life sentence, either life without parole (LWOP), life with parole (LWP) or virtual life (50 years or more), totaling 203,865 people
- The number of people serving life without parole — the most extreme type of life sentence — is higher than ever before, a 66% increase since our first census in 2003
- More than two-thirds of those serving life sentences are people of color;
- One in 5 Black men in prison is serving a life sentence;
- Latinx individuals comprise 16% of those serving life sentence



Policies that Advance a Second Look

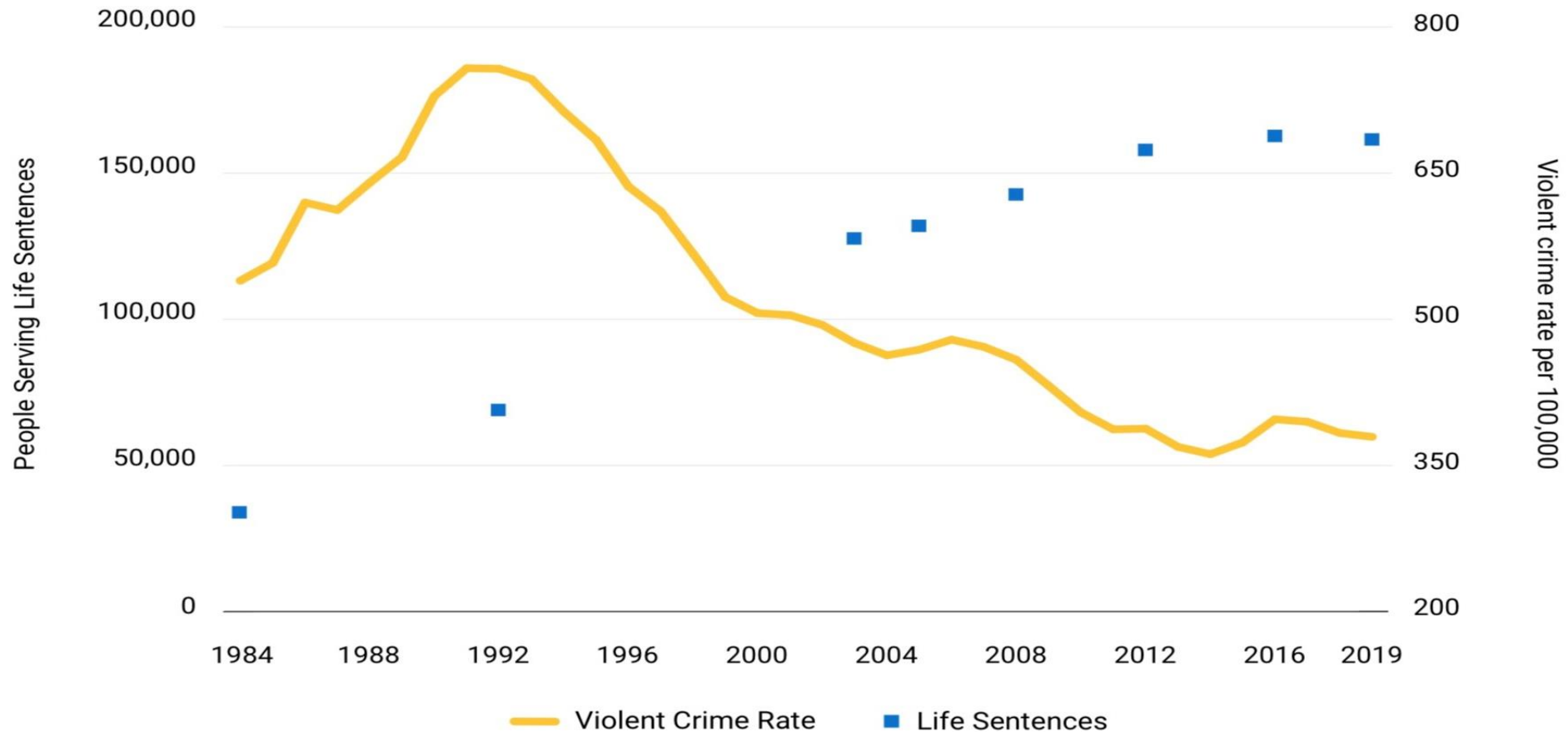
- Underlying causes lengthening prison terms demand expansions of post-conviction remedies
- Statutory expansions: DC, California, and Connecticut
- Sentence Review Units: Baltimore, Los Angeles
- Post sentence review efforts: Ohio and Wisconsin

Figure 3. Change Over Time in Life Without Parole and Life with Parole, 2003-2020



Public Safety and Life Imprisonment

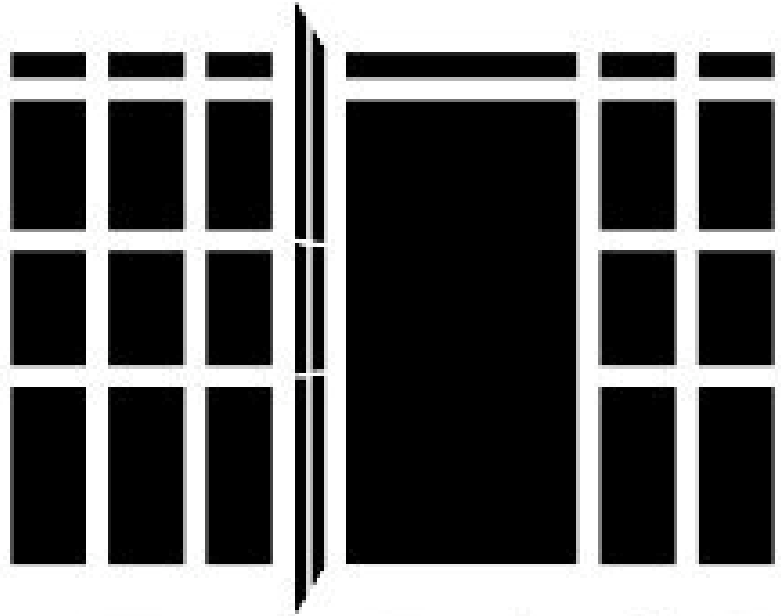
Figure 1. Trends in Violent Crime and Life Imprisonment



Strategizing to Advance Second Look Reforms

- Litigation and case advocacy
- Campaign to End Life Imprisonment: Building momentum jurisdiction by jurisdiction – endlifeimprisonment.org
- Long-term strategies to recalibrate extreme sentences and create space for mid term adjustments in the short term





THE SECOND LOOK PROJECT

Part 2: Incarceration Reduction Amendment Act (“IRAA”)

James Zeigler
*Executive Director,
The Second Look Project*

History of DC's Second Look Sentence Review Law, The Incarceration Reduction Amendment Act ("IRAA")

- Passed in 2016 as part of broader package of youth justice reforms, original version of the bill allowed relief after 20 years for those sentenced for offenses committed before 18, who were not yet parole eligible
- Inspired by line of Supreme Court cases dealing with sentencing of juvenile offenders
- Later amended to allow for relief after 15 years, independent of parole eligibility

D.C. Code § 24-403.03

- Court must make two threshold findings in order to grant relief:
 - that 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.
- Statute lists factors for the Court to consider in making those findings
 - Factors encompass client's entire life, from childhood social history, circumstances surrounding the offense, client's history while incarcerated
- Does *not* require prosecutorial approval, and prosecutors almost always oppose these cases

IRAA Practice Overview

- Right to counsel in these proceedings
- Development of mitigation case/telling the client's life story
 - Records review
 - Mitigation specialist/other experts
 - Reentry plan
- Drafting a petition laying out comprehensive mitigation narrative and case for release
- Evidentiary Hearing

Success under IRAA so far

- Approximately 60 people released and approximately 10 denials
- Denials have been largely based on poor disciplinary histories while incarcerated, not on the underlying offense or other more subjective factors commonly seen in parole hearings (acceptance of responsibility, remorse, etc.)
- Successes have almost all been over government opposition

The Second Look Amendment Act (IRAA 3.0)

- Will expand eligibility under IRAA to those who committed their offenses before age 25
- Passed by the D.C. Council in December, signed by the Mayor on January 13, expected to become law in May
- Will create the broadest and most impact sentence review mechanism in the country, making an estimated 600 people sentenced for serious offenses immediately eligible for resentencing and release



Part 3: Theoretical and Practical Objections to Second Look Sentencing

Greg Newburg
*Director of State Policy –
Florida at FAMM*

Theoretical and Practical Objections

- Theoretical Objections
 - Finality
 - Separation of powers
- Practical Objections
 - Overloaded courts
 - Are judges the right people to modify sentences?
 - Effect on victims

Theoretical Objection 1: “Finality”

- What is finality?
- Why do some say second look undermines finality?
- Finality of convictions v. finality in sentencing

Theoretical Objection 2: Separation of Powers

Second Look sentencing interferes with an exclusive executive commutation power

- Legislative prerogative to define crimes and sentences v. executive power to commute sentences/grant pardons
- Federal
 - United States v. Benz, 282 U.S. 304 (1931)
 - “Drugs Minus Two”
 - First Step Act
- States
 - Maryland
 - Louisiana - State ex rel. Esteen v. La., 239 So. 3d 233 (2018)
 - North Carolina - In Re Briggs, 47 S.E. 403 (N.C. 1904); State v. Blalock, 61 N.C. 242
 - Colorado – People v. Smith, 536 P.2d 820 (Col. 1975)
- “Shared decision-making legislation”

Practical Objection 1: Administrative Capacity

- Will courts be overwhelmed by resentencing motions, many of them frivolous?
 - States can outline specific eligibility criteria
 - Courts already receive pro se filings
 - States that have undertaken sentence modification haven't seen this outcome
 - Courts could deny without a hearing
 - Temporary increased court workload vs. chronic prison overload

Practical Objection 2: Who Should Modify?

- Are judges really the best people to modify sentences?
- Judges v. parole boards
- Disparities?

Practical Objection 3: What About Victims?

- By my lights, easily the most difficult objection
 - Resentencing means re-litigating relevant parts of the offense
 - Victims really do have legitimate expectations and interests in finality
 - Those interests should not *control* the outcome, i.e., act as a “pre-veto,” but should be weighed against (similarly legitimate) interests in justice and individual liberty
- Relevant notice and input
- “Seen v. Unseen” victims
- Restorative justice?
- Sometimes there is no “victim”

Sources

- Meghan J. Ryan, [Finality and Rehabilitation](#), 4 Wake Forest J.L. & Pol'y 121, 123 (2014)
- Douglas A. Berman, “[Re-Balancing Fitness, Fairness, and Finality for Sentences](#),” Public Law and Legal Theory Working Paper Series No. 243 (May 2, 2014)
- Cecelia Klingele, “[Changing the Sentence without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release](#)”, 52 Wm. & Mary L. Rev. 465 (2010)



Part 4: NACDL's Model Second Look Legislation

JaneAnne Murray

*Based on:
Draft Legislation by NACDL Second Look
Taskforce and Report by JaneAnne
Murray, Sean Hecker, Michael Skocpol
and Marissa Elkins*

Model Penal Code (Sentencing), Dec. 2018

Principles for Legislation

- Judicial “second look” after 15 years served
- Review at no more than 10-year intervals thereafter
- Harnesses DOC to commence process
- Judge has discretion to appoint counsel
- Permits summary dismissal of petition
- Ensures and cabins victim participation
- Sets forth review process
- Commission to establish guidelines
- Animated by principle of humility



NACDL's Model Second Look Legislation: Key Components

- Judicial “second look” after 10 years served
- Review at no more than 5-year intervals thereafter
- Harnesses DOC to commence process
- Petitioner has right to appointed counsel
- Requires a face-to-face hearing
- Sets forth factors that must be considered
- Ensures and cabins victim participation
- Petitioner has right to appellate review
- Animated by principles of humility and humanity



Why Ten Years?

- NACDL follows FAMM and Sen. Cory Booker in seeking second look after 10 years
- Still confines “second look” to those serving very long sentences (10 years served would often mean a sentence of 15 years or more at state level)
- Permits opportunity for retroactive application of changed charging practices and sentencing policies and new social science insights
- This threshold is humane – offers hope and incentivizes rehabilitation



Why Representation?

- NACDL (like FAMM and Sen. Cory Booker) includes provision requiring appointment of counsel
- Counsel is more effective
- Hard to advocate for oneself from prison
- Multiple recent analogues indicate that large-scale representation is viable



“I’ve heard mitigating things about you.”

Our Proposed Process

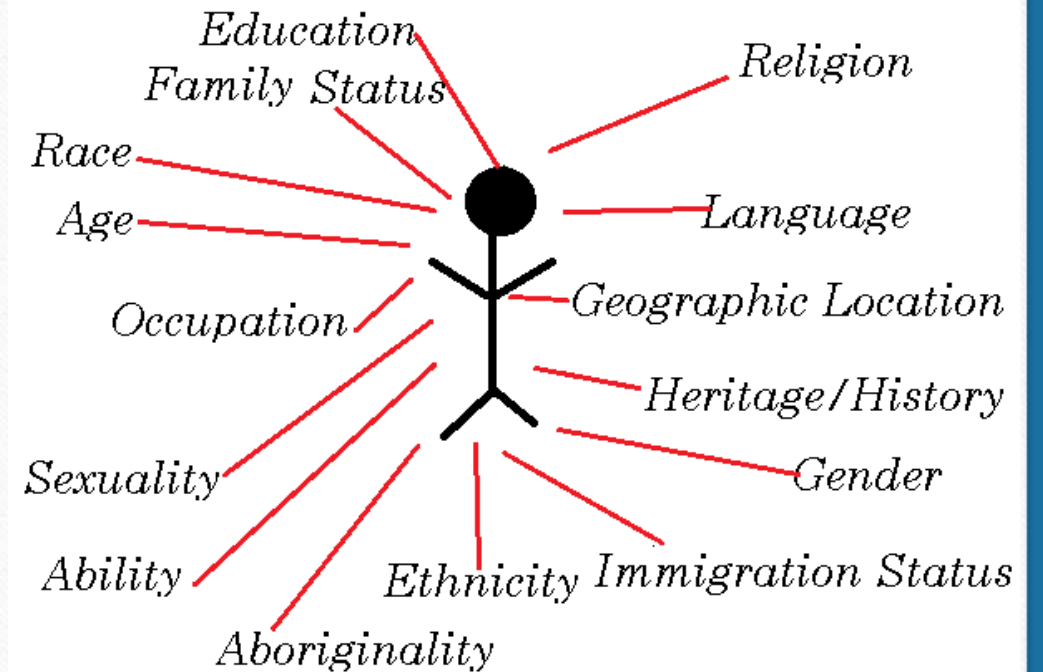
- DOC identifies eligible petitioners
- Petitioner can file easily
- Hearing required; does not need to be full-blown evidentiary one but must be involve “face to face” in-person or virtual meeting between judge and petitioner
- Delineates who should be 2d look judge, what is appellate procedure and whether the right can be waived (answer: not)
- Sets forth lengthy series of factors to be considered



“The past, Your Honor, is a foreign country, and we did things differently there.”

Factors to Be Considered

- Age at time of offense and time of petition
- Nature of the offense
- Petitioner's history and current characteristics
- Petitioner's role in the original offense
- Current health and mental health status
- Victim impact statement
- Did petitioner suffer a trial penalty?
- Did petitioner receive IAC?
- Is there an innocence issue?
- Key issue: would sentence be lower today



Role of Victims

- At state level, majority is incarcerated for violent crime
- “Second look” has potential to retraumatize victims
- MPL and NACDL propose orderly procedure for victim participation in second look process
- Presents opportunity for restorative justice



Getting Second Look Legislation Passed

- Uphill battle against precedent, tradition, culture (see Part 3)
- Floodgates (burden on courts and cost) . . . but at \$30K per prisoner per year, the mechanism more than pays for itself
- Studies show early release does not increase recidivism for similarly situated prisoners who serve entire sentence, see e.g.
- Public opinion is changing and open to this kind of reform
- This issue is bipartisan
- Second look legislation is being passed (e.g., DC, Florida, New York DVSJA)

