



**REPORT ON PROPOSED LEGISLATION BY THE  
TASK FORCE ON MASS INCARCERATION,  
CRIMINAL COURTS COMMITTEE,  
AND CRIMINAL JUSTICE OPERATIONS COMMITTEE**

**THE SECOND CHANCE AMENDMENT**

This report is respectfully submitted by the New York City Bar Association’s (the “City Bar”) Task Force on Mass Incarceration, Criminal Courts Committee and Criminal Justice Operations Committee.<sup>1</sup> The City Bar submits this report and proposes an amendment to New York Criminal Procedure Law § 440.20 (the “Second Chance Amendment”) to provide a mechanism for the modification of certain prison sentences for eligible applicants. A copy of the proposed amendment is appended to this report.

In drafting the proposed legislation, the City Bar evaluated existing initiatives and programs and was informed by the substantial research on mass incarceration’s effects on communities and on the criminal justice system. We believe that the Second Chance Amendment will parallel other innovative and impactful legislative initiatives to improve the justice system while reducing New York State’s prison population.

**I. BACKGROUND**

Mass incarceration is one of this country’s most significant social, economic, and political issues. In just four decades, the U.S. prison population increased from 300,000 to 2.2 million.<sup>2</sup>

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<sup>1</sup> The Task Force on Mass Incarceration is composed of leaders committed to criminal justice reform—prosecutors, defense attorneys, judges, and other experts on criminal law. The Task Force is committed to reducing the mass incarceration rate with a focus on our home state of New York. The Criminal Courts Committee consists of prosecutors, and criminal defense attorneys who analyze laws and policies that affect the criminal courts in New York. The Criminal Justice Operations Committee has expansive jurisdiction involving issues relevant to New York State penal law and procedure and the functioning of the courts with regard to criminal cases. For more information on the committees and their work, visit <https://www.nycbar.org/issue-policy/issue/criminal-justice> (All websites last accessed on May 9, 2023).

<sup>2</sup> Equal Justice Initiative, Criminal Justice Reform, at <http://www.eji.org/criminal-justice-reform/>; Roy Walmsley, International Centre for Prison Studies, World Population List 3 (10th ed. 2013), [www.prisonstudies.org/sites/default/files/resources/downloads/wpp1\\_10.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1_10.pdf).

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

The U.S. now has the highest incarceration rate in the world<sup>3</sup> and, with just 4.4 % of the world's population, incarcerates over 19% of the world's prisoners.<sup>4</sup> New York State currently imprisons about 30, 895 people.<sup>5</sup>

The cost of these staggering figures is borne both by the millions of families and communities affected by the incarceration of sons, daughters, and parents, as well as by taxpayers: In New York, the average annual cost per inmate is almost \$115,000.<sup>6</sup> The concomitant effects on the children of incarcerated individuals are also increasingly widespread. An estimated 7 % of children have had a parent incarcerated at some point in their life,<sup>7</sup> the effect of which has been found to be associated with increased emotional difficulties, low academic engagement, and issues at school.<sup>8</sup>

Communities of color have been disproportionately impacted by these incarceration rates. Currently, African Americans and Latinos account for 56% of the prison population nationwide.<sup>9</sup> The figures for New York State are even more striking: over 72% of inmates are African American or Hispanic.<sup>10</sup> African American and Latino communities therefore bear the bulk of the effects of mass incarceration, including poverty, long-term unemployment, and the break-up of families.

The roots of mass incarceration stem in large part from the increase in tough-on-crime legislation, beginning in the 1970s. Longer sentencing ranges and mandatory minimum sentencing came into widespread use. In addition, during the 1980s a focus on prosecuting drug offenses led to a substantial increase in both incarceration rates and lengthy prison terms. Between 1992 and 2009, the average prison sentence continued to increase by 36% nationwide, with states such as

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<sup>3</sup> *Id.*

<sup>4</sup> World Prison Brief, World Prison Population List (13<sup>th</sup> Ed. 2021), [https://www.prisonstudies.org/sites/default/files/resources/downloads/world\\_prison\\_population\\_list\\_13th\\_edition.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_13th_edition.pdf).

<sup>5</sup> DOCCS Fact Sheet, New York State Corrections and Community Supervision, Aug. 1, 2022, available at <https://doccs.ny.gov/system/files/documents/2022/08/doccs-fact-sheet-august-2022.pdf>.

<sup>6</sup> Vera Institute of Justice, The Cost of Incarceration in New York State, <https://www.vera.org/the-cost-of-incarceration-in-new-york-state>.

<sup>7</sup> Child Trends, *Parents Behind Bars: What Happens to Their Children?*, Oct. 2015, <https://www.childtrends.org/publications/parents-behind-bars-what-happens-to-their-children>.

<sup>8</sup> *Id.* at 1.

<sup>9</sup> E. Ann Carson, *Prisoners in 2021 – Statistical Tables*, U.S. Dept. of Justice 10 (Dec. 2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf>.

<sup>10</sup> State of New York Dep't of Corrections and Community Supervision, *Incarcerated Profile Report – January 2023*, Jan. 2023, available at [https://doccs.ny.gov/system/files/documents/2023/01/2023\\_01\\_01-uc-profile.pdf](https://doccs.ny.gov/system/files/documents/2023/01/2023_01_01-uc-profile.pdf) [hereinafter “Under Custody Report”].

Florida seeing an increase of 166%.<sup>11</sup> In New York, almost 45% of the incarcerated population has a minimum sentence length of 10 years or more.<sup>12</sup>

This trend has not gone unchallenged. There have been significant efforts both at the state and federal levels to combat the human and economic consequences of increased incarceration. For instance, in 2005 and 2009, New York State passed drug law reform bills to eliminate certain mandatory minimum sentences and authorize judges to sentence certain offenders to drug treatment programs instead of prison. These reforms also provided those incarcerated for drug offenses the opportunity to petition for reduced sentences under the new sentencing regime. In 2010, Congress passed the Fair Sentencing Act, designed to reduce the disparity between the amounts of crack and powder cocaine required to trigger statutory mandatory minimum and maximum penalties. Between November 2014 and March 2015, California released 2,700 prisoners under Proposition 47, or the Reduced Penalties for Some Crimes Initiative, by reducing their non-violent felony convictions to misdemeanors.<sup>13</sup> And in 2014 and 2015, the “Smarter Sentencing Act” was introduced in both the U.S. Senate and House, demonstrating bipartisan support for sentencing reform.<sup>14</sup> This was followed by the “Sentencing Reform and Corrections Act of 2017,” which the Senate Judiciary Committee approved with bipartisan support, and which called for reducing reliance on mandatory minimum sentences, permitting the Fair Sentencing Act to be applied retroactively, and sealing and expunging juvenile delinquency records.<sup>15</sup> In 2018, Congress and the White House enacted the “First Step Act,” bipartisan sentencing reform legislation which takes some steps toward reforming mandatory minimums and reducing mass incarceration.<sup>16</sup> Various states have taken steps to mitigate harsh penalties for drug laws, including instituting diversion programs to help people with substance use disorders instead of incarcerating them.<sup>17</sup>

Judges also have begun to speak out about their inability to appropriately sentence, or to modify the sentences of, certain defendants. For instance, District Judge Stefan Underhill wrote

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<sup>11</sup> The Pew Charitable Trusts, *The High Cost, Low Returns on Long Prison Sentences*, June 2012, <https://www.pewtrusts.org/en/research-and-analysis/reports/2012/06/06/time-served-the-high-cost-low-return-of-longer-prison-terms>.

<sup>12</sup> Under Custody Report, *supra* n. 10.

<sup>13</sup> Melody Gutierrez, *California Prisons Have Released 2,700 Inmates Under Prop. 47*, SFGATE, Mar. 6, 2015, <https://www.sfgate.com/crime/article/California-prisons-have-released-2-700-inmates-6117826.php>.

<sup>14</sup> A bipartisan group of senators re-introduced the bill in October 2017.

<sup>15</sup> The City Bar’s report in support of the Sentencing Reform and Corrections Act of 2017 is available at [https://s3.amazonaws.com/documents.nycbar.org/files/2017354-SentencingReformCorrections\\_FEDERAL\\_COURTS\\_3.22.18.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/2017354-SentencingReformCorrections_FEDERAL_COURTS_3.22.18.pdf).

<sup>16</sup> Public Law No. 115-391 (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/756/text?r=104&s=4>. The City Bar’s report on the First Step Act is available at <https://s3.amazonaws.com/documents.nycbar.org/files/2018462-FirstStepAct.pdf>.

<sup>17</sup> See, e.g., Dakota Makres, *Pilot program aims to dismiss charges of non-violent offenders*, WYMT, Jan. 5, 2023, <https://www.wyvt.com/2023/01/05/pilot-program-aims-dismiss-charges-non-violent-offenders/>; see also White House Office of National Drug Control Policy, *White House Announces State Model Law to Expand Programs that Deflect People with Addiction to Care*, Mar. 3, 2022, <https://www.whitehouse.gov/ondcp/briefing-room/2022/03/03/white-house-announces-state-model-law-to-expand-programs-that-deflect-people-with-addiction-to-care/>.

an essay for the New York Times concluding that the sentence he gave to a former drug dealer was too long but lamenting that he was unable to modify it. In 2006, Judge Underhill had sentenced the man (who had been incarcerated since 2001) to 18 years in prison. In 2012, the judge visited him in prison and learned that he had taken advantage of educational and job opportunities and exhibited good character. When Judge Underhill approached prosecutors about the possibility of early release, he learned there was no readily available mechanism that would allow for such release. Despite the prisoner’s evident success in changing his life by at least 2012, if not earlier, he remained incarcerated until 2016—serving 14 years of his 18-year sentence. Judge Underhill observed that “[t]he last three years of that sentence, if not more, were a waste of time.”<sup>18</sup>

There have been other attempts by academics and reformers to permit the re-examination of excessive sentences. The American Law Institute, a non-governmental organization of judges, lawyers and academics, has approved revisions to the Model Penal Code. The MPC was developed in 1962 to introduce uniformity and coherence to criminal codes in the states. In one revision, the Code calls for state legislatures to enact a “second look” provision, which would create a mechanism to reexamine a person’s sentence after 15 years no matter the crime or length of original sentence. The Code recommends that the sentence be revisited every ten years if it is not reduced.<sup>19</sup> Efforts by various communities to adopt solutions to this problem are just beginning to bear fruit: in 2021, Washington, DC became the first jurisdiction in the country to permit individuals incarcerated for at least 15 years based on offenses committed before the age of 25 to apply for resentencing.<sup>20</sup>

Despite these efforts and advocacy from judges, lawmakers, and community organizations, the clear fact remains that there are still millions of people behind bars serving inordinately long sentences. Some are there as the result of strict mandatory minimums—an issue beyond the scope of the Amendment.<sup>21</sup> But others are there because they were given a harsh sentence that may have seemed right at the time to the sentencing judge, but that deserves a second look. The Second Chance Amendment is designed to permit judges to revisit such sentences and reduce them where warranted, giving the individuals the opportunity to return to their families and communities to rebuild their lives.

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<sup>18</sup> Judge Stefan Underhill, “Did the Man I Sentenced to 18 Years in Prison Deserve It,” N.Y. Times, Jan. 21, 2016, <https://www.nytimes.com/2016/01/24/opinion/sunday/did-i-sentence-a-murderer-or-a-cooperative-witness.html>.

<sup>19</sup> Steven Zeidman, “For Justice and Decarceration, Enact Second-Look Sentencing,” Gotham Gazette, June 26, 2018, <http://www.gothamgazette.com/opinion/7766-for-justice-and-decarceration-enact-second-look-sentencing>.

<sup>20</sup> DC Corrections Information Council, *DC Council Passes Second Look Amendment Act of 2019* (May 19, 2021), <https://cic.dc.gov/release/dc-council-passes-second-look-amendment-act-2019>.

<sup>21</sup> The City Bar has elsewhere called for the abolishing of mandatory minimum sentences. See N.Y. City Bar Ass’n, *A Pathway Out of Mass Incarceration and Toward a New Criminal Justice System: Recommendations For The New York State Legislature* (2021), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/a-pathway-out-of-mass-incarceration>.

## II. THE SECOND CHANCE AMENDMENT

Currently, New York Criminal Procedure Law § 440.20 (CPL) permits a defendant to make a motion to set aside a sentence on the grounds that it was unauthorized, illegally imposed or otherwise invalid as a matter of law. Although this provision offers an avenue for relief for some defendants, it does not permit a reduction of sentences that are valid but nonetheless excessive in light of the crime and the defendant's individual circumstances, including evidence of meaningful rehabilitation while serving the initial sentence. Any such claims regarding excessiveness can currently only be raised on direct appeal.<sup>22</sup>

The Second Chance Amendment is designed to give individuals the chance to prove, part way through their sentences, that they deserve a reduction in sentence.<sup>23</sup> It adds a new subsection to CPL § 440.20 to allow a motion for reduction or modification of a sentence after the individual has served a specified portion of that sentence or a certain number of years on the grounds that the sentence is excessive—that is, greater than necessary to achieve the purposes of sentencing. It will allow the presentation of evidence regarding the individual's age, personal circumstances, and medical condition, as well as confinement record, including indicators of rehabilitation. The Amendment will therefore incentivize both good behavior and participation in programming designed to help prisoners gain education and vocational skills.

The Amendment would apply to those serving sentences of ten years or more who are more than one year away from scheduled Conditional Release.<sup>24</sup> Any individual ineligible for sentencing relief can be deemed eligible if the District Attorney consents.

The following examples, drawn from cases handled by a variety of New York City-based defender organizations, demonstrate a range of situations in which motions under this Amendment might be appropriate:

- R.H., at age 20, was convicted of first-degree robbery, despite a plausible claim of innocence. He also had no criminal record, a stable home life, steady work history, and was about to enter the U.S. Army. He was active in his church and veterans support organizations. Despite the joint request by the prosecution and the defense for the 5-year minimum, and numerous letters of support from family and friends attesting to R.H.'s good character, the judge sentenced him to 15 years.

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<sup>22</sup> *E.g., People v. Cunningham*, 305 A.D.2d 516 (2003). Note that direct appeals generally conclude within two years of sentencing, often before the defendant has the opportunity to demonstrate rehabilitation, and new information not part of the record on appeal is generally not permitted.

<sup>23</sup> Similar legislation is pending in the current legislative session. A.B. 531 / S.B. 321 (N.Y. 2023-24 Sess.). The City Bar has separately issued a Report supporting that legislation; see <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/communities-not-cages-act>. While the City Bar continues to support the Second Chance Amendment as an alternative approach, we fully endorse passage of A.B. 531 / S.B. 321.

<sup>24</sup> A person serving a determinate prison sentence is eligible for conditional release after serving six-sevenths of that sentence, if the person earns all of his or her good time. Penal Law §§ 70.40(1)(b), 70.30(4)(a); Correct. Law § 803(1)(c).

- L.R. was convicted of first-degree drug possession, conspiracy, and several third-degree sale charges. She had dropped out of school at age 15 to care for her mother, who was dying of AIDS. After her mother’s death, L.R. turned to drugs to support herself and her brother. The minimum for first-degree drug possession is 8 years. The minimum for second-degree conspiracy with no prior felony convictions is 5 years. Third-degree sale carries no mandatory minimum jail time. Despite numerous letters submitted on her behalf, and no prior felony convictions, L.R. was sentenced to an aggregate term of 25 years.
- K.A., at age 32, was convicted of first-degree robbery after he and a friend robbed a stranger, taking a necklace and phone. Although they showed a gun during the robbery, no one was harmed. K.A. had four prior misdemeanors but no prior felony convictions. He also held a steady job at Con Edison and was a father of four. The minimum sentence for first-degree robbery is 5 years. The judge sentenced K.A. to 15 years.

In each of these cases, the sentence imposed is likely far in excess of what is required to achieve the purposes of incarceration. Like the drug dealer sentenced by Judge Underhill, each of them may serve several years—or decades—that are a waste of time and resources, and only contribute to the cycle of poverty and loss of family ties that are hallmarks of our incarceration system. Indeed, recent research suggests that long sentences are in general no more effective at deterring recidivist crime than shorter sentences, and in some cases may actually lead to *increased* recidivist crime.<sup>25</sup>

The Second Chance Amendment would give those who deserve the opportunity a chance to regain a “claim to their future.”<sup>26</sup> In doing so, it will ultimately encourage prisoners to exhibit good behavior, as well as job and educational advancement, and will incentivize participation in rehabilitative actions like substance abuse programs. The Second Chance Amendment will also save taxpayer money. The amount of money that could be saved is evidenced by the high annual cost of housing and guarding inmates in New York State – almost \$115,000 per inmate.<sup>27</sup>

In addition to the enormous benefits of the Amendment to resident New Yorkers, enactment would make New York a model state for criminal justice reform. A number of other states have recently implemented reforms to their sentencing processes.<sup>28</sup> The Second Chance

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<sup>25</sup> See, e.g., Daniel P. Mears et al., *Recidivism and Time Served in Prison*, 106 *Criminology* 83, 117-19 (2016).

<sup>26</sup> Eric Holder, July 9, 2009, Vera Institute of Justice’s Third Annual Justice Address, <https://www.justice.gov/opa/speech/attorney-general-eric-holder-vera-institute-justice-s-third-annual-justice-address>.

<sup>27</sup> Vera Institute of Justice Report, *supra* n. 6.

<sup>28</sup> E.g. Indiana Pub. Law 164 (May 13, 2015) (allowing individuals to apply for reduced sentences conditional upon good conduct in prison); Louisiana Acts No. 280, 281, 282 (June 15, 2017) (allowing judges to reduce sentences for subsequent offenses for individuals with prior criminal records); Oklahoma H.B. 1548 (April 21, 2015) (allowing for sentence modification for individuals incarcerated for a number of drug-related offenses); North Dakota Century code Title 12.1, Ch. 12.1-32-02.03 (allows judges to sentence below the mandatory minimum at the time of sentencing if the minimum would be unreasonably harsh); Texas Code of Criminal Procedure Ch 42, Arts. 42.0199, 42.12 (allowing individuals to apply for reduced sentences following the submission of a report from the Department of Corrections).

Amendment not only would draw on these reforms, but would improve upon them. This proposed legislation would eliminate much of the administrative cost present in other states' programs, which typically require substantial input from the states' departments of correction in order for a sentence to be reduced.<sup>29</sup> In adopting the Second Chance Amendment, New York would become a national leader in reducing mass incarceration.

### **III. PROPOSED LEGISLATION**

The Second Chance Amendment would join current legislation reform efforts on the federal and state levels to reduce the prison population.

#### **A. Subsection A**

This subsection permits an eligible individual to make a motion to the court that imposed his or her sentence to reduce or modify that sentence on the grounds that the sentence is excessive – that is, greater than necessary to achieve the purposes of incarceration. Modification includes the running of consecutive sentences concurrently.

#### **B. Subsection B**

This subsection addresses the eligibility requirements, which include that an individual must be serving a sentence of at least 10 years. Additionally, this subsection provides that individuals sentenced to the minimum permitted under the Penal Law are not eligible for relief, as this Amendment does not intend to alter statutory mandatory minimum sentences.

Individuals less than one year away from conditional release or an initial parole eligibility date at the time of filing will not be eligible.

The individual must have served at least one-half (1/2) of the aggregate minimum term of an indeterminate sentence or at least one-half (1/2) of an aggregate determinate sentence, or 10 years, whichever is less.<sup>30</sup>

#### **C. Subsection C**

This subsection provides that if the individual has appealed their judgment or sentence, the appeal must have been finally determined prior to the individual becoming eligible for relief under the Amendment, but that a direct appeal is not necessary in order to obtain relief. .

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

<sup>30</sup> An individual serving a sentence for a class A-1 felony (other than a drug felony) will not be eligible unless they have served 15 years; if the individual has been convicted of a class A-1 felony (other than a drug felony) and their aggregate total determinate sentence or minimum sentence is at least 50 years, they will not be eligible unless they have served 20 years. *See* Section (5) (b) (v).

**D. Subsection D**

This subsection provides that an otherwise ineligible individual shall be deemed eligible upon the consent of the district attorney.

**E. Subsection E**

This subsection provides that the motion shall be referred to the judge or justice who imposed the original sentence and, if that judge or justice is unavailable, the administrative judge of the applicable court shall assign the motion to another judge or justice of the court.

**F. Subsection F**

This subsection provides that the court may consider any relevant facts or circumstances submitted by the individual or the district attorney, including age, particularly if the individual was under age 25 at the time of the crime, or is currently over 50 years old, personal circumstances, and medical condition, as well as record of confinement. The court may also consider any statement by a victim of the crime.

**G. Subsection G**

This subsection provides for the opportunity for a hearing, and requires that the court place its reasons for the modification or denial on the record.

**H. Subsection H**

If an individual's motion is denied, this subsection permits a new motion two years after the motion's denial date.

**I. Subsection I**

This subsection provides a right to appeal.

**J. Subsection J**

This subsection provides that a defendant may not waive the right to eligibility for relief under this statute as a condition of any plea or agreement, and such a waiver will be unenforceable.

**K. Subsection K**

This subsection confirms that an order reducing or modifying a sentence does not affect the validity or status of the underlying conviction.

**L. Subsection L**

This subsection provides for the appointment of counsel.



#### IV. CONCLUSION

We urge our state leaders to support the Second Chance Amendment (CPL § 440.20(5)), which is a step towards reducing our prison population and providing individuals with a second chance. We are hopeful that this legislation will bring balance, fairness, and an opportunity to encourage proactive and positive actions by incarcerated individuals.

Task Force on Mass Incarceration  
Sarah J. Berger, Chair

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Carola Beeney, Co-Chair  
Anna G. Cominsky, Co-Chair

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*\*This report was first issued in January 2019 during the terms of the following chairs: Sean Hecker, Task Force on Mass Incarceration; Kerry Ward, Criminal Courts Committee; Sarah J. Berger, Criminal Justice Operations.*