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# Taking Another Look at Second-Look Sentencing

Meghan J. Ryan<sup>†</sup>

## INTRODUCTION

An astonishing number of Americans—nearly one out of every one hundred adults—is behind bars in this country.<sup>1</sup> And many of these offenders are serving extremely long sentences—sometimes on the order of decades.<sup>2</sup> These staggering figures raise concerns about over-incarceration, excessive punishments, the neglect of criminal offenders’ humanity, and the fairness of our criminal justice system. The figures also raise concerns about the costs of imprisonment, as incarcerating so many individuals and for such long periods of time is incredibly expensive.<sup>3</sup> As a result,

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<sup>1</sup> See NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 2 (2014); cf. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2013*, at 7 tbl.6 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf> [<http://perma.cc/997R-WT5A>] (explaining that, “[o]n December 31, 2013, 1.2% of adult males, and 0.9% of males of all ages, were serving sentences in state or federal prison” and that “the imprisonment rate for U.S. residents of all ages was 478 sentenced prisoners per 100,000, and for U.S. residents age 18 or older it was 623 per 100,000”); Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER (Jan. 30, 2012), <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america> [<http://perma.cc/63MU-7KTY>] (“Over all, there are now more people under ‘correctional supervision’ in America—more than six million—than were in the Gulag Archipelago under Stalin at its height. That city of the confined and the controlled, Lockuptown, is now the second largest in the United States.”).

<sup>2</sup> See NAT’L RESEARCH COUNCIL, *supra* note 1, at 24-25, 34, 52-56 (examining the long prison sentences in U.S. prisons); see also Gopnik, *supra* note 1 (stating that “huge numbers of [American prisoners] are serving sentences much longer than those given for similar crimes anywhere else in the civilized world”).

<sup>3</sup> See Brad Plumer, *The War on Drugs is Breaking the Justice Department’s Budget*, WASH. POST (Aug. 12, 2013), <http://www.washingtonpost.com/news/wonkblog/wp/2013/08/12/prisons-are-breaking-the-justice-departments-budget/> [<http://perma.cc/9DMX-4X6V>]; *Rough Justice in America: Too Many Laws, Too Many Prisoners*, ECONOMIST (July 22, 2010), <http://www.economist.com/node/16636027/> [<http://perma.cc/G2N7-EDRL>]. See generally CHRISTIAN HENRICHSON & RUTH DELANEY, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS* (Jan. 2012), <http://www.vera.org/sites/default/files/>

sentencing reform is in the air. For example, just this year, bills were introduced in both the House and Senate that would roll back federal mandatory minimum sentences for some prisoners who have committed certain drug offenses.<sup>4</sup> Another proposed reform is the U.S. Department of Justice's clemency initiative, which encourages certain prisoners to petition the federal government for commutation and could result in clemency for thousands of nonviolent drug offenders.<sup>5</sup> But perhaps most revolutionary of all, the drafters of the Model Penal Code are proposing that judges be given the power to revisit certain offenders' sentences on the ground that society has had second thoughts about the seriousness of their offenses.<sup>6</sup>

The American Law Institute (ALI), which promulgates the Model Penal Code, has adopted a new provision that would authorize judges to reduce some severe sentences imposed by other judges over fifteen years ago.<sup>7</sup> This "second-look sentencing" provision is thought to have a number of positive effects, such as reducing incarceration and consequently decreasing governmental spending on incarceration.<sup>8</sup> It could also realign a number of long sentences with more recent assessments of offense seriousness. For example, many Americans now view drug offenses as much less serious than in previous decades. This can be seen in several states legalizing the use of marijuana<sup>9</sup> and

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resources/downloads/price-of-prisons-updated-version-021914.pdf [http://perma.cc/N3FY-4REA] (examining the cost of prisons to U.S. taxpayers).

<sup>4</sup> See Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015); Sentencing Reform Act of 2015 H.R. 3713, 114th Cong. (2015); Smarter Sentencing Act of 2014, S. 1410, 113th Cong. (2014).

<sup>5</sup> See *New Clemency Initiative*, DEPT OF JUST., <http://www.justice.gov/pardon/new-clemency-initiative.html> [http://perma.cc/2LWJ-YWF5] (last updated Apr. 22, 2015); Sari Horwitz & Katie Zezima, *Justice Department Prepares for Clemency Requests from Thousands of Inmates*, WASH. POST (Apr. 21, 2014), [https://www.washingtonpost.com/world/national-security/justice-department-prepares-for-clemency-requests-from-thousands-of-inmates/2014/04/21/43237688-c964-11e3-a75e-463587891b57\\_story.html](https://www.washingtonpost.com/world/national-security/justice-department-prepares-for-clemency-requests-from-thousands-of-inmates/2014/04/21/43237688-c964-11e3-a75e-463587891b57_story.html) [http://perma.cc/7WLN-VELP]. According to some commentators, this "effort has gone almost nowhere." *President Obama and the Power of Mercy*, N.Y. TIMES (Oct. 1, 2015), <http://www.nytimes.com/2015/10/01/opinion/president-obama-and-the-power-of-mercy.html> [http://perma.cc/HTV9-BRFN].

<sup>6</sup> See MODEL PENAL CODE: SENTENCING § 305.6 (AM. LAW INST., Tentative Draft No. 2, 2011). This article consistently cites to the publicly available version of section 305.6 that was approved by the American Law Institute membership in 2011. See *id.* As recently as September 2015, though, the drafters of section 305.6 have proposed further changes to the section. These changes are encompassed in a new draft that has not yet been approved by the ALI Council or membership. See MODEL PENAL CODE: SENTENCING § 305.6 (AM. LAW INST., Council Draft No. 5, 2015).

<sup>7</sup> See *id.*

<sup>8</sup> See *infra* Part I.

<sup>9</sup> Alaska, Colorado, Oregon, Washington, and the District of Columbia have all legalized marijuana for recreational use. See *State Marijuana Laws Map*, GOVERNING (June 19, 2015), <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> [http://perma.cc/PUS2-94ZV]. A number of other states have legalized

the Obama administration's plan to grant clemency to a large number of drug offenders.<sup>10</sup> Considering these benefits of second-look sentencing, it is not surprising that there is significant support for the new provision.<sup>11</sup> In fact, although the drafters have acknowledged that there are some costs to implementing the provision—primarily financial and political—there appears to have been no public criticism of it.<sup>12</sup>

This article provides a much-needed look at some questions raised by adopting a second-look sentencing approach. Preliminarily, the drafters have neglected the age-old interest in finality—a doctrine, though, that has been somewhat eroded in recent years.<sup>13</sup> More importantly, the drafters have based this novel second-look sentencing provision at least in part on the idea that Americans' views of offense seriousness evolve with time.<sup>14</sup> But history demonstrates that many of our moral views about criminal sentences are cyclical in nature; rather than evolving toward leniency—or in some other direction—Americans' views of offenses like drug use and sexual assault vacillate between very serious and not so serious.<sup>15</sup> And because these are moral views, it is difficult to determine which view, if any, is true or correct. There is little persuasive reason, then, to think that new sentencers will reach more accurate conclusions on offense seriousness than the original sentencers in any given case. In fact, the original sentencers are likely in a better position to determine an offender's desert, as they can often better assess the offender's

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the use of marijuana for medical purposes or decriminalized possessing small amounts of marijuana. *See id.*

<sup>10</sup> In fact, President Obama recently granted clemency to a large number of nonviolent drug offenders. *See* Sari Horwitz, *President Obama Commutes Sentences of 95 Federal Drug Offenders*, WASH. POST (Dec. 18, 2015), [https://www.washingtonpost.com/world/national-security/president-obama-commutes-sentences-of-about-100-drug-offenders/2015/12/18/9b62c91c-a5a3-11e5-9c4e-be37f66848bb\\_story.html](https://www.washingtonpost.com/world/national-security/president-obama-commutes-sentences-of-about-100-drug-offenders/2015/12/18/9b62c91c-a5a3-11e5-9c4e-be37f66848bb_story.html); Sari Horwitz & Juliet Eilperin, *Obama Commutes Sentences of 46 Nonviolent Drug Offenders*, WASH. POST (July 13, 2015), [https://www.washingtonpost.com/world/national-security/obama-commutes-sentences-of-46-non-violent-drug-offenders/2015/07/13/b533f61e-2974-11e5-a250-42bd812efc09\\_story.html](https://www.washingtonpost.com/world/national-security/obama-commutes-sentences-of-46-non-violent-drug-offenders/2015/07/13/b533f61e-2974-11e5-a250-42bd812efc09_story.html) [<http://perma.cc/26ST-3EU5>]; Ryan J. Reilly, *Obama Grants Clemency for Drug Offenders, Including Four Who Were Set to Die Behind Bars*, HUFFINGTON POST (Dec. 17, 2014, 5:00 PM), [http://www.huffingtonpost.com/2014/12/17/obama-clemency-drug-defendants\\_n\\_6343722.html](http://www.huffingtonpost.com/2014/12/17/obama-clemency-drug-defendants_n_6343722.html) [<http://perma.cc/2CHD-M74K>].

<sup>11</sup> *See infra* Part II.

<sup>12</sup> To be fair, awareness of this proposal seems to be rather limited.

<sup>13</sup> *See* Margaret A. Berger, *Lessons from DNA: Restriking the Balance Between Finality and Justice*, in *DNA AND THE CRIMINAL JUSTICE SYSTEM: THE TECHNOLOGY OF JUSTICE* 112 (David Lazer ed., 2004) (“Undoubtedly, the demonstration that numerous defendants were wrongfully convicted has made the most dramatic inroad into the case for finality . . . .”); Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1636 (2008) (“DNA technology has eroded . . . finality.”).

<sup>14</sup> *See* MODEL PENAL CODE: SENTENCING § 305.6 (AM. LAW INST., Tentative Draft No. 2, 2011).

<sup>15</sup> *See infra* text accompanying notes 75-94.

culpability and the harm caused to the original public—the public against which the crime was actually committed. Although the new sentencer may be in a better position to assess whether, as time has passed, the offender has been rehabilitated or whether he still poses a danger to society, these are questions rooted in utilitarianism rather than in the retributive concern of offense seriousness. However, the Model Penal Code spells out the importance of retributivism in determining an offender's sentence. Adopting a limiting retributivist approach, the Code directs sentencers to base their sentencing determinations on the offender's desert and, "when reasonably feasible," utilitarian considerations within the limits of the offender's desert.<sup>16</sup> Despite this directive, the new second-look sentencing approach runs astray of retributivism, as retributivism does not soundly support modifying offenders' sentences based on evolving views of offense seriousness. While utilitarian considerations may certainly justify second-look sentencing, and while second-look sentencing may very well be a useful innovation, retributivism does not substantiate this new approach. Reliable assessments of an offender's desert best lie with the decisionmakers in place around the time the crime was committed.

## I. SECOND-LOOK SENTENCING

Drafters of the new Model Penal Code on sentencing have devised a provision that would allow judges to reduce offenders' fifteen-year-old sentences. Section 305.6 of the draft Code provides:

1. The legislature shall authorize a judicial panel or other judicial decisionmaker to hear and rule upon applications for modification of sentence from prisoners who have served 15 years of any sentence of imprisonment.
2. After first eligibility, a prisoner's right to apply for sentence modification shall recur at intervals not to exceed 10 years.
- ...
4. Sentence modification under this provision should be viewed as analogous to a resentencing in light of present circumstances.<sup>17</sup> The

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<sup>16</sup> See MODEL PENAL CODE: SENTENCING § 1.02(2) (AM. LAW INST., Tentative Draft No. 1, 2007).

<sup>17</sup> The comments explain that "the judicial decisionmaker should engage in a thought process that resembles a de novo sentencing decision." MODEL PENAL CODE: SENTENCING § 305.6 cmt. f (AM. LAW INST., Tentative Draft No. 2, 2011). "The decisionmaker should not be expected to reconstruct the reasoning behind the original sentence, or critique the decision of the sentencing judge many years before. . . . [T]he purpose of § 305.6 is not to review the correctness of the original sentence." *Id.*

inquiry shall be whether the purposes of sentencing [which focus on retribution but also include other secondary purposes such as deterrence, incapacitation, and rehabilitation]<sup>18</sup> would better be served by a modified sentence than the prisoner's completion of the original sentence. The judicial panel or other judicial decisionmaker may adopt procedures for the screening and dismissal of applications that are unmeritorious on their face under this standard.

5. The judicial panel or other judicial decisionmaker shall be empowered to modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence. The sentence-modification authority under this provision shall not be limited by any mandatory-minimum term of imprisonment under state law.<sup>19</sup>

In sum, the draft Code encourages jurisdictions to adopt legislation authorizing the sentencing court to modify the sentences of offenders who were sentenced at least fifteen years earlier.<sup>20</sup>

The comments to the draft Code state that there are two primary reasons that prompted the drafters to fashion such a novel approach. First, the drafters were concerned about the “extraordinarily long sentences” imposed in American criminal cases.<sup>21</sup> Indeed, the incarceration rate in the United States is vastly greater than that of other western democracies,<sup>22</sup> and long

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<sup>18</sup> The actual text of the provision states that “[t]he inquiry shall be whether the purposes of sentencing *in § 1.02(2)* would better be served by a modified sentence than the prisoner's completion of the original sentence.” MODEL PENAL CODE: SENTENCING § 305.6 (AM. LAW INST., Tentative Draft No. 2, 2011) (emphasis added). Section 1.02(2) provides:

The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are:

(a) in decisions affecting the sentencing of individual offenders:

(i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders;

(ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i); and

(iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii) . . . .

MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i)-(iii) (AM. LAW INST., Tentative Draft No. 1, 2007).

<sup>19</sup> MODEL PENAL CODE: SENTENCING § 305.6 (AM. LAW INST., Tentative Draft No. 2, 2011).

<sup>20</sup> *See id.*

<sup>21</sup> *Id.*

<sup>22</sup> *See id.* cmt. a (“American criminal-justice systems make heavy use of lengthy prison terms—dramatically more so than other Western democracies—and the nation's reliance on these severe penalties has greatly increased in the last 40 years.”). The draft

prison sentences—especially for drug offenses—regularly span decades.<sup>23</sup> Second, the drafters stated that “[section] 305.6 is rooted in the belief that governments should be especially cautious in the use of their powers when imposing penalties that deprive offenders of their liberty for a substantial portion of their adult lives.”<sup>24</sup> Pursuant to this concern, the drafters opined that section 305.6 “reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still.”<sup>25</sup> They explained that “[a] second-look mechanism [like section 305.6] is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition.”<sup>26</sup> The drafters’ concerns about sentence length and humility in sentencing are the centerpiece of this proposal.

Despite the drafters’ finding that there is a pressing need for a second-look provision like section 305.6, the drafters identified some costs to enacting such a provision. First, substantial financial costs could be involved in implementing this approach.<sup>27</sup> Providing resentencing for all offenders—or those who apply for resentencing—who have sentences extending beyond fifteen years will require additional time and resources from already overburdened judges (or other decisionmakers).<sup>28</sup> Second,

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Code states that “[a]s a proportion of its population, the United States in 2009 confined” dramatically more people than many other democratic nations. *Id.* It confined “5 times more people than the United Kingdom (which has Western Europe’s highest incarceration rate), 6.5 times more than Canada, 9 times more than Germany, 10 times more than Norway and Sweden, and 12 times more than Japan, Denmark, and Finland.” *Id.*

<sup>23</sup> See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 711 (2005) (explaining that “[s]ome of the most notorious examples [of anti-rescidivist statutes and mandatory minimums] involve low-level drug offenders and other minor criminals sentenced to years or even decades in federal prison”); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 170 (2012) (stating that “defendants [are] sentenced to decades in prison for relatively minor theft or drug offenses”); Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POLY 83, 111 (2003) (“For both violent offenders . . . or the non-violent drug offenders who fill our nation’s prisons in record numbers, a decades-long prison sentence is not unusual.” (footnote omitted)).

<sup>24</sup> MODEL PENAL CODE: SENTENCING § 305.6 cmt. a (AM. LAW INST., Tentative Draft. No. 2, 2011).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Early versions of section 305.6 called on the original sentencing court to engage in resentencing. *See id.* There were significant doubts among the membership of the ALI, though, that this would work in some jurisdictions. *See id.* There was concern that this approach “would add to the workload of already overburdened trial courts” and “that trial judges in some jurisdictions would treat sentence-modification applications as nuisances, of far lower priority than their pending cases, and would feel pressure to dispose of the bulk of cases on the papers alone, without a hearing or counsel.” *Id.* cmt. d. Further, there was concern about the political vulnerability of some judges and the possible “politically charged” nature of second-look decisions, and that this would cause “timorous judges [to] fail to act on meritorious applications” and “that courageous judges

there are “predictable political risks” associated with asking judges (or other decisionmakers) to shorten some offenders’ sentences.<sup>29</sup> As the comments to section 305.6 explain, “[d]ecisions to release prisoners short of their maximum available confinement terms are often unpopular, and even one instance of serious reoffending by a releasee can focus overwhelming negative attention upon the releasing authority.”<sup>30</sup> Additionally, there is the concern that section 305.6 may do very little to curb the troublesome burgeoning imprisonment rates in the United States because only offenders who might serve more than fifteen years in prison are eligible for resentencing.<sup>31</sup> The commenters estimated that only about two or three percent of offenders will be able to take advantage of the provision.<sup>32</sup> The commenters also noted, however, that, “in standing populations,” these offenders will be more numerous simply because they do not cycle through the corrections system as quickly.<sup>33</sup> This heightens the impact that the provision could have on rates of imprisonment. In all, the drafters have concluded that the benefits of implementing section 305.6 outweigh the costs. In fact, there has been a remarkable consensus that a second-look approach like the one envisioned by section 305.6 is necessary in our criminal justice system.<sup>34</sup>

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would be voted out of office.” *Id.* Because of these concerns, the drafters of section 305.6 broadened the possible choice of decisionmakers to “a judicial panel or other judicial decisionmaker” to encourage jurisdictions to think more broadly about what approach might work best for them. *See id.* cmts. a, d.

<sup>29</sup> *Id.* cmt. a.

<sup>30</sup> *Id.* The judges of the ALI seemed so concerned about these political risks that they convinced the membership to revise an earlier draft of section 305.6 that placed second-look authority squarely in the courts that originally sentenced the offender. *See* MODEL PENAL CODE: SENTENCING 17-18 (AM. LAW INST., Discussion Draft No. 3, 2010); *see also* MODEL PENAL CODE: SENTENCING § 305.6 cmt. d (AM. LAW INST., Tentative Draft No. 2, 2011) (“In early drafts of the second-look provision, the sentence-modification power was to be reposed in ‘a trial court of the jurisdiction in which the prisoner was sentenced.’”).

<sup>31</sup> *See* MODEL PENAL CODE: SENTENCING § 305.6 cmt. a (AM. LAW INST., Tentative Draft No. 2, 2011).

<sup>32</sup> *See id.* (“In most existing American criminal-justice systems, offenders with such sentences make up a tiny fraction of all prison admissions—probably on the order of two or three percent in most states.”).

<sup>33</sup> *Id.*

<sup>34</sup> *See id.* cmt. c (noting the “near consensus within the Institute that 15 years was the proper time period for engagement of the second-look authority”); MODEL PENAL CODE: SENTENCING 14 (AM. LAW INST., Discussion Draft No. 3, 2010) (“We may begin with a foundation of relative consensus. At the broadest conceptual level—before thorny implementation details are placed in issue—there has been consistent majority sentiment among the Advisers, [Members Consultative Group], and Council that a second-look provision of one kind or another, targeted at extremely long prison sentences, should be included in the [Model Penal Code: Sentencing.]”); Margaret Colgate Love & Cecelia Klingele, *First Thoughts about “Second Look” and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859, 873-74 (2011) (“[T]here now appears to be consensus that courts must have some power to reexamine a lengthy sentence after a period of years, particularly if the public mood that produced a particularly harsh sentence has mellowed or the overall legal environment has changed.”).



One potential drawback of second-look sentencing that the drafters failed to mention but that they likely did not fail to consider is that section 305.6 undermines the doctrine of finality—the notion that a conviction or sentence should be considered settled and should not be revisited once the ordinary course of legal appeals has concluded.<sup>35</sup> This finality interest is considered important for several reasons. First, finality is valuable for promoting deterrence.<sup>36</sup> The severity, certainty, and swiftness of punishment have been said to be central components of deterrence, so undermining the severity and certainty of punishment—or even maybe the certainty of the extent of punishment—could undermine the deterrence value of punishment.<sup>37</sup> Finality is also said to serve the government’s “punitive interests,” meaning that when a conviction or sentence is revisited at some later time, it may be difficult for the government to prove its case because witnesses’ memories fade and evidence disappears as time passes.<sup>38</sup> It has also been suggested that finality furthers rehabilitation.<sup>39</sup> The

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<sup>35</sup> See Meghan J. Ryan, *Finality and Rehabilitation*, 4 WAKE FOREST J.L. & POL’Y 121, 123 (2014) [hereinafter Ryan, *Finality*]. Note, however, that “[t]he doctrine of finality is somewhat difficult to circumscribe.” *Id.* at 122.

<sup>36</sup> See *Teague v. Lane*, 489 U.S. 288, 309 (1989) (“Without finality, the criminal law is deprived of much of its deterrent effect.”); Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 606 (2002); Ryan, *Finality*, *supra* note 35, at 125-26.

<sup>37</sup> See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 71 (2005) (“General deterrent effects depend on a number of factors: the severity of the penalty; the swiftness with which it is imposed; the probability of being caught and punished . . . .”); Harold G. Grasmick & George J. Bryjak, *The Deterrent Effect of Perceived Severity of Punishment*, 59 SOC. FORCES 471, 486 (1980) (finding that “perceived severity of punishment . . . is a significant variable” in deterrence and that this “effect . . . is concentrated among those people who believe the certainty of punishment is relatively high”); Mark A.R. Kleiman, *Community Corrections as the Front Line in Crime Control*, 46 UCLA L. REV. 1909, 1918 (1999) (enumerating “severity, certainty, [and] swiftness” as “the routes to increased deterrence”). Today, however, there is significant skepticism as to whether severity of sentences furthers deterrence. See, e.g., Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 146, 189 (2003) (“[N]o consistent body of literature has developed over the last twenty-five to thirty years indicating that harsh sanctions deter.”). *But cf.* Grasmick & Bryjak, *supra*, at 486; Steven Klepper & Daniel Nagin, *The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited*, 27 CRIMINOLOGY 721, 741 (1989) (“In the conventional nomenclature of the deterrence literature, our findings suggest that both the certainty and severity of punishment are deterrents, whereas prior findings generally suggest that only the former is an effective deterrent.”).

<sup>38</sup> See *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986) (Powell, J., concurring); Ryan, *Finality*, *supra* note 35, at 125.

<sup>39</sup> See Ryan, *Finality*, *supra* note 35, at 126. This sentiment may be contrary to views held by many modern criminal justice scholars because rehabilitation is often thought to be furthered by an indeterminate sentencing system. The notion that finality furthers rehabilitation rests on the rationale that “[b]y remaining firm on the matter of the offender’s conviction, [finality] allows the offender to turn inward and begin working on himself rather than continuing to focus on the fight to have his conviction overturned.” *Id.*; see also *Kuhlmann*, 477 U.S. at 453 (Powell, J., concurring) (stating that “finality serves the State’s goal of rehabilitating those who commit crimes because “[r]ehabilitation

certainty and finality of a punishment is often essential for an offender to accept conviction and punishment, and instead of continuing to fight for his innocence or more lenient sentencing, he can focus his attention inward on his own transformation.<sup>40</sup> Further, finality preserves limited governmental resources.<sup>41</sup> As the drafters of section 305.6 recognized, second-look sentencing will require considerable resources because, pursuant to the provision, a group of offenders will be entitled to resentencing, which requires additional court time and possibly even government-funded attorneys.<sup>42</sup> Lastly, finality is also said to provide closure for victims.<sup>43</sup> It limits the number of times that victims must recount their stories. Under section 305.6, though, victims may feel pressured to once again publicly share their victimizations.<sup>44</sup> These many justifications for finality help explain why the long-respected doctrine can be found woven into many aspects of criminal law and procedure. The Antiterrorism and Effective Death Penalty Act of 1996, for example, places significant limitations on the petitions for writs of habeas corpus that federal courts may consider, because the drafters were

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demands that the convicted defendant realize that he is justly subject to sanction, that he stands in need of rehabilitation” (quoting *Engle v. Isaac*, 465 U.S. 107, 128 n.32 (1982))).

<sup>40</sup> See *Kuhlmann*, 477 U.S. at 453 (Powell, J., concurring); Ryan, *Finality*, *supra* note 35, at 126. In examining the relationship between finality and rehabilitation, though, it is important to scrutinize the type of rehabilitation that is sought. See Ryan, *Finality*, *supra* note 35, at 144-49. Terms such as “rehabilitation” and “reformation” are often used interchangeably in the criminal justice literature. See Meghan J. Ryan, *Science and the New Rehabilitation*, 3 VA. J. CRIM. L. 261, 264-65 n.3 (2015) [hereinafter Ryan, *New Rehabilitation*]. It is important to distinguish between change in the offender’s character and change in the offender’s behavior, though. See Ryan, *Finality*, *supra* note 35, at 144-49. While it may be difficult in practice to determine whether an offender’s character or behavior has changed, whether they have both changed, or whether neither has changed, understanding the relationship between this change and finality is important to determine whether finality might bolster or undercut these goals. See *id.*

<sup>41</sup> See Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148-49 (1970) (arguing that “the most serious single evil with today’s proliferation of collateral attack is its drain upon the resources of the community”); Ryan, *Finality*, *supra* note 35, at 126.

<sup>42</sup> See MODEL PENAL CODE: SENTENCING § 305.6 cmt. a (AM. LAW INST., Tentative Draft No. 2, 2011). Section 305.6(3) provides that “[t]he department of corrections shall ensure that prisoners are notified of their rights under th[e] provision, and have adequate assistance for the preparation of applications, which may be provided by nonlawyers.” *Id.* The provision further states that “[t]he judicial panel or other judicial decisionmaker shall have discretion to appoint counsel to represent applicant prisoners who are indigent.” *Id.*

<sup>43</sup> See Seth F. Kreimer, *Truth Machines and Consequences: The Light and Dark Sides of “Accuracy” in Criminal Justice*, 60 N.Y.U. ANN. SURV. AM. L. 655, 655-56, (2004); Kreimer & Rudovsky, *supra* note 36, at 606; Ryan, *Finality*, *supra* note 35, at 126.

<sup>44</sup> See MODEL PENAL CODE: SENTENCING § 305.6 cmt. h (AM. LAW INST., Tentative Draft No. 2, 2011); Ryan, *Finality*, *supra* note 35, at 126-27; Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 MD. L. REV. 545, 585 (2009) (noting “AEDPA’s goal of promoting . . . finality”). Finality also serves the interests of comity and federalism in some circumstances. See Ryan, *Finality*, *supra* note 35, at 126-27; Traum, *supra*, at 585.

concerned about maintaining—or bolstering—the finality of convictions.<sup>45</sup> The finality interest is so strong that several courts have even concluded that preserving finality trumps examining colorable claims that convicted offenders are actually innocent and were wrongly convicted.<sup>46</sup> Considering the historical importance of finality, it is surprising that the drafters failed to mention it.

Second-look sentencing's effects on finality, consumption of governmental resources, potential political divisiveness, and other costs may be significant, but that does not necessarily mean that second-look sentencing is unjustified. Indeed, the thoughtful drafters of section 305.6 have determined that the benefits of the provision outweigh the costs, and the ALI has already adopted the draft provision, which would encourage jurisdictions to embrace second-look sentencing.

## II. TREMENDOUS SUPPORT FOR SECOND-LOOK SENTENCING

The consensus in support of section 305.6 extends beyond the membership of the ALI; it seems that everyone who has commented on the provision supports it.<sup>47</sup> Most of the arguments in favor of section 305.6 parallel the explanations provided in comments to the draft provision. For example, pardon attorney Margaret Colgate Love and Professor Cecelia Klingele have

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<sup>45</sup> See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in various sections of the U.S. Code); Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1258 (2013) (“AEDPA, more than previous congressional limitations on habeas corpus, significantly limits the circumstances under which detained individuals may bring petitions for the writ. Relying on AEDPA, courts have identified three overarching concerns that justify these limitations on bringing such a petition: federalism, comity, and finality.” (footnote omitted)) [hereinafter Ryan, *Death and Rehabilitation*].

<sup>46</sup> See Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Meaning of the Eighth Amendment*, 2016 U. ILL. L. REV. (forthcoming 2016); see also, e.g., Noel v. Norris, 322 F.3d 500, 504 (8th Cir. 2003) (relying on the Court’s “reluctance . . . to extend relief to defendants who might prove their ‘actual innocence,’” and the Court’s “observation that [c]laims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity than do claims that focus solely on the erroneous imposition of the death penalty,” to conclude that “*Herrera* offers . . . [nothing] to defendants advancing freestanding claims of newly discovered mitigating evidence” (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)); *Robison v. Johnson*, 151 F.3d 256, 267 (5th Cir. 1998) (rejecting a defendant’s claim based on newly discovered evidence because “‘the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus,’ and ‘the Supreme Court’s *Herrera* opinion does not alter this entrenched habeas principle” (quoting *Lucas v. Johnson*, 132 F.3d 1069, 1074 (5th Cir. 1998)); *Lardie v. Birkett*, No. 05-CV-74766-DT, 2008 WL 474072, at \*3 (E.D. Mich. Feb. 19, 2008) (noting that “the Sixth Circuit has ruled that a free-standing claim of actual innocence based upon newly-discovered evidence does not warrant federal habeas relief” (citing *Wright v. Stegall*, No. 05-2419, 2007 WL 2566047, at \*2-3 (6th Cir. Sept. 5, 2007))).

<sup>47</sup> Perhaps not surprisingly, however, there is quite a bit of overlap between ALI membership and commentators on section 305.6.

highlighted these same virtues of a second-look approach and concluded that an approach such as the one set forth in section 305.6—one that is “principled and fair” and offers “expedien[cy]”—“is one worthy of emulation.”<sup>48</sup> Professor Sarah French Russell has offered another justification for the provision, explaining that “[e]xposing judges to stories of rehabilitation”<sup>49</sup>—something made more possible under section 305.6—“humanizes individuals convicted of serious crimes, and demonstrates to judges that people are capable of change—even when they have committed horrific acts.”<sup>50</sup> As a result, “[t]hese narratives . . . may make judges more reluctant in future cases to give up entirely on individuals at the time of sentencing.”<sup>51</sup>

Professor Richard Frase has perhaps most thoroughly analyzed the implications of adopting a second-look sentencing approach. In an article in the *Federal Sentencing Reporter*, Frase elaborated on the justifications for second-look sentencing.<sup>52</sup> He stated that our current “system openly tolerates very long sentences that have become unjustified due to changed circumstances.”<sup>53</sup> There are “numerous, valid grounds for sentence modification,” he said, and they “must be accommodated[] to avoid the injustice and waste of sentences that no longer fit the crime and/or the offender.”<sup>54</sup> Like the drafters of section 305.6, Frase also acknowledged some of the concerns with adopting such a second-look provision. First, Frase reiterated that adopting such a provision could impose tremendous costs on a state.<sup>55</sup> He explained that because section 305.6 does not appoint a gatekeeper to limit the petitions for resentencing pursuant to this

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<sup>48</sup> Love & Klingele, *supra* note 34, at 877. Elsewhere, Professor Klingele concludes that “judicial sentence modification promises to be the most legitimate, and hence the most sustainable, early release mechanism available today.” 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, 536 (2010).

<sup>49</sup> Sarah French Russell, *A “Second Look” at Lifetime Incarceration: Narratives of Rehabilitation and Juvenile Offenders*, 31 QUINNIPIAC L. REV. 489, 519 (2013).

<sup>50</sup> *Id.*; see also Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL’Y 179, 207-08 (2014) (stating that “[s]entence modification procedures have a sound basis in theory,” that “they offer a measure of transparency and public accountability not present in other back-end mechanisms for release,” and that “[t]here is considerable merit in ‘second look’ and similar procedures”).

<sup>51</sup> See Russell, *supra* note 49, at 519.

<sup>52</sup> See Richard S. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT’G REP. 194, 196-99 (2009).

<sup>53</sup> *Id.* at 200.

<sup>54</sup> *Id.* at 201.

<sup>55</sup> See *id.* at 200 (commenting on an earlier draft of section 305.6—Council Draft No. 2, 2008—that also mentions the costs of implementing the provision); see also Love & Klingele, *supra* note 34, at 875 (noting that the most recent draft of the provision—as of summer 2011—“acknowledge[d] that there will be a variety of costs associated with revisiting sentences imposed many years earlier”).

provision, “it can be assumed that virtually all inmates will file a petition at some point after they have served fifteen years.”<sup>56</sup> While the volume of claims is difficult to estimate, it is not difficult to conclude that this could easily place a tremendous burden on courts’ resources.<sup>57</sup> Further, Frase pointed out that, to the extent that criminal defendants employ publicly funded counsel to assist them in petitioning for section 305.6 resentencings, this could be an additional drain on state resources.<sup>58</sup> Frase also suggested that providing for resentencing may be worthless in practice.<sup>59</sup> Just as it is difficult to predict the extent to which sentence-modification proceedings will drain state resources, it is difficult to predict how courts will actually apply a provision like section 305.6.<sup>60</sup> State courts may apply such a provision so narrowly as to provide sentencing relief in only a tiny fraction of cases.<sup>61</sup> This may cause criminal defendants to become disillusioned with the practice and may actually increase disfavored sentencing disparities among criminal offenders.<sup>62</sup> Moreover, Frase contended, if courts only rarely reduce sentences based upon the changed circumstances as authorized by section 305.6, then the tremendously long sentences that currently plague our nation will not be resolved.<sup>63</sup> The final concern with adopting a section 305.6-like provision that Frase identified is that creating such a safety valve at the back end of sentencing for criminal defendants removes an incentive for judges to remain accountable for the sentences they impose rather than kowtow to the political pressures of being tough on crime.<sup>64</sup> Drawing an analogy to the safety valve of parole for harsh sentencing in indeterminate sentencing systems, Frase suggested that the existence of such a back-end release may translate into judges imposing more severe sentences than if no such safety valve were to exist.<sup>65</sup> Despite all of these concerns, however, Frase concluded

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<sup>56</sup> Frase, *supra* note 52, at 200.

<sup>57</sup> *See id.*

<sup>58</sup> *See id.*; *see also* MODEL PENAL CODE: SENTENCING § 305.6 (3) (AM. LAW INST., Tentative Draft No. 2, 2011) (offering the current draft’s position on publicly funded counsel under the provision).

<sup>59</sup> *See* Frase, *supra* note 52, at 200 (asking: “Even if hearings are granted with some frequency (and especially if they are not), will inmates rarely see much (or any) reduction in their sentences?”).

<sup>60</sup> *See id.*

<sup>61</sup> *See id.*

<sup>62</sup> *See id.* (“If relief is highly sporadic, inmates will be (further) disillusioned . . . and the rare instances of relief will introduce a new form of disparity.”).

<sup>63</sup> *See id.* (“If relief is highly sporadic, . . . unjustified lengthy sentences will remain in force . . .”).

<sup>64</sup> *See id.*

<sup>65</sup> *Id.* at 200 (“State experience with parole-abolition guidelines suggests that when front-end decision makers have to take responsibility for these consequences [of

that the justifications for adopting a provision like section 305.6 outweigh these disadvantages and that adopting such a provision is essential “to avoid the injustice and waste of sentences that no longer fit the crime and/or the offender.”<sup>66</sup> This position appears to represent a consensus among legal commentators on the issue.

### III. RETRIBUTION AND THE ORIGINAL PUBLIC

It is perhaps not surprising that section 305.6 has received such an enthusiastic response. To the membership of the ALI, many sentencing experts, and a good part of the general public, the staggering number of individuals incarcerated in America is incredibly concerning.<sup>67</sup> Further, the goals that the drafters have explained as undergirding section 305.6 seem laudable: decreasing rates of incarceration in America, correcting misconceptions about the seriousness of certain criminal offenses, and improving sentences to comport with new and better data about rehabilitation and future dangerousness.<sup>68</sup> Sure, the drafters have identified some drawbacks of section 305.6—such as the costs it may impose on courts and that it could fuel criticisms of judicial decisionmakers employing the provision—but the drafters have concluded that these costs are justifiable in light of the section’s worthy goals.<sup>69</sup> And indeed they very well may be. There is at least one concern implicated by section 305.6, though, that has not really been discussed: that section 305.6 undermines the importance of the original sentencer’s determination of the seriousness of the criminal offense at issue.<sup>70</sup>

The comments to section 305.6 explain that “societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation or comparable

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excessive punishment, spiraling costs, and overcrowding], they tend to legislate, charge, and impose fewer very severe penalties.”)

<sup>66</sup> *Id.* at 201.

<sup>67</sup> See MODEL PENAL CODE: SENTENCING § 305.6 cmt. a (AM. LAW INST., Tentative Draft No. 2, 2011) (stating that “[t]he Institute calls for a new approach to prison release in cases of extraordinarily long sentences [because] . . . American criminal-justice systems make heavy use of lengthy prison terms—dramatically more so than other Western democracies—and the nation’s reliance on these severe penalties has greatly increased in the last 40 years”); *supra* text accompanying notes 1-2.

<sup>68</sup> See generally MODEL PENAL CODE: SENTENCING § 305.6 cmts. a, b (AM. LAW INST., Tentative Draft No. 2, 2011) (explaining some of the reasons for creating section 305.6).

<sup>69</sup> See *supra* Part I.

<sup>70</sup> The Model Penal Code suggests that it is the community’s assessment of offense seriousness that matters. See MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. b (AM. LAW INST., Tentative Draft No. 1, 2007) (noting that “proportionality limitations in a democratic society are best derived through cooperative and collective assessments of community sentiment”).

periods.”<sup>71</sup> They enlist “drug offenses, homosexual acts as criminal offenses, . . . [battered-spouse homicides], euthanasia[,] assisted suicide[,] . . . witchcraft, heresy, adultery, the sale and consumption of alcohol, and the rendering of aid to fugitive slaves” as examples of this phenomenon.<sup>72</sup> With respect to many of these examples, the societal shift in the perception of offense seriousness is virtually undebatable. With respect to other examples—such as drug offenses and assisted suicide—less of a consensus exists among the current public that the seriousness of these offenses has dwindled over time. The comments rightly state, though, that “[i]t 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>73</sup> Throughout time, in this nation and across cultures, moral values have changed.<sup>74</sup> It would be surprising if they do not continue to change as time progresses.

Although the drafters of section 305.6 astutely note that moral values change over time, any suggestion that past moral values become irrelevant as time marches forward is troublesome. Moreover, concluding that today’s moral values are somehow more true or correct than yesteryear’s moral values seems problematic. Just as the comments assert that “[i]t would be an error of arrogance and ahistoricism” to view our past offense-seriousness determinations as perfect or as reflecting timeless values, it similarly would be an error of arrogance and ahistoricism to generally view our current offense-seriousness determinations as more true or correct than those of years past. Any objective truth or correctness of offense-seriousness determinations seems

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<sup>71</sup> See MODEL PENAL CODE: SENTENCING § 305.6 cmt. b (AM. LAW INST., Tentative Draft No. 2, 2011).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See Paul Bloom, *How Do Morals Change?*, 464 NATURE 490 (2010) (“[O]ne of the most interesting aspects of human nature [is] that morals evolve.”); Frank Newport, *Five Things We’ve Learned About Americans and Moral Values*, GALLUP (June 8, 2015), <http://www.gallup.com/opinion/polling-matters/183518/five-things-learned-americans-moral-values.aspx> [<http://perma.cc/ZVH5-9A2B>] (“Norms surrounding behaviors relating to sexual behavior and reproduction have been shifting in the U.S. in recent years.”); Steve Stewart-Williams, *Did Morality Evolve?*, PSYCHOL. TODAY (May 2, 2010), <https://www.psychologytoday.com/blog/the-nature-nurture-nietzsche-blog/201005/did-morality-evolve> [<http://perma.cc/Y4CV-LW7A>] (noting that “moral beliefs sometimes change rapidly over time, both within individuals and within societies”); see also Moral Relativism, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 20, 2015), <http://plato.stanford.edu/entries/moral-relativism/> [<http://perma.cc/XQH6-GEMJ>] (explaining that, in philosophy, one aspect of moral relativism is the notion that different societies, and different people, may have varying moral views on a matter).

unachievable. In fact, history suggests that many of our views on the seriousness of offenses are cyclical in nature.<sup>75</sup>

Our experience with the criminalization of drug use is a good example of this cycle of perceived offense seriousness. There were only a handful of laws regulating or prohibiting drugs before the twentieth century, and enforcement of these laws was rather insignificant.<sup>76</sup> In the 1900s, however, drug laws became more onerous.<sup>77</sup> The Harrison Narcotic Drug Act, “the first major landmark of the drug wars,” was passed in 1914, and federal enactment and enforcement of drug laws subsequently began to swell.<sup>78</sup> Ensuing federal legislation introduced severe mandatory minimum sentences for drug offenses, heightened enforcement, and even authorized death as punishment for selling heroin to minors.<sup>79</sup> During this period, drug use waxed and waned, most notably marked by a large measure of acceptance of drug use among the middle class in the late 1960s and 1970s.<sup>80</sup> In 1971, though, President Nixon announced the country’s “War on Drugs.”<sup>81</sup> Federal efforts to stop drug use continued to grow, and sentences for violating the drug laws expanded, with the government imposing even more stringent mandatory minimum sentences for those convicted of violating drug laws.<sup>82</sup> Despite this steady growth of drug prohibition and enforcement, in recent

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<sup>75</sup> See Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1771 (1999) (“Human behaviors, values, and beliefs oscillate over time, moving back and forth between what are widely seen as fundamentally different positions.”).

<sup>76</sup> See LAWRENCE M. FRIEDMAN, CRIME & PUNISHMENT IN AMERICAN HISTORY 355 (1993) (“In the nineteenth century, . . . drug laws hardly mattered.”); see also DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL 8, 10 (1973) (explaining that “[s]tate laws designed to curb the abuse of morphine and cocaine came mostly in the last decade of the nineteenth century” and that “there was little effort until after 1900 to enact a federal law to control the sale and prescription of narcotics”); Richard C. Boldt, *Drug Policy in Context: Rhetoric and Practice in the United States and the United Kingdom*, 62 S.C. L. REV. 261, 271-72 (2010) (“Although there were several very early attempts by states and localities to legislate in this area, there were no significant legal restrictions on the distribution of narcotics until the 1890s.” (footnote omitted)).

<sup>77</sup> See FRIEDMAN, *supra* note 76, at 355 (explaining that, while drug laws were inconsequential in the nineteenth century, “[t]his situation changed radically in the twentieth century”).

<sup>78</sup> See *id.* at 355-57; PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 224 (1998) (noting that “drug scares . . . peaked in the critical year 1914, when the federal government effectively prohibited cocaine and opiate drugs, and in 1936-37, the time of the national regulation of marijuana”).

<sup>79</sup> See Narcotics Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567 (codified at 21 U.S.C. §§ 174-198a (Supp. 1957)), repealed by Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-971 (2006); Boldt, *supra* note 76, at 285-96.

<sup>80</sup> See JENKINS, *supra* note 78, at 224.

<sup>81</sup> See Boldt, *supra* note 76, at 286-87. Later that decade, though, President Carter called for the decriminalization of marijuana for personal use. See Tonry, *supra* note 75, at 1780. President Reagan later renewed the crusade by declaring a “War on Drugs” in 1982. Ryan, *Finality*, *supra* note 35, at 137.

<sup>82</sup> See FRIEDMAN, *supra* note 76, at 355-56; Boldt, *supra* note 76, at 287-88.



years, these efforts have reversed course. For example, sentences for drug crimes have been reduced;<sup>83</sup> former Attorney General Eric Holder has instructed federal prosecutors to refrain from charging certain low-level, nonviolent drug offenders with offense levels that would trigger mandatory minimum sentences;<sup>84</sup> the Obama administration has announced a plan to grant clemency to a large number of nonviolent drug offenders;<sup>85</sup> and some states have actually legalized the use of drugs such as marijuana.<sup>86</sup> The second-look sentencing provision of section 305.6 may also largely be aimed at reducing sentences of drug offenders,<sup>87</sup> bolstering this relatively recent about-face in perceptions about the seriousness of drug offenses.

A similar cyclical trend can be seen with the enactment and enforcement of sexual assault laws. There was very little focus on sexual offenses until the 1940s, when J. Edgar Hoover shined a light on the offense genre after a series of sexually

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<sup>83</sup> See, e.g., Kyle Graham, *Sorry Seems to Be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765, 765 (2011) (explaining that the 2010 Fair Sentencing Act, which Congress passed in 2010, “eliminated the five-year mandatory minimum prison sentence that previously adhered under federal law upon a conviction for possession of five grams or more of crack cocaine” and “increased the amount, in weight, of crack that must be implicated for either a five- or a ten-year mandatory minimum sentence to apply upon conviction of any of several federal drug trafficking crimes”); Press Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Votes To Reduce Drug Trafficking Sentences (Apr. 10, 2014), [http://www.uscc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410\\_Press\\_Release.pdf](http://www.uscc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410_Press_Release.pdf) [<http://perma.cc/68GQ-M4P3>] (“The United States Sentencing Commission voted today at a public meeting to reduce the sentencing guideline levels applicable to most federal drug trafficking offenders.”).

<sup>84</sup> See Memorandum from the Attorney General, Eric Holder, to the United States Attorneys and Assistant Attorney General for the Criminal Division (Aug. 12, 2013), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-convict-entitlements-in-certain-drugcases.pdf> [<http://perma.cc/KH6E-CULB>]; see also Sarah Childress, *Feds to Reconsider Harsh Prison Terms for Drug Offenders*, PBS (Apr. 9, 2014, 12:50 PM), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/locked-up-in-america/feds-to-reconsider-harsh-prison-terms-for-drug-offenders/> [<http://perma.cc/89TK-YBHX>] (“In August 2013, Attorney General Eric Holder announced a change in the charging policy for federal prosecutors, instructing them not to charge low-level, non-violent drug crimes with offenses that would trigger a mandatory minimum sentence.”).

<sup>85</sup> See Sari Horwitz, *Justice Department Prepares for Clemency Requests from Thousands of Inmates*, WASH. POST (Apr. 21, 2014), [https://www.washingtonpost.com/world/national-security/justice-department-prepares-for-clemency-requests-from-thousands-of-inmates/2014/04/21/43237688-c964-11e3-a75e-463587891b57\\_story.html](https://www.washingtonpost.com/world/national-security/justice-department-prepares-for-clemency-requests-from-thousands-of-inmates/2014/04/21/43237688-c964-11e3-a75e-463587891b57_story.html) [<http://perma.cc/9DE6-622F>]; *Clemency Project Overview and FAQs*, NAT’L ASS’N CRIM. DEF. LAW., <http://www.nacdl.org/clemencyproject/> [<http://perma.cc/R2ME-QC94>] (last visited Dec. 11, 2015); *supra* note 10 and accompanying text.

<sup>86</sup> See Josh Barro, *D.C., Oregon and Alaska Vote to Legalize Marijuana*, N.Y. TIMES (Nov. 3, 2014), [http://www.nytimes.com/2014/11/04/upshot/marijuana-on-the-ballot-in-florida-alaska-oregon-and-dc.html?\\_r=0](http://www.nytimes.com/2014/11/04/upshot/marijuana-on-the-ballot-in-florida-alaska-oregon-and-dc.html?_r=0) [<http://perma.cc/LXM3-6GVK>]; Niraj Chokshi, *Why 2014 Was the Year of Pot*, WASH. POST (Dec. 23, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/12/23/why-2014-was-the-year-of-pot/> [<http://perma.cc/8UEJ-CUMT>].

<sup>87</sup> See *supra* text accompanying note 72.

motivated murders of children.<sup>88</sup> Over the course of a couple of decades, states passed “sexual psychopathy” laws to treat sex offenders and return them to society.<sup>89</sup> As time passed, the pressing concern about sex offenses abated,<sup>90</sup> but then, led by feminists of the time, swelled again in the 1970s.<sup>91</sup> After once again subsiding, concern about sex offenses grew anew.<sup>92</sup> In the 1980s, punishing sexual assaults was once again set as a criminal justice priority.<sup>93</sup> And since approximately 1990, states have imposed more stringent sentences for sex offenders.<sup>94</sup>

Of course it is ordinarily difficult to discern whether differences in sentencing reflect changing views about offense seriousness or changing philosophical views on the purposes of punishment. Under the theory of retribution, the seriousness of a punishment should reflect the offender’s desert, but other considerations, like deterrence and rehabilitation, drive punishment under utilitarian views.<sup>95</sup> Retribution, or at least some version of it, can be tied to the earliest legal punishments.<sup>96</sup> In the early 1900s, though, utilitarian ideals crowded out

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<sup>88</sup> See Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 53 (1998); see also JENKINS, *supra* note 78, at 221, 224 (suggesting that sex crime panics occurred in the 1910s, 1940s, and 1980s; remarking that it is somewhat surprising that sex offenses were “treated with . . . relative indifference during the intervening decades”; and explaining that “[c]oncern about sex crimes was at its lowest during periods of relatively high tolerance for sexual experimentation, including the 1920s and especially the sexual revolution under way by the early 1960s”).

<sup>89</sup> See Lieb et al., *supra* note 88, at 53.

<sup>90</sup> See *id.* at 91 (noting that “sexual psychopathy laws came into general disfavor in the United States by the 1980s”).

<sup>91</sup> See *id.* at 53-54.

<sup>92</sup> See *id.* at 54.

<sup>93</sup> See JENKINS, *supra* note 78, at 190.

<sup>94</sup> See Lieb et al., *supra* note 88, at 44. Further, related civil laws, such as sex offender registration laws and civil commitment laws for sex offenders, have been passed in many states. See *id.*

<sup>95</sup> See MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW* 6 (1997) (describing “retributive justice theories” as those that have the purpose of “giv[ing] those who deserve punishment what they deserve”); LEO ZAIBERT, *PUNISHMENT AND RETRIBUTION* 214 (2006) (“To be a retributivist is to recognize that deserved punishment is an intrinsic good.”); Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1079 (1964) (explaining that utilitarian aims are achieved “through deterrence, incapacitation, rehabilitation, or some combination of these”); Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1942 (2010) (“The past half-century has seen a continuing debate between ‘retributivists,’ who view deserved punishment as a value in itself that does not require further justification, and ‘utilitarians’ (or ‘instrumentalists’), who see punishment as justified only if it brings about a greater good—typically the avoidance of future crime.”).

<sup>96</sup> See IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 13 (1989) (“The history of the retributive view of punishment begins with the biblical and talmudic ethical and legal ideas . . . .”); Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. 1049, 1053 (2012) (“The penological purpose of retribution was perhaps the first articulated justification for legal punishment.”) [hereinafter Ryan, *Proximate Retribution*].

retribution as the primary consideration in sentencing offenders.<sup>97</sup> During this period, many offenders received less stringent punishments than in the past. Retribution began gaining ground again in the mid-1970s, and the harshness of punishments generally ratcheted upward. This was especially the case with drug offenses and demonstrates that our views of punishment do not always evolve over time in the direction of leniency. Today, most legal scholars believe that retribution dominates sentencing determinations.<sup>98</sup> And retribution remains important under the Model Penal Code. According to the Code, “[t]he general purposes of the provisions on sentencing . . . [include] . . . render[ing] sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders.”<sup>99</sup> Only when it is “reasonably feasible” should sentencers consider utilitarian purposes of punishment such as deterrence and rehabilitation in sentencing offenders.<sup>100</sup> This approach to sentencing is known as “limiting retributivism,” and, not surprisingly, retributivism plays an important, and limiting, role in punishment under this theory.<sup>101</sup> Despite the importance of retributivism under the Code,

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<sup>97</sup> See Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1314-17 (2000); Ryan, *Proximate Retribution*, *supra* note 96, at 1055-56 (“[B]eginning in the late eighteenth and early nineteenth centuries, consequentialist theories of punishment—rehabilitation, deterrence, and incapacitation—challenged retribution’s position as the primary justification for punishment . . . . By the beginning of the twentieth century, consequentialist theories of punishment had firmly replaced retribution as the primary accepted justification for punishment.”).

<sup>98</sup> See Ryan, *Proximate Retribution*, *supra* note 96, at 1059 (“[T]oday, many scholars conclude that retributivism is the leading theory for justifying punishment.”); see also R A Duff, *In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekara*, 24 MELB. U. L. REV. 411, 411 (2000) (“A striking feature of penal philosophising during the last thirty years has been the revival of retributivism.”); James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL’Y REV. 173, 180-82 (2010) (arguing that “the [Federal Sentencing] Guidelines’ concern with offenders’ blameworthiness—a combination of harm caused, state of mind, and to a lesser extent, personal circumstances—reveals their focus on retribution or just deserts”).

<sup>99</sup> MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (AM. LAW INST. Tentative Draft No. 1, 2007).

<sup>100</sup> *Id.* § 1.02(2)(a)(ii). Further, in no instance shall a sentence “render sentences . . . more severe than necessary to achieve the[se] purposes.” *Id.* § 1.02(2)(a)(iii).

<sup>101</sup> See *id.* § 1.02(2) cmt. b (stating that the MPC “borrows” this approach from Norval Morris, who “called his theory ‘limiting retributivism,’ because it drew from retributive—or deontological—considerations to impose limits on the intrusiveness of utilitarian sentences”); NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 161 (1982) (“To the limiting retributivist, desert sets the outer limits, upper and lower, of punishment. It is the reflection of society’s official view of what the criminal deserves . . . .”); see also NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 58-80 (1974) (describing an earlier view of limiting retributivism).

utilitarian ideals are cycling back into fashion.<sup>102</sup> In this environment, commentators have expressed that many sentences are too long and much punishment is too harsh based on the offenses at issue. Section 305.6 may be a product of this current climate of perceived offense-seriousness abatement.

The indeterminable nature of offense seriousness is certainly problematic, and, to the extent that we care about retribution, we need to assess who is best positioned to accurately determine an offender's desert. Now, there are certainly manifold varieties of retribution. For example, Herbert Morris has argued that offenders deserve to be punished because they have shirked their share of the burdens of the self-restraint required of individuals in order to maintain law and order.<sup>103</sup> Punishment then restores the equal distribution of these burdens among citizens.<sup>104</sup> Jean Hampton has argued that when an individual commits a criminal offense, he sends a message to his victim that the victim is of lesser importance than him.<sup>105</sup> Punishment serves the purpose of expressing to the community that this message is untrue and that the victim is in fact of equal worth.<sup>106</sup> Understandings of retribution such as these, though, generally do not explain who should be responsible for assessing any particular offender's desert and thus determining the appropriate punishment for that offender. Professor Paul Robinson has explained that most moral philosophers gauge the amount of an offender's desert—at least to the extent that they attempt to do so—by their own moral intuitions.<sup>107</sup> This leads to the question of who should be determining desert for any particular offender within the criminal justice system. In practice, judges most often sentence offenders, although some jurisdictions employ jury sentencing (and all jurisdictions rely on juries to sentence in death penalty cases).<sup>108</sup> But do these judges possess superior

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<sup>102</sup> See Jonathan Simon et al., *Introduction*, in *AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION* 10 (Mary Louise Frampton et al. eds., 2008) (stating that “rehabilitation is back on the table”); Michael Tonry, *Purposes and Functions of Sentencing*, 34 *CRIME & JUST.* 1, 2 (2006); Ryan, *New Rehabilitation*, *supra* note 40, at 289-304.

<sup>103</sup> See Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475, 476-78 (1968).

<sup>104</sup> See *id.* It “restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt.” *Id.* at 478.

<sup>105</sup> See Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS* 12-13 (Wesley Cragg ed., 1992).

<sup>106</sup> See *id.*

<sup>107</sup> See Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 *CAMBRIDGE L.J.* 145, 148-49 (2008).

<sup>108</sup> See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 *VA. L. REV.* 311, 314-15 (2003) (“For decades, legal scholarship has been overwhelmingly skeptical toward the practice.”); Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments Clause Determinations*, 64 *FLA. L. REV.*

moral intuitions about desert? Judges are not ordinarily trained in the moral intuitions of desert.<sup>109</sup> They may have a sense of the typical sentence for the type of offense and offender at issue—due to the existence of sentencing guidelines or the general sentencing practices in the jurisdiction—but having a sense of what sentence may be typical differs from having a sense of what sentence is appropriate. Moreover, sentencing decisions usually do not explain what part of a sentence is due to desert considerations and what part is due to other concerns such as deterrence. Accordingly, judges' experience in sentencing is of limited use in determining what punishment an offender actually deserves. Robinson has argued that there is a better way to assess desert. Pursuant to his theory of empirical retributivism, an offender's desert is assessed based on "the *community's* intuitions of justice. The primary source of the principles [for assessing desert], then, is empirical research into those factors that drive people's assessments of blameworthiness."<sup>110</sup> As Robinson conceded, though, "[j]ust because the community's intuitions suggest certain punishment is doing justice, it does not make it so, even if there is a strong agreement on those intuitions."<sup>111</sup> Despite this concern, the Model Penal Code seems to have adopted an approach focused on the community's sense of desert.<sup>112</sup> It states that the "proportionality limitations," which are representative of retributive constraints, "are best derived through cooperative and collective assessments of community sentiment."<sup>113</sup> Still, within the current criminal justice system, there are limited options for ultimate deciders of desert, namely judges and juries. And their decisions are usually cabined by the desert decisions of legislatures, which set limitations on available punishments.

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549, 589 (2012) ("A handful of states employ jury sentencing . . . . There are good reasons for jurisdictions to engage in jury sentencing . . . . [.] but the overwhelming majority of jurisdictions leave sentencing to judges' discretion."). Interestingly, though, Alabama law allows a judge to override a jury's decision and impose capital punishment even though the jury determined that such a severe punishment was not warranted. See ALA. CODE § 13A-5-47(e) (1981). The Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), has called into doubt the constitutionality of this law, but, even after *Ring* was decided, Alabama judges continued to employ this judicial override. See EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE 16 (2011) (noting that, "in 2008, a [.] [judicial] election year, 30% of the death sentences imposed in Alabama were the result of judge override").

<sup>109</sup> See Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849, 872-73 (2014) (explaining that judges are not ordinarily trained in moral decisionmaking).

<sup>110</sup> Robinson, *supra* note 107, at 149 (emphasis added).

<sup>111</sup> *Id.*

<sup>112</sup> See MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. b (AM. LAW INST., Tentative Draft No. 1, 2007).

<sup>113</sup> *Id.*

The ALI's new provision on second-look sentencing expands the options for possible desert assessors by unwittingly highlighting that the options include current judges and juries, as well as the original judges and juries in cases. To the extent that we care about retribution, then,<sup>114</sup> we must pin the seriousness assessment to some point in time. The drafters of section 305.6 have adopted the current time—whenever that is—as the relevant time for assessing offense seriousness. If we were consistently inching toward greater truth and correctness, that might make sense. But recognizing the indeterminacy and moral relativeness of seriousness determinations suggests that a different point is more appropriate.

The best juncture for assessing the seriousness of an offense is the point in time at which the crime was committed, not fifteen or so years later when a section 305.6 resentencing is supposed to take place. The crime was committed against the public at *that* time; it was committed against *that* public—the original public—not against the current public. As a result, the original public—whether it is represented by a judge or jury sentencer at the offender's original trial—is often in a better position to determine the extent of the harm caused by the offense. Moreover, the original public—represented by the original judge or jury—may be more competent to assess the mental state of the offender, as *that* public has a better sense of what societal and moral pressures may have been at play in influencing offenders of that period. It should be this original public's assessment of seriousness that matters, rather than an assessment by a public against which the crime was not committed. While there may certainly be overlap between the constituencies of the original public and the current public, with at least fifteen years separating these two bodies, it is extremely unlikely that they will be identical.

That the original public's assessment of offense seriousness is the one that matters is not a novel concept; sentencing experts consistently describe retribution as backward looking in some respect.<sup>115</sup> An offender's desert is determined as of

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<sup>114</sup> See *supra* text accompanying note 99 (explaining that retribution remains important under the Model Penal Code).

<sup>115</sup> See Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 U. CHI. L. REV. 1, 15 (2003) ("It contends that retribution, a seemingly archaic, backwards-looking goal dismissed by the champions of rehabilitation at one end of the twentieth century and by the champions of 'crime control' at the other, merits recognition as the central purpose of criminal punishment."); Stephen P. Garvey, "As the Gentle Rain from Heaven": *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1012 (1996) ("[R]etributivism is deontological and backward-looking. In contrast to forward-looking consequentialist

the time he commits his crime. Future events are generally considered irrelevant to this desert determination.<sup>116</sup> The drafters' suggestion that already-sentenced offenders' deserts change with the times, then, ignores this fundamental backward-looking characteristic of retribution. Shifting the decisionmaking from the original judge or jury to a current one does not solve the philosophical conundrum as to what an offender's desert actually is. Further, it increases the distance between the offense and the desert assessor, thus generally making desert determinations more removed from those suffering harms stemming from the offense and the particular circumstances of the case. This runs the risk of ignoring the original public harmed by the offense.

Of course, even if the original public is better positioned to accurately assess desert, the variety of retributivism on which the Code and section 305.6 rest—limiting retributivism—acknowledges that our assessments of desert are shaky: “[W]e lack the moral calipers to say with precision [that] a given punishment . . . ‘was . . . just.’”<sup>117</sup> We can assess an offender's desert within only a particular range of certainty, but there is a risk of error surrounding these determinations. According to the

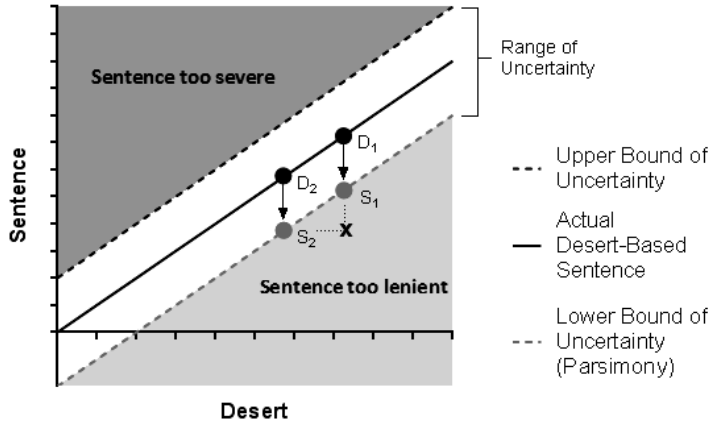
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approaches that justify punishment in the name of what might be, retributivism justifies punishment in the name of what has been. Punishment strictly predicated on moral desert is blind to the future.”) It is worth clarifying, however, that when retribution is referred to as “backward looking,” it seems that it is a reference to the fact that retribution is not concerned about the consequences flowing from punishment. It does not by definition state that the original public must determine desert or that a later public cannot revisit desert. Indeed, as I describe in the next paragraph, information that may be learned only later could possibly call for revisiting a desert determination. Further, certain niche applications of retributivism can be more forward looking. See Jeffrie G. Murphy, *Repentance, Punishment, and Mercy*, in REPENTANCE: A COMPARATIVE PERSPECTIVE 143, 149 (Amitai Etzioni & David E. Carney eds., 1997) (explaining that “[s]ometimes the wrongfulness of an act is a function of the harm that it brings to a victim, and sometimes this harm may be lessened through an act of repentance”); *infra* note 120 and accompanying text.

<sup>116</sup> There are some circumstances in which the future is relevant under a retributivist theory. See *supra* note 115. If sentencers have the ability to determine what additional harms the crime might cause in the future, for example, those harms—at least to the extent that they are legally relevant (or “proximate”) to the committed offense—should perhaps be considered in determining the offender's desert. See generally Ryan, *Proximate Retribution*, *supra* note 96 (suggesting the need for proximate cause analysis in determining which harms should be considered in determining an offender's just deserts).

<sup>117</sup> Norval Morris & Marc Miller, *Predictions of Dangerousness*, in 6 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 1, 37 (1985); see also MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. b (AM. LAW INST., Tentative Draft No. 1, 2007) (relying on Morris's theory of limiting retributivism); Christopher Slobogin, *Introduction to the Symposium on the Model Penal Code's Sentencing Proposals*, 61 FLA. L. REV. 665, 671 (2009) (noting that the draft Code “rejects not only the view that desert should be the sole determinant of disposition, but also the notion of some desert theorists that there is a single correct retributive punishment for each offender” (footnote omitted)).

well accepted principle of parsimony,<sup>118</sup> though, if there is uncertainty surrounding how much punishment an offender deserves, that offender should be sentenced to the least severe punishment within that range of uncertainty.



**Figure 1.** Displaying how sentences based on the principle of parsimony vary as assessments of desert change.

Thus, as displayed in Figure 1, if the defendant actually deserves a particular punishment ( $D_1$ ), because we cannot be certain about that level of desert, the defendant should receive the lowest sentence within the applicable range of uncertainty ( $S_1$ ). After a second look, however, a judge may very well find that the defendant is less deserving of punishment ( $D_2$ ) and therefore sentence him to the lowest possible punishment within the new applicable range of uncertainty ( $S_2$ ). Note that this new sentence ( $S_2$ ) lies outside the range of uncertainty based on the initial determination of desert ( $D_1$ ). Thus, if both sentencers abided by the parsimony principle, then, according to the initial desert assessment ( $D_1$ ), the second sentence ( $S_2$ ) lies outside the initial range of uncertainty. It is, by definition, a sentence that is too lenient according to the initial desert assessment ( $D_1$ ). If the principle of parsimony was not observed at the initial sentencing, and the second-look sentencing is employed just to correct this oversight, then there may be no retributive difficulty. But the draft's suggestion that the desert assessment may change over time seems to contemplate

<sup>118</sup> See MODEL PENAL CODE: SENTENCING § 1.02 cmt. f (AM. LAW INST., Tentative Draft No. 1, 2007) (noting that the Code “incorporates the principle of ‘parsimony’” and asserting that “[f]ew can disagree with the principle’s content”).



greater movement than just within the uncertainty range of the initial desert determination ( $D_1$ ).

Neglect of the parsimony principle in the initial sentencing of an offender is an example of an instance in which a second look at a sentence may be justified under a retributive framework. In this case and others, the passage of time between the commission of the offense and the determination of punishment could sometimes be useful in bringing to light new information that bears on determinations of offenders' just deserts and sentences. The harm caused by the offense and the offender's mental state are generally considered central to desert determinations.<sup>119</sup> As time continues on, new research and developments may reveal insights about how a particular victim, or the public in general, has been harmed by an offense. Research might also provide us with new information about the offender's psychological makeup that could affect the extent to which he engaged in the offense voluntarily or with the requisite mental state. Further, certain niche varieties of retributivism may incorporate new information into their desert calculi. For example, "character retributivism" views an offender's desert as "a function not merely of [his] wrongful acts, but also of the ultimate state of [his] character"<sup>120</sup>—something that could have evolved during his years of confinement. Under this distinctive view, an offender's rehabilitation—something ordinarily considered utilitarian in nature—might be a relevant reason to resentence. New information might also reveal that there were defects in an offender's original sentencing, such as that it was influenced by racism, sexism, or other illegitimate factors. It could also illuminate errors in translating actual desert into an imposed sentence, such as if it comes to light that the conditions of an offender's confinement are worse than the sentencer anticipated—or if they have become worse over time.<sup>121</sup> Under these circumstances, even an accurate assessment of desert could result in a sentence that was too harsh because the

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<sup>119</sup> See Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1408 (2002) (explaining that "[r]etributivism limits attention to an offender's mental state, conduct, and the harm he caused"); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1445 (2004) (stating that retributive punishment "should be commensurate to the seriousness of the wrong and [the offender's] blameworthiness in committing it"); Ryan, *Proximate Retribution*, *supra* note 96, at 1062-63.

<sup>120</sup> See Murphy, *supra* note 115, at 149. This forward-looking variety of retribution, though, is not widely accepted in practice. See John Tasioulas, *Repentance and the Liberal State*, 4 OHIO ST. J. CRIM. L. 487, 503 (2007) ("[C]haracter retributivism is a deeply problematic theory."); cf. Murphy, *supra* note 115, at 151 (stating that character retributivism does not often animate criminal codes but noting that the character examination it involves might be more relevant at sentencing).

<sup>121</sup> Whether such conditions of confinement are or should be considered relevant to desert determinations is debatable.

conditions of confinement were unknown at the time of sentencing. If new information can better inform desert assessments or the translation of desert into actual sentences, then revisiting the initial sentence may indeed be appropriate on retributive grounds. But changing societal assessments of desert based on wavering moral intuitions rather than new, relevant information is not a legitimate retributive ground on which to take a second look at offenders' sentences.

In some sense, the passage of time could also be useful in providing space to guard against sentencers acting inappropriately out of passion rather than remaining objective and neutral in assessing desert. A sentencing decision inflamed by passion could be more akin to one made out of vengeance than one rooted in retributivism, which is based on passionless and community-based notions of desert.<sup>122</sup> This idea of allowing punishers' inflamed passions to subside before deciding a defendant's life course is similar to the notion that pretrial publicity impedes a defendant's right to a fair trial. In the infamous case of *Sheppard v. Maxwell*,<sup>123</sup> for example, defendant Sam Sheppard—the doctor who allegedly “bludgeoned [his pregnant wife] to death” and whose story is said to have inspired the television series and film *The Fugitive*<sup>124</sup>—claimed that “the massive, pervasive and prejudicial publicity that attended his prosecution” deprived him of a fair trial.<sup>125</sup> The Supreme Court concluded that the “carnival atmosphere” of the courtroom did violate Sheppard's due process right to a fair trial and that courts can take a number of prophylactic measures to avert such a

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<sup>122</sup> See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 367 (1981) (stating that “[r]evenge involves a particular emotional tone, pleasure in the suffering of another, while retribution either need involve no emotional tone, or involves another one, namely, pleasure at justice being done”); Stephanos Bibas, *Criminal (In)justice and Democracy in America*, 126 *HARV. L. REV. F.* 134, 141 (2013) (stating that retribution “is a reflective, impartial, proportional moral judgment, while [revenge] is a hot, unchecked passion”); Ryan, *Proximate Retribution*, *supra* note 96, at 1053-56 (distinguishing vengeance from the “just deserts” of retributivism).

<sup>123</sup> *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

<sup>124</sup> See *Sam Sheppard Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/sam-sheppard-12987136> [<http://perma.cc/B93W-248T>] (last visited Dec. 11, 2015); cf. JACK P. DESARIO & WILLIAM D. MASON, *DR. SAM SHEPPARD ON TRIAL: THE PROSECUTORS AND THE MARILYN SHEPPARD MURDER* 7-8, 324 (2003) (noting that Sheppard was found not guilty in his second trial and also explaining that, in the later-filed civil suit seeking a declaration that Sheppard was innocent and had been wrongfully imprisoned, the state prevailed); Fox Butterfield, *DNA Test Absolves Sam Sheppard of Murder, Lawyer Says*, *N.Y. TIMES* (Mar. 5, 1998), <http://www.nytimes.com/1998/03/05/us/dna-test-absolves-sam-sheppard-of-murder-lawyer-says.html> [<http://perma.cc/4AWR-RTWV>] (“New DNA evidence taken from the exhumed body of Dr. Sam Sheppard provides the most compelling piece of evidence that he was wrongfully convicted of murdering his wife in a trial that transfixed America more than four decades ago . . .”).

<sup>125</sup> *Sheppard*, 384 U.S. at 335.

scenario.<sup>126</sup> One important measure that trial courts might employ to avoid this prejudice is to “continue the case until the threat [of prejudice due to pretrial publicity] abates.”<sup>127</sup> The theory is that the passage of time will allow the media attention, along with the public’s impassioned response to the crime, to subside before the defendant faces the jury deciding his fate. In the same way, perhaps a sentencer further removed in time from the commission of the offense can look more objectively at the defendant and his crime and better determine the offender’s proper desert. Neither the text of nor the comments to section 305.6 suggest that this was a consideration in drafting the provision, however.<sup>128</sup> And a resentencing after fifteen years have elapsed is perhaps excessively protective in this regard. Moreover, the time that it ordinarily takes an offender to be sentenced—a median of over seven months in the federal system<sup>129</sup>—may be sufficient to dull inflamed passions so that sentencing is rooted in passionless and objective desert rather than vengeance.

Despite these possible benefits stemming from the passage of time, the original public is often still better positioned to assess desert. But this is not to say that the current public is not impacted by the length of offenders’ sentences. It is certainly the current public that pays the price of securing, feeding, housing, and medically treating offenders. And these often exorbitant costs are one of the driving forces of back-end release mechanisms like second-look sentencing. Further, the current public will likely be affected by released prisoners’ reintegration into the community. Longer sentences may make reintegration more difficult because the prisoners have been in a different, and possibly criminogenic, environment for a longer period of time.<sup>130</sup> Moreover, it ends up

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<sup>126</sup> *Id.* at 335, 358.

<sup>127</sup> *Id.* at 363.

<sup>128</sup> See MODEL PENAL CODE: SENTENCING § 305.6 (AM. LAW INST., Tentative Draft No. 2, 2011).

<sup>129</sup> See U.S. DIST. COURTS, JUDICIAL BUSINESS 2014, at 1 tbl.D-6 (Sept. 30, 2014), <http://www.uscourts.gov/statistics/table/d-6/judicial-business/2014/09/30> [<http://perma.cc/E33D-BLA4>] (placing the “[m]edian [t]ime . . . [f]rom [c]ommencement to [t]ermination for [c]riminal [d]efendants [d]isposed of . . . [d]uring the 12-[m]onth [p]eriod [e]nding September 30, 2014,” at 7.0 months); U.S. DIST. COURTS, JUDICIAL BUSINESS 2014, at 1 tbl.D-12, (Sept. 30, 2014), <http://www.uscourts.gov/statistics/table/d-12/judicial-business/2014/09/30> [<http://perma.cc/Z92F-6MRY>] (placing the “[m]edian [t]ime from [c]onviction to [s]entencing for [c]riminal [d]efendants [c]onvicted [d]uring the 12-[m]onth [p]eriod [e]nding September 30, 2014,” at 99 days); see also, e.g., U.S. DIST. COURTS, NATIONAL JUDICIAL CASELOAD PROFILE (Mar. 31, 2015), <http://www.uscourts.gov/file/18187/download> [<http://perma.cc/T3R8-ZZXX>] (recording that the median time period from filing to disposition in criminal felony cases from April 1, 2014, to March 31, 2015, was 7.6 months).

<sup>130</sup> See Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1053-54 (2008) (“tentative[ly] conclu[ding] . . . that we may be at or near a tipping point where further increases in incarceration will actually generate more crime than they prevent”).

being the current public that actually does the punishing. Although some people would like to lock up offenders and throw away the keys—cease thinking about the offenders anymore at all<sup>131</sup>—there is a continuous daily aspect to carrying out a sentence. One might argue, then, that the current public should have a say in whether it is required to continue executing the same sentence that was imposed by the original public. This is a valid point: Is continuing to punish an offender really worth the significant resources that we, the current public, invest in the punishment? This question is one of utilitarianism, though. From a Kantian perspective, the current public should perhaps have a say in whether to continue carrying out an old sentence because the current public may not have the same *obligation* to punish that the original public had.<sup>132</sup> But that does not change the fact that the offender may deserve the punishment.

Perhaps the drafters of section 305.6 did provide *some* consideration for the original public. The section states that “[n]otice of the sentence-modification proceedings should be given to the relevant prosecuting authorities and any victims, if they can be located with reasonable efforts, of the offenses for which the prisoner is incarcerated.”<sup>133</sup> This may be an effort to account for harm to the original public that the offender

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<sup>131</sup> Cf. Ryan, *Death and Rehabilitation*, *supra* note 45, at 1277 (suggesting that “[s]ociety’s need to distance itself” from death row inmates likely helps explain why death row inmates are not provided with the same liberties—such as rehabilitative services—as the general prison population).

<sup>132</sup> See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 106 (Mary Gregor ed., 1996). Kant suggests that community members may have an obligation to punish deserving individuals. He states that:

Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.

*Id.*

<sup>133</sup> MODEL PENAL CODE: SENTENCING § 305.6(6) (AM. LAW INST., Tentative Draft No. 2, 2011). In the 2015 Council Draft, the drafters recommended modifying this language to provide that notice “be given to victims, if they can be located with reasonable efforts, and to the relevant prosecuting authorities.” MODEL PENAL CODE: SENTENCING § 305.6 (AM. LAW INST., Council Draft No. 5, 2015); *see also supra* note 6 (noting the status of the 2015 Council Draft). The modified language also states that “[a]ny victim’s impact statement from the original sentencing shall be considered by the judicial panel or other judicial decisionmaker.” MODEL PENAL CODE: SENTENCING § 305.6 (AM. LAW INST., Council Draft No. 5, 2015). Moreover, it provides that “[v]ictims shall be afforded an opportunity to submit a supplemental impact statement, limited to changed circumstances since the original sentencing.” *Id.* The new language arguably provides greater consideration for victim perspectives in determining what an offender’s new appropriate sentence might be.

caused. Indeed, victims are some of the individuals harmed by the criminal offender. The statute's caveat that victims need to be notified only "if they can be located with reasonable efforts,"<sup>134</sup> however, sheds some doubt on the extent to which such a provision would account for the victims' views on the wrongfulness of the offender's conduct. Further, many of the offenses contemplated by section 305.6 as deserving of a second look—such as drug offenses and euthanasia—are offenses for which there very well may be no identifiable victims.<sup>135</sup> Of course, the criminalization of an activity—whether that be murder or jaywalking—suggests the legislature has determined that the general public is also harmed in some way by an offender's criminal conduct. Without a robust accounting of victims' perspectives, there is a risk that some of the harms caused by offenders will be overlooked or undervalued in second-look sentencing. Although prosecutors are charged with representing the public's interests at trial, prosecutors, like resentencing judges (or other decisionmakers), will most likely represent the interests of the current public rather than the original public. After all, it is the current public to which these prosecutors must answer, and it is the current public that pays their salaries. It is also the current public that will vote on their re-elections, where applicable. But prosecutors are not the only actors charged with protecting the public against harmful criminal acts; the legislature does so by enacting criminal laws and assessing the seriousness of criminal offenses through setting statutory sentencing ranges, promulgating mandatory minimum sentences in certain circumstances, and in some jurisdictions, charging sentencing commissions with establishing sentencing guidelines that reflect offense-seriousness determinations. Because section 305.6 does not require a new legislative assessment of punishment and resentencers are not beholden to mandatory minimum sentences,<sup>136</sup> however, the legislature—either original or current—has very little role in reassessments of desert under section 305.6. As a result, representatives of the original public—those often most capable of determining offense seriousness at time zero—are wholly left out of section 305.6 resentencing assessments.

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<sup>134</sup> *Id.*

<sup>135</sup> *See id.* § 305.6 cmt. b (stating that, "[i]n recent decades, . . . there has been flux in community attitudes toward many drug offenses, homosexual acts as criminal offenses, and even crime categories as grave as homicide, such as when a battered spouse kills an abusive husband, or cases of euthanasia and assisted suicide").

<sup>136</sup> *See id.*

Criticizing section 305.6's neglect of the original public raises the question of whether having the current public—through the vehicle of a judge or jury—decide questions of punishment is any more troubling than having a legislature decide the bounds of crime and punishment and then making those laws retroactive. For example, a state legislature may decide to decriminalize the use and possession of marijuana. The legislature may further decide to make that decriminalization retroactive such that anyone in prison for use or possession of marijuana could go free. This might be a legitimate policy choice on the part of the legislature. It would likely be one rooted in the same theory of changing societal values that is set forth in the comments to section 305.6.<sup>137</sup> But the legislature is more representative than any single judge. Further, the second-look sentencing provision of section 305.6 risks unequal treatment of individual offenders based on who they happen to luck upon as their resentencers. Perhaps thinking along the same lines, Frase, in responding to an early draft of section 305.6, explained that determining whether a shift in societal views is “sufficiently clear and substantial to justify sentence modifications” may be a question “much more appropriate for legislative or sentencing commission policy making and retroactivity, which courts would then apply—with greater consistency and legitimacy—to entire groups of offenders.”<sup>138</sup> Beyond these concerns about what is properly within the province of the various decisionmakers, the legislature may not be tied to retributivism in the same way that the Model Penal Code purports to be.<sup>139</sup> Thus, while the legislative choice may be legitimate, it is likely not the best body to decide what retribution requires in that instance. Instead, the legislators in office around the time the conduct was committed would be better positioned to know what is a deserved response to this conduct. In the same way, section 305.6 departs from the theory of limiting retributivism that supposedly grounds the Model Penal Code.

Perhaps the drafters of section 305.6 have intuited that second-look sentencing actually does not respect traditional understandings of retributivism. Aside from the drafters' suggestion that perceptions of offense seriousness change as society evolves, much of the discussion related to section 305.6 revolves around utilitarian considerations. The drafters explained

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<sup>137</sup> See MODEL PENAL CODE: SENTENCING § 305.6 cmts. b, f (AM. LAW INST., Tentative Draft No. 2, 2011).

<sup>138</sup> Frase, *supra* note 52, at 198. Frase further stated that “[w]hen . . . penalty reductions or decriminalization have been enacted, the case should be governed by the Code's retroactivity provisions” rather than by a judicial resentencer. *Id.*

<sup>139</sup> See *supra* text accompanying notes 99-101.

that “[a]dvancements in empirical knowledge,” “risk-assessment methods,” and general research can improve the reliability of deterrence assessments and rehabilitation practices.<sup>140</sup> Indeed, utilitarian assessments of proper punishment can benefit from new information, even if it is acquired at a later point in time. Further, the resentencing approach of section 305.6 is in many ways similar to traditional parole determinations, which are also based on utilitarian considerations of rehabilitation and future dangerousness.<sup>141</sup> The drafters of the provision have worked hard to distinguish second-look sentencing from parole, explaining that second-look sentencing “represents a fundamental departure from the underlying theory of parole release, which supposed that most prisoners could be rehabilitated,” and that section 305.6’s approach “offers a wholly new institutional model . . . that substitutes a judicial decisionmaker for the administrative parole board.”<sup>142</sup> As with the underlying theory of the Model Penal Code, these comments suggest that rehabilitation is only supplemental to the limiting retributive foundation of the Code. But section 305.6 does not hold up as a retributivism-based approach. Even if the drafters sensed that section 305.6 is more properly a provision rooted in utilitarian ideals, the draft remains adamant that the provision is appropriate as relating to all the basic purposes of punishment, including retribution. Again, the draft emphasizes that “[t]he passage of many years can call forward every dimension of a criminal sentence for reevaluation. On proportionality grounds, societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation . . . .”<sup>143</sup> In fact, the drafters arguably could not abandon retribution as irrelevant under section 305.6, as retribution is a major component of sentencing under the Model Penal Code. The Code adopts limiting retributivism as its theory of punishment, and an offender’s desert thus places upper and

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<sup>140</sup> MODEL PENAL CODE: SENTENCING § 305.6 cmt. b (AM. LAW INST., Tentative Draft No. 2, 2011).

<sup>141</sup> The drafters of section 305.6, though, took great pains to distinguish section 305.6 resentencing from parole determinations. *See, e.g.*, MODEL PENAL CODE: SENTENCING § 305.6 cmts. a, f (AM. LAW INST., Tentative Draft No. 2, 2011) (stating that section 305.6 “represents a fundamental departure from the underlying theory of parole release, which supposed that most prisoners could be rehabilitated and that the parole board could discern when rehabilitation had been achieved in individual cases,” and “emphas[izing] that § 305.6 has been designed largely out of deep dissatisfaction with the discretionary-release framework of indeterminate sentencing systems in the United States”).

<sup>142</sup> *Id.* cmt. a.

<sup>143</sup> *Id.* cmt. b. The proposal also sets forth utilitarian grounds for second-look sentencing. *See id.*

lower limits on the appropriate sentence to impose.<sup>144</sup> Utilitarian considerations like deterrence and rehabilitation should be only part of the analysis under this sentencing approach.<sup>145</sup>

## CONCLUSION

The ALI's proposed second-look sentencing provision ignores a key factor in determining an offender's desert: the importance of the original public. The provision stipulates that the current public should determine whether an offender's sentence is too long and too harsh and anoints the current public (as represented by the current sentencing judge or other decisionmaker) with superior powers of assessing an offender's desert. This approach suggests that members of the current public—you and I—are more enlightened than previous generations. While it is possible that we are more educated and compassionate than our predecessors, there is little reason to believe that we are better at accurately determining how much punishment an offender deserves in most instances. Society's views of desert continue to evolve as time marches forward, but these views do not always change in the direction of sentence leniency; they are instead cyclical in nature. While there may be a true or correct sentence for each offender based on desert, there is no way to determine whether we today can come closer to that punishment than those who decided the offender's original sentence. In fact, the original sentencers may in many instances be better positioned to assess an offender's desert because they are likely more familiar with the harms suffered by the direct victims and the public as a result of the offense, and the original sentencers may have a better idea of the offender's mental state when committing the offense. Second-look sentencing may very well be an enlightened approach to punishment, but, if so, it is probably not because it can provide better assessments of desert. Despite the importance of retributivism to sentencing under the Model Penal Code, second-look sentencing appears not to be motivated by retributivism. Rather, it is utilitarianism cloaked as limiting retributivism that animates this new provision of the Code. This makes it difficult to clearly and effectively assess the novel proposal.

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<sup>144</sup> MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (AM. LAW INST., Tentative Draft No. 1, 2007); *see supra* notes 16, 99-101 and accompanying text.

<sup>145</sup> MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(ii) (AM. LAW INST., Tentative Draft No. 1, 2007).