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# UNWINDING “LAW AND ORDER”: HOW SECOND LOOK MECHANISMS RESIST MASS INCARCERATION AND INCREASE JUSTICE

by *Destiny Fullwood\** and *Cecilia Bruni\*\**

## I. Introduction

For decades, the United States has used incarceration to achieve a particularized version of safety. Amidst the civil rights movement, presidential candidate Barry Goldwater wielded the phrase “law and order”<sup>1</sup>

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1 See Beth Schwartzapfel, *What Trump Really Means When He Tweets ‘Law & Order!!!’*, THE MARSHALL PROJECT (Oct. 7, 2020), <https://www.themarshallproject.org/2020/10/07/what-trump-really-means-when-he-tweets-law-order> (“Law and order” is a term that United States’ politicians histori-

against the masses of Black men, women, and children in their fight for equitable treatment.<sup>2</sup> This came at a time when “[i]t was no longer socially permissible for polite White people to say they opposed equal rights for Black Americans. Instead, they began ‘talking about the urban uprisings’” and “attaching [those] to street crime, to ordinary lawlessness[.]”<sup>3</sup> The result was a decades-long, persistent campaign to maintain order by arresting and incarcerating communities of color and people experiencing poverty.

The United States, as one of the largest incarcerators in the world, contributed to wide-spread family separation, wealth inequality, and generational trauma for many communities. Despite these traumas, oppressed communities remained resilient. The life and redemptive journey of Colie Levar Long exemplifies this struggle and resilience.

Colie Levar Long was born in Washington, D.C. after his parents, former sharecroppers, moved to the North during the last years of the Great Migration.<sup>4</sup> Although Colie was raised in a typical nuclear family, lengthy prison sentences had affected generations of his family, reaching back to his grandfather who was arrested and imprisoned in South Carolina for a crime he did not commit. Colie grew up witnessing the path many of the men in his family walked, cycling between the community and prison, while he lost decades with many of them. This cycle continued until, at 18, Colie was arrested and sentenced to serve life in prison without the possibility of parole.

Colie spent many years entrenched in the prison milieu — a place of extreme violence, lacking proper medical and mental health care and rehabilitative programming. As he aged, he began to take advantage of what little reading material he was afforded. While

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cally and repeatedly use to covertly call for increased criminalization and incarceration of people of color and people experiencing poverty, particularly Black Americans).

2 Schwartzapfel, *supra* note 1.

3 *Id.* (quoting Vesla Weaver, political scientist at John’s Hopkins University).

4 Amanda Onion, et al., *The Great Migration*, HISTORY.COM (Aug. 30, 2022), <https://www.history.com/topics/black-history/great-migration> (“The Great Migration was the relocation of more than 6 million Black Americans from the rural South to the cities in the North, Midwest and West from about 1916 to 1970”).

reading, Colie experienced a paradigm shift; he became determined to end the cycle with him.<sup>5</sup>

Colie chose to live his life differently after that moment, and on July 28, 2022, Colie was released from his life sentence and allowed to return to the community. At age 45, he is now a student at Georgetown University and expects to graduate with a bachelor's degree in liberal arts in 2025. Colie is also a Program Associate at Georgetown's Prison and Justice Initiative<sup>6</sup> and the Justice Reform Fellow with Families Against Mandatory Minimums.<sup>7</sup> Colie's story epitomizes the resilience and self-determination of many incarcerated people, and his release and subsequent successes exemplify why Americans should support disenfranchised communities with systemic reforms like sentence review ("second look") mechanisms.

This Article uses the District of Columbia's Incarceration Reduction Amendment Act ("IRAA") and legislation expanding IRAA to discuss the critical need for second look mechanisms, which combat mass incarceration by providing individuals serving lengthy sentences with meaningful opportunities to return home. Part II provides background on the history of mass incarceration, the harm it and lengthy sentences cause, and the legal framework that led to the passage of IRAA and its progeny. Using these laws as a backdrop, Part III analyzes the impact of second look mechanisms, explains the importance of continuing to expand second look laws nationwide, and provides practical considerations for jurisdictions enacting these types of laws. Part IV concludes the Article.

## II. Background

### A. *The Rise of Mass Incarceration in the United States*

Between 1972 and 2009, the United States' prison

<sup>5</sup> For more on the beginning of Colie's transformation: Colie Levar Long, *I Will Not Be Broken*, MORE THAN OUR CRIMES (Feb. 9, 2021), <https://morethanourcrimes.medium.com/i-will-not-be-broken-27a9ea1f59>.

<sup>6</sup> Colie 'Shaka' Long, GEO. U.: PRISONS & JUST. INITIATIVE, <https://prisonsandjustice.georgetown.edu/people/colie-shaka-long/> (last visited Apr. 23, 2023).

<sup>7</sup> Press Release, FAMM, FAMM welcomes Colie Levar Long as Justice Reform Fellow (Aug. 19, 2022), <https://famm.org/famm-welcomes-colie-levar-long-as-justice-reform-fellow/>.

population grew by an average of 5.8 percent each year, with people of color, particularly Black men, disproportionately incarcerated.<sup>8</sup> In the 1960s and 1970s, politicians spanning the political spectrum seized on "law and order" rhetoric, advocating for and "enacting harsh, punitive, and retributively oriented policies as a solution to rising crime rates."<sup>9</sup> In no coincidence, this rise in incarceration of Black Americans followed closely on the heels of the civil rights movement. In the wake of the progress that Black Americans had achieved through the civil rights movement, politicians, who were historically and predominantly white, tied increased crime rates explicitly and implicitly to the Black community and urban centers where the community most frequently resided.<sup>10</sup> A recession in the 1970s exacerbated this issue, leaving many Black families—and Black men in particular—living in urban spaces, unemployed, and experiencing poverty.<sup>11</sup> Since the 1970s, legislators, executives, and judges have relied on incarceration and lengthy sentences—defined here as 10 years or more—as the premiere means to decrease crime and increase public safety, even though the continued overreliance on incarceration

<sup>8</sup> Nazgol Ghandnoosh, Ph.D., *Ending 50 Years of Mass Incarceration: Urgent Reform Needed to Protect Future Generations*, THE SENT'G PROJECT (Feb. 8, 2023), <https://www.sentencingproject.org/policy-brief/ending-50-years-of-mass-incarceration-urgent-reform-needed-to-protect-future-generations/>.

<sup>9</sup> Ruth Delaney et al., *American History, Race, and Prison*, VERA INST. OF JUST. (Oct. 2018), <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison>.

<sup>10</sup> *Id.* (Presidents Johnson and Nixon included wars on crime in urban settings in their policies and platforms); see also James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> ("But the prison population truly exploded during President Ronald Reagan's administration. When Reagan took office in 1980, the total prison population was 329,000, and when he left office eight years later, the prison population had essentially doubled, to 627,000.").

<sup>11</sup> Delaney et al., *supra* note 9.

and lengthy sentences has not achieved either goal.<sup>12</sup> Through these policies, the 200,000-person state and federal prison population in 1970 increased eight-fold to 1.6 million in 2008.<sup>13</sup> Today, although nearly 50 years have passed since incarceration became the priority of the American criminal legal system, the United States is still a leading incarcerator<sup>14</sup> with nearly two million people in prisons and jail<sup>15</sup> and 3.9 million people living under community supervision as of 2021.<sup>16</sup> This is all in the purported name of public safety.<sup>17</sup>

12 In a Brennan Center study on the effect of increased incarceration on crime from 1980 to 2013, researchers determined that “[s]ince approximately 1990, the effectiveness of increased incarceration on bringing down crime has been essentially zero.” Dr. Oliver Roeder, Lauren-Brooke Eisen, & Julia Bowling, *What Caused the Crime Decline?*, BRENNAN CTR. FOR JUST., 23 (2015), <https://www.brennancenter.org/our-work/research-reports/>. The researchers noted that some marginal decrease in property crimes in the 1990s could be attributed to increased incarceration, but that reductions in violent crime were not attributable to increased incarceration. *Id.* at 23–24. Citing empirical studies, researchers noted that “longer sentences have minimal or no benefit on whether offenders or potential offenders commit crimes.” *Id.* at 26.

13 Delaney et al., *supra* note 9.

14 *Highest to Lowest – Prison Population Total*, WORLD PRISON BRIEF, [https://www.prisonstudies.org/highest-to-lowest/prison-populationtotal?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison-populationtotal?field_region_taxonomy_tid=All) (last visited Feb. 23, 2023).

15 Ashley Nellis, *Mass Incarceration Trends*, THE SENT’G PROJECT (Jan. 25, 2023), <https://www.sentencingproject.org/reports/mass-incarceration-trends/>.

16 Danielle Kaebler, *Probation and Parole in the United States, 2020*, BUREAU OF JUST. STAT. (Dec. 2021), <https://bjs.ojp.gov/library/publications/probation-and-parole-united-states-2020>.

17 All too often, this reliance panders to the white and the wealthy, people who have incorrectly learned from politicians and media that crime is frequently on the rise and that harsher punishment corresponds with decreased crime, even where evidence of neither exists. See MARTIN NELSON, SAMUEL FEINEH & MARIS MAPOLSKI, A NEW PARADIGM FOR SENTENCING IN THE UNITED STATES 19 (Feb. 2023), <https://www.vera.org/downloads/publications/Vera-Sentencing-Report-2023.pdf> (noting that “public perception about crime [remains] out of sync with actual crime rates” and that the “purported safety” delivered by mass incarceration caters to “a select subset of U.S. communities that are predominantly white and wealthy”); see also DON STEMEN, THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER (July 2017), [https://www.vera.org/downloads/publications/for-the-record-prison-paradox\\_02.pdf](https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf).

### *B. Mass Incarceration and Lengthy Sentences Cause Harm*

Research shows that mass incarceration does not increase public safety.<sup>18</sup> Instead, it seriously harms the incarcerated, their families, and their communities by removing parents from their children, children from their families, and neighbors from their communities. Beyond this physical familial separation, an incarcerated person often loses income<sup>19</sup> and educational opportunities and experiences future barriers to employment, housing instability,<sup>20</sup> and impediments to or blanket exclusion from voting and civic participation.<sup>21</sup>

These and other collateral consequences of mass incarceration also harm the families and communities of incarcerated people. In particular, the historical rise in incarceration of Black men (and Black women and Latino people on a smaller scale) has caused generations of individuals to be removed from their communities,<sup>22</sup> locking financial providers, parents, partners, employees, and other valuable community members

18 For a thorough discussion of why mass incarceration does not contribute to lower crime rates or increased public safety, see Nelson, Feineh, & Mapolski, *supra* note 17, at 23–31; see also Todd R. Clear, *The Impacts of Incarceration on Public Safety*, 74 SOC. RES. 613 (2007).

19 Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL’Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html#community> (“The criminal justice system punishes poverty, beginning with the high price of money bail: The median felony bail bond amount (\$10,000) is the equivalent of 8 months’ income for the typical detained defendant. As a result, people with low incomes are more likely to face the harms of pretrial detention. Poverty is not only a predictor of incarceration; it is also frequently the outcome, as a criminal record and time spent in prison destroys wealth, creates debt, and decimates job opportunities.”).

20 See AM. BAR ASS’N, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK 4–7 (Mar. 2018), <https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf>.

21 See Christopher Uggen et al., *Locked Out 2022: Estimates of People Denied Voting Rights*, THE SENT’G PROJECT (Oct. 25, 2022), <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/>. For additional potential consequences of incarceration, see Sarah B. Berson, *Beyond the Sentence – Understanding Collateral Consequences*, NAT’L INST. OF JUST. 25, 26 (Sept. 2013).

22 See Delaney, *supra* note 9 (“The incarceration boom fundamentally altered the transition to adulthood for several generations of [B]lack men and, to a lesser but still significant extent, [B]lack women and Latino men and women.”).

behind bars.<sup>23</sup> As of 2018, approximately 113 million adults in America had an immediate family member who has experienced some form of incarceration, and one in 34 adults have lost or will lose a decade or longer with an immediate family member due to incarceration.<sup>24</sup> The impact on Black families is particularly severe: “63 percent [of B]lack adults have had an immediate family member incarcerated and nearly one third (31 percent) have had an immediate family member incarcerated for more than one year.”<sup>25</sup> Families of the incarcerated deal with a myriad of financial burdens: they must pay court fines and fees, they often lose a source of income or child support, and, if they want to maintain contact with their incarcerated loved one, face expenses in doing so.<sup>26</sup> Children of incarcerated parents frequently experience depression, anxiety, and emotional distress, and both children and parents of the incarcerated experience an increased risk of medical issues like obesity and diabetes.<sup>27</sup>

All this harm and more befalls those who serve lengthy sentences. The longer a person is incarcerated, the more impactful the separation from their communities, families, and society is, and the more difficult reentering their community becomes. Those who have served at least a decade in prison return to a community that has changed drastically, making it difficult to navigate social reconnections, employment opportunities, technology, and more. Long-term incarceration can also have lasting physical<sup>28</sup> and mental health consequences.<sup>29</sup>

23 Nelson, Feineh & Mapolski, *supra* note 17, at 28; *see also* Clear, *supra* note 18, at 621 (“High imprisonment rates disturb social networks and occupy the resources that could otherwise be used to strengthen them.”).

24 BRIAN ELDERBROOM ET AL., EVERY SECOND THE IMPACT OF THE INCARCERATION CRISIS ON AMERICA’S FAMILIES, 24, 26 (Dec. 2018), <https://everysecond.fwd.us/downloads/everysecond.fwd.us.pdf>.

25 *Id.* at 29.

26 *Id.* at 35–36, 38.

27 *Id.* at 37.

28 Ashley Nellis, *No End In Sight: America’s Enduring Reliance on Life Sentences*, THE SENT’G PROJECT, 26 (Feb. 17, 2021) <https://www.sentencingproject.org/reports/no-end-in-sight-americas-enduring-reliance-on-life-sentences/> (discussing how living in prison accelerates aging, with accompanying medical conditions like hypertension, cancer, and dementia occurring sooner among prisoners than among the general public).

29 Katie Rose Quandt, *Research Roundup: Incarceration can cause*

The majority of people serving lengthy sentences in the United States are incarcerated for serious violent offenses.<sup>30</sup> But boiling down the identities of people who have committed violent crimes to their worst mistakes creates a culture of fear around their release, one that is often unwarranted. Data reveals that one act or a series of acts from the past does not predict the future.<sup>31</sup> Those arrested for violent crimes are often young,<sup>32</sup> and the widely-accepted age-crime curve demonstrates that young people most often age out of criminal activity.<sup>33</sup> Without question, victims of these violent crimes have experienced serious harm, but a 2022 survey of crime victims shows that most of these victims do not see longer sentences and harsher punishments as the best means to decrease crime and increase public safety.<sup>34</sup> Focusing solely on a person’s crime and not their capacity for reformation also belies courts’ disparate use of lengthy sentences for Black men,<sup>35</sup> and increasingly, women.<sup>36</sup> Decreasing the number of people serving lengthy sentences, therefore, is a racial justice issue, a

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*lasting damage to mental health*, PRISON POL’Y INITIATIVE (May 13, 2021), <https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/> (“The carceral environment can be inherently damaging to mental health by removing people from society and eliminating meaning and purpose from their lives. On top of that, the appalling conditions common in prisons and jails — such as overcrowding, solitary confinement, and routine exposure to violence — can have further negative effects.”).

30 Nellis, *No End In Sight*, *supra* note 28, at 22.

31 *See id.* at 27–28 (“U.S. Bureau of Justice Statistics data reveal that 98% of persons released from prison after serving time for a homicide conviction are not arrested for another homicide. Just as encouraging, this analysis shows that people released from prison who were originally convicted of homicide are less likely than other released prisoners to be rearrested for a violent crime”).

32 *See* Nelson et al., *supra* note 17, at 26.

33 Laurence Steinberg, Elizabeth Cauffman & Kathryn C. Monahan, *Psychosocial Maturity and Desistance From Crime in a Sample of Serious Juvenile Offenders*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUV. JUST. BULL. (U.S. DEP’T OF JUST.), 1, 9 (Mar. 2015), <https://ojjdp.ojp.gov/library/publications/psychosocial-maturity-and-desistance-crime-sample-serious-juvenile-offenders>.

34 ALLIANCE FOR SAFETY & JUST., CRIME SURVIVORS SPEAK 2022: NATIONAL SURVEY OF VICTIMS’ VIEWS ON SAFETY AND JUSTICE 26, 28, 36 (Sept. 2022), <https://allianceforsafetyandjustice.org/wp-content/uploads/2022/09/Alliance-for-Safety-and-Justice-Crime-Survivors-Speak-September-2022.pdf>.

35 NAZGOL GHANDNOOSH & ASHLEY NELLIS, HOW MANY PEOPLE ARE SPENDING OVER A DECADE IN PRISON 7 (Sept. 2022), <https://www.sentencingproject.org/app/uploads/2022/10/How-Many-People-Are-Spending-Over-a-Decade-in-Prison.pdf>.

36 Nellis, *No End In Sight*, *supra* note 28, at 18.

feminist issue, and a human rights issue.

### C. *The History of the Incarceration Reduction Amendment Act*

In the 21<sup>st</sup> century, as neuroscience advanced and public opinion on lengthy sentences and mass incarceration began to shift, so too did the law. Most impactfully, the United States Supreme Court analyzed childhood brain development with respect to juvenile incarceration. Between 2005 and 2016, the Court concluded in a series of cases that “children are constitutionally different than adults for purposes of sentencing.”<sup>37</sup> This lineage of cases, on which IRAA is based, acknowledged that developments in neuroscience showed “fundamental differences between juvenile and adult minds.”<sup>38</sup> This brain development accounts for the difficulty young people experience in weighing consequences and resisting peer pressure prior to reaching the stage of psychological maturity.<sup>39</sup> Research confirms that an adolescent’s greater potential for rehabilitation is a result of this continued development and means that “[t]he vast majority of juvenile offenders, even those who commit serious crimes, grow out of antisocial activity as they transi-

37 *Montgomery v. Louisiana*, 577 U.S. 190, 206–07 (2016) (quoting *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (citing *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005)

& *Graham v. Florida*, 560 U.S. 48, 68 (2010))). In these cases, the Court has found that (1) “children have a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking”; (2) “children ‘are more vulnerable . . . to negative influences and outside pressures,’ . . . they have limited ‘control over their own environment[,]’ and lack the ability to extricate themselves from horrific, crime-producing settings;” and (3) “a child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievabl[e] deprav[ity].” *Miller*, 567 U.S. at 471 (quoting *Roper v. Simmons*, 543 U.S. at 569–570). As a result, the Court has held that the Eighth Amendment’s ban on cruel and unusual punishment prohibits the death penalty for people who were under eighteen at the time of the offense, *Roper*, 543 U.S. at 568; prohibits life without parole for non-homicide offenses committed by children under eighteen, *Graham*, 560 U.S. at 74; and prohibits life without parole in homicide cases for “all but the rarest of children, those whose crimes reflect ‘irreparable corruption,’” *Montgomery*, 136 S. Ct. at 726 (quoting *Miller*, 567 U.S. at 479–480).

38 *Graham*, 560 U.S. at 68 (2010).

39 D.C. Council Rep. on B. 21-0683 at 3–4 (October 5, 2016) (citing Johnson et al., *supra* note 10; Steinberg, *supra* note 33).

tion to adulthood.”<sup>40</sup>

In response to Supreme Court precedent and the supporting science, the D.C. Council<sup>41</sup> (“Council”) passed—and has since continued to expand—a sentence review mechanism titled the “Incarceration Reduction Amendment Act” passed in 2017.<sup>42</sup> The Council crafted IRAA and its subsequent amendments to ensure that adolescents and young adults are treated differently in the District’s criminal legal system.

The first iteration of IRAA banned life without parole and eliminated mandatory minimum sentences for juveniles,<sup>43</sup> while also creating a sentence reduction mechanism for juveniles serving lengthy sentences.<sup>44</sup> Since 2017, the Council has continued to expand eligibility for sentence reductions to its incarcerated population in accordance with developments in neuroscience. Most recently, through the Second Look Amendment Act,<sup>45</sup> the Council expanded eligibility to people who were under age 25 at the time of their offense and who have spent 15 years or more in prison. The Council expanded the law in recognition of the extreme racial disparities<sup>46</sup> and significant economic cost of mass incarceration and the fact “that as we have increased the length of prison sentences and limited the ability to obtain release, our prisons have become overwhelmed with people whose current conduct proves further incarceration is not in the public interest.”<sup>47</sup>

IRAA focuses on rehabilitation and community safety instead of punishment for the sake of punishment. Given what we now know about psychological maturation and the concomitant ability for young people to

40 Steinberg, et al., *Psychosocial Maturity and Desistance From Crime*, *supra* note 33, at 1.

41 The D.C. Council is the District of Columbia’s legislative body and operates akin to a state’s legislature.

42 D.C. Code § 24-403.01.

43 *Id.* § 24-403.01(c)(2).

44 *Id.* § 24-403.03.

45 *Id.*

46 D.C. Council Comm. Rep., *supra* note 39, at 11 (“Black men ages 18 to 19 were twelve times as likely to be imprisoned as white men of the same age.”).

47 *Id.* at 12 (quoting Ben Miller and Daniel S. Harawa, *Why America Needs to Break Its Addiction to Long Prison Sentences*, POLITICO (Sept. 3, 2019)).

change and grow, IRAA tasks judges with evaluating evidence of an individual's change and rehabilitation, "despite the brutality or cold-blooded nature of any particular crime,"<sup>48</sup> to answer two over-arching questions: (1) is the petitioner a danger to any person or the community, and (2) do the interests of justice warrant a sentence reduction? If the answers to those questions are "yes," the judge *must* reduce the petitioner's sentence.<sup>49</sup> A sentence reduction in these cases most often results in immediate release, as the statute contemplates questions of current safety and rehabilitation. This recognition of the trademarks of youth and the human capacity for change provides individual motivation for the incarcerated and increases safety for all.

### III. Analysis

#### *A. Second Look Mechanisms Increase Hope, Incentivize Personal Transformation, and Increase Racial Justice*

Second look mechanisms increase safety both within prisons and throughout free communities through the cultivation of hope. By creating the opportunity for release, these second look mechanisms give incarcerated people permission to dream of a future free from violence, despair, and captivity. For decades, theorists spanning several disciplines have come to similar conclusions, linking hope to resilience and recovery, and finding that hope provides people with the motivation to persevere in the face of adversity.<sup>50</sup> Research shows "hope's strong empirical association with other variables of well-being, such as greater life satisfaction, more self-worth, more meaning to life, and less overall dysphoria."<sup>51</sup>

Second look mechanisms also provide incarcerated people with a "locus of control," or the ability to perceive that a person has control over their future.<sup>52</sup> This locus of control is frequently linked to resilience, "as the more internal control an individual perceives over [their life], the more [they] will approach adverse

48 D.C. Code § 24-403.03(c) (10).

49 *Id.* § 24-403.03.

50 Ricky T. Munoz, Shane R. Brady & Vanessa Brown, *The Psychology of Resilience: A Model of the Relationship of Locus of Control to Hope Among Survivors of Intimate Partner Violence*, 23 TRAUMATOLOGY 2 (2016).

51 *Id.*

52 *Id.*

situations in a determined, calm, and mentally healthy manner."<sup>53</sup> Hope, combined with the perception of some level of self-determination, incentivizes incarcerated people to engage in pro-social and rehabilitative activities like education and programming. These activities will allow them to pursue sustainable and fulfilling employment upon release, explore their interests, and find their passions. Fueled by feelings of hope and self-determination, incarcerated people are empowered to reconnect with their families and communities, to mentor and guide young people away from a path to prison, and to avoid violence and increase peace within their institutions, helping members of their community who are not yet free. Second look mechanisms help foster safety by igniting a light within incarcerated people that has the potential to shine far and wide into their communities both captive and free.

#### *B. Alternative Release Mechanisms like Parole are Ineffective or Nonexistent*

Second look mechanisms may seem redundant to alternative release mechanisms like parole and executive clemency, but these systems do not exist in every jurisdiction. Even where they do, they are often inconsistent in implementation and focus on an individual's original offense and the political implications of granting relief over the applicant's growth and rehabilitation.<sup>54</sup>

For example, although in D.C. the system of parole has been abolished, individuals who were sentenced for D.C. Code offenses under the old indeterminate sentencing scheme are still eligible for parole.<sup>55</sup> They now go before the United States Parole Commission ("USPC"), a federal commission whose members are not representatives of D.C. residents<sup>56</sup> and who are not required to have any prior background in the criminal legal system.<sup>57</sup> Parole examiners from the USPC operate with a great deal of discretion when determin-

53 *Id.*

54 Nellis, *supra* note 28, at 29.

55 Sophia Browning, *Three Ring Circus: How Three Iterations of D.C. Parole Policy Have Up to Tripled the Intended Sentence for D.C. Code Offenders*, 14 GEO. J. L. & PUB. POL'Y 577, 584 (2016).

56 *See id.* at 584–85.

57 *See* Eleanor Holmes Norton, *Apply for U.S. Parole Commission*, <https://norton.house.gov/apply-for-us-parole-commission> (last visited Feb. 17, 2023).

ing whether a D.C. parole applicant should be granted parole. Even where someone qualifies for presumptive release under the applicable parole guidelines, an individual parole examiner may choose not to follow those guidelines, oftentimes ignoring a person’s rehabilitative journey and giving unnecessary weight to the nature of the underlying offense.<sup>58</sup> Moreover, incarcerated District residents frequently appear before the USPC without the safeguards of any representation.<sup>59</sup> D.C.’s parole system illustrates some of the issues with alternative release systems and the different and more just function that second look mechanisms can serve, but some practical considerations remain for jurisdictions hoping to pass a second look mechanism.

### *C. Practical Considerations for the Expansion of Second Look*

#### **1. Prosecutor buy-in has the potential to create increased equitable results and lower the burden on courts.**

In practice, the implementation of IRAA has been successful, though some roadblocks to its robust implementation remain. Because IRAA focuses on rehabilitation, not punishment, it requires neutral arbiters (D.C. Superior Court judges), rather than members of commissions or the executive branch, to determine whether a petitioner has demonstrated readiness for release.<sup>60</sup> In many cases, judges have seriously weighed IRAA factors, focusing on rehabilitation and public safety, and released adults who have thoroughly demonstrated that they are non-dangerous after decades in prison. Misconceptions about the propensity of people who have committed serious offenses to commit those same offenses upon release, however, have impacted the Court’s ability to efficiently decide these cases. For example, from the inception of IRAA, the United States Attorney’s Office followed a practice of near universal opposition to these petitions,<sup>61</sup> a position that resulted in greater burdens on the court

<sup>58</sup> Browning, *supra* note 55, at 591.

<sup>59</sup> *Id.* at 580.

<sup>60</sup> Notably, D.C. is unique compared other jurisdictions because its trial level judges are appointed, rather than elected, and therefore, these judges may have less political pressure impacting their decisions in these cases.

<sup>61</sup> Letter from D.C. Councilmember Charles Allen to United States Attorney Jessie K. Liu (March 11, 2019).

system, as petitioners clearly ready for release were required to litigate their cases fully prior to release. Prosecutor buy-in to review of extreme sentences could alleviate these burdens on courts, petitioners, and defense counsel, as it has in other jurisdictions.<sup>62</sup> Therefore, the creation of sentence review units in prosecutor offices, alongside the passage of second look legislation could result in the most efficient and just implementation of second look mechanisms.<sup>63</sup>

#### **2. Legislators should emphasize that consideration of the underlying offense in any material way contravenes Supreme Court precedent and supporting neuroscience.**

Additionally, jurisdictions enacting similar second look legislation should consider clarifying the degree to which courts are permitted to consider the nature of the underlying offense in their decisions. Although most individuals who will qualify for a second look have been convicted of serious offenses, legislators should focus on the data that demonstrates that recidivism rates for these types of crimes are lower than their non-violent counterparts,<sup>64</sup> and individuals frequently age out of criminal activity.<sup>65</sup> As such, the nature of the underlying offense is not relevant to a person’s current dangerousness and ability to be safely released. Instead, the foundation of community safety is built upon psychosocial maturation and age. Without clearly drawing

<sup>62</sup> Jurisdictions including Maryland and Pennsylvania have implemented these types of units. See *Sentencing Review Unit*, OFF. OF THE STATE’S ATT’Y FOR BALTIMORE CITY, <https://www.stattorney.org/office/bureaus-units/sentencing-review> (last visited Feb. 17, 2023); *Conviction Integrity Unit*, PHILADELPHIA DIST. ATTORNEY’S OFF., <https://phillyda.org/safety-and-justice/investigations/conviction-integrity-unit-ciu/> (last visited Feb. 17, 2023).

<sup>63</sup> *Id.*

<sup>64</sup> J.J. Prescott, Benjamin Pyle & Sonia B. Starr, *Understanding Violent Crime Recidivism*, 95:4 NOTRE DAME L. REV. 1643, 1668 (2020) (citing James Austin et al., Square One Project, Reconsidering the “Violent Offender” 2, 23-24 (2019) (“[P]eople who have perpetuated violence . . . have relatively low rates of recidivism . . . . The recidivism rates among those incarcerated for violent offenses are lower than those incarcerated for other offenses.”)).

<sup>65</sup> Studies also show that recidivism rates for people who are now decades older than they were at the time of their offense (even for the most serious offenses), are extremely low. GHANDNOOSH & NELLIS, *supra* note 35, (citing United States Sentencing Commission, “Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment,” May 2014).



the link between maturation and recidivism, legislators leave open the potential for second look decision makers to choose not to release a person due to the violent or sexual nature of an underlying offense, despite that petitioner's rehabilitation and lack of present dangerousness. Materially considering the nature of the offense misunderstands brain science and empirical data and instead relies on biases and emotions—two things that have no place in the legal field.

### 3. Community-based reentry support is a critical companion to the passage and implementation of second look mechanisms.

Jurisdictions attempting to pass or implement second look mechanisms should not contemplate them in a vacuum, but rather recognize and support the diverse needs of citizens returning to their communities after a decade or more behind bars. Although jurisdictions often have some form of reentry support in place for individuals released from jails and prisons, support specifically catered to those who have served lengthy sentences is important to ensure their success in the community. As noted above, individuals coming home from lengthy sentences have exacerbated needs compared to citizens returning after shorter sentences.<sup>66</sup> For example, after serving a long sentence, individuals are unlikely to have identification documents, financial stability, credit history, independent housing, or immediate employment offers. They are likely to struggle reintegrating socially (particularly if they have lost contact with family and friends), navigating transportation, becoming financially independent, and using technology.<sup>67</sup> Reentry organizations can and should be poised to meet these needs. In the wake of IRAA's passage, D.C. reentry service providers developed programs specifically catered to IRAA grantees, created peer support groups for IRAA recipients, and dedicated certain funds directly to supporting these individuals.<sup>68</sup> But in D.C., the lack of transitional or

66 See *infra* Section II. B.

67 See *Voices for Reform in DC: Recommendations for improving reentry following long prison terms*, JUST. POL'Y INST., 2, 3–4 (July 2021), <https://justicepolicy.org/wp-content/uploads/2021/07/Voices-for-Reform-in-DC-2021.pdf>.

68 For example, the Mayor's Office on Returning Citizen Affairs offers case management services specialized for IRAA grantees and Free Minds Book Club & Writing Workshop hosts a biweekly virtual support group for IRAA grantees.

supportive housing for individuals and the high cost of independent housing<sup>69</sup> have created a challenge for attorneys and clients in planning for their reentry. Creating, funding, and preserving transitional and supportive housing specifically for returning citizens, alongside other reentry supports, should thus be a priority of jurisdictions passing second look mechanisms. In particular, supportive housing for returning citizens with mental health challenges and disabilities is important, as these individuals are disproportionately incarcerated, but less likely to be able to fully access supportive services upon release.<sup>70</sup> Additionally, to best facilitate reentry, prisons should treat those petitioning for second look relief as having upcoming release dates, so that these individuals may benefit from the reentry programming offered during their incarceration and become connected to reentry organizations and job opportunities before release.<sup>71</sup>

69 See HOUSING FOR CRIMINAL JUSTICE INVOLVED INDIVIDUALS IN THE DISTRICT OF COLUMBIA, CRIMINAL JUST. COORDINATING COUNCIL 1, 19 (Feb. 2020), <https://web.archive.org/web/20220513005605/https://cjcc.dc.gov/sites/default/files/dc/sites/cjcc/Housing%20for%20criminal%20justice%202020.pdf> (“[D]ue to an oversaturated public housing market and a lack of private housing options, there is a severe shortage of housing options for returning citizens both nationwide and in the District.”). Additionally, in an issue that is perhaps unique to the District, supervision has not evolved with the continually rising housing prices which have driven many returning citizens' families into nearby Maryland or Virginia where prices are more reasonable. Those who are incarcerated for D.C. Code offenses are required to reside in D.C. immediately upon release, even if they have stable housing available with a family member just over the District border in Maryland or Virginia.

70 Approximately 43 percent of individuals in state prisons report having been diagnosed with a mental health disorder. Leah Wang, *Chronic Punishment: The unmet health needs of people in state prisons*, PRISON POL'Y INITIATIVE (June 2022), <https://www.prisonpolicy.org/reports/chronicpunishment.html#mentalhealth>. Additionally, according to the Bureau of Justice Statistics, based on self-report, nearly 40 percent of incarcerated people reported having some form of a disability as of 2016. See Laura M. Maruschak, Jennifer Bronson, & Mariel Alper, *Disabilities Reported by Prisoners*, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., 1 (March 2021).

71 See HOUSING FOR CRIMINAL JUSTICE INVOLVED INDIVIDUALS IN THE DISTRICT OF COLUMBIA, *supra* note 69, at 3 (“In many state prisons, months prior to release, returning citizens are connected with social services organizations and potential employers, have opportunities to attend job fairs, and even receive assistance with building their resume.”).

#### IV. Conclusion

For over half a century, the United States has over-incarcerated its citizens in the name of public safety, without returns. After decades of mass incarceration’s harm, second look mechanisms have the power to restore some justice, hope, and control to communities of color and people experiencing poverty, especially Black communities. These mechanisms recognize that people are so much more than their worst act, and that human beings are capable of reformation and transformation. Colie’s story is a prime example. Instead of relying on disenfranchised communities to lift themselves up out of trenches dug by decades of trauma linked to mass arrests and lengthy sentences, it is imperative that lawmakers acknowledge the advancements in neuroscience and the wealth of empirical data that make clear that this country can both atone for its past harms and create a safe future for all.