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Taking Another Look at Second-Look Sentencing

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TAKING ANOTHER LOOK AT SECOND-LOOK SENTENCING

Meghan J. Ryan*

ABSTRACT

An unprecedented number of Americans are currently behind bars. Our high rate of incarceration, and the high bills that it generates for American taxpayers, has led to a number of proposals for sentencing reform. For example, a bill recently introduced in Congress would roll back federal mandatory minimum sentences for certain drug offenders, and the Obama Administration has announced a plan to grant clemency to hundreds of non-violent drug offenders. Perhaps the most revolutionary proposal, though, is one advanced by the drafters of the Model Penal Code, namely that judges be given the power to resentence offenders who have been serving long sentences on the ground that societal views about the seriousness of the offenses these individuals committed have changed. These evolved societal views, the drafters assert, justify reducing the offenders’ sentences. The drafters of the Code suggest that this view is based on retributivism—on what these particular defendants deserve as a result of committing these crimes. But an offender’s desert does not change as time progresses; it is societal views of desert that change. This raises a new question in criminal law about whether the original sentencer—the one imposing punishment at the time of trial—or a new sentencer—one imposing punishment over a decade after the offense was committed—is better positioned to determine the offender’s desert. The drafters of the Code proffer that a new sentencer is best because it can be more representative of modern values. But the new sentencer does not represent the public against which the offense was committed. And the new sentencer is not as well positioned to assess the offender’s culpability or the harm he caused. The new sentencer may be in a better position to know whether, as time has passed, the offender has been rehabilitated or whether he still poses a danger to society, but these factors are not based on the offender’s desert. The proposed Code provision confuses offender desert with these other utilitarian

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considerations. These other considerations may be important, but the Code is explicitly based primarily on retributivist ideals. As a result, there is a lack of fit between the functioning of the proposed Code provision and the rationale that allegedly supports it. Utilitarian considerations are masquerading as retribution here, making it difficult to honestly and effectively assess the law. Staying within the retributivist framework of the Code, though, reliable assessments of an offender’s desert best lie with the decisionmakers in place at the time the crime was committed.
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INTRODUCTION

Nearly one out of every one hundred adults is behind bars in this country.¹ And many of these offenders are serving extremely long sentences—sometimes on the order of decades.² These staggering figures raise concerns about over-incarceration, excessive punishments, neglecting the humanity of criminal offenders, 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 durations is incredibly expensive.³ As a result, sentencing reform is currently a hot issue. For example, just this past year, a bill was introduced in Congress that would roll back federal mandatory minimum sentences for some prisoners who have committed certain drug offenses.⁴ Another proposed reform is the Department of Justice’s clemency initiative, which encourages certain prisoners to petition the federal government for commutation

¹ See Nat’l Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences 2 (2014); cf. E. Ann Carson, Prisoners in 2013, Bureau of Justice Statistics, Sept. 30, 2014, at 6, available at http://www.bjs.gov/content/pub/pdf/p13.pdf (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?, The New Yorker, Jan. 30, 2012 (“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.”).

² See Nat’l Research Council, supra note 1, at 24–25, 34, 52–58 (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”).


and could result in clemency for thousands of non-violent drug offenders. 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.

The American Law Institute, which promulgates the Code, is in the process of adopting a new provision that would encourage judges to reduce some severe sentences imposed by other judges over fifteen years ago. This “second-look sentencing” provision is thought to have a number of positive effects, such as reducing incarceration and consequently reducing governmental costs. It also will realign a number of long sentences with 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 and the Obama Administration’s plan to grant clemency for a large number of drug offenders. Considering these benefits of second-look sentencing, it is not surprising that there is tremendous support for the proposed provision. In fact, although the drafters have acknowledged that there are some costs to implementing the provision—primarily financial and political—there has been no public criticism of it whatsoever.

This Article provides a much-needed look at the problems posed by adopting a second-look sentencing approach. First, the drafters neglect the age-old interest in finality—a doctrine, though, that has been somewhat eroded in recent years. More importantly, the drafters have based this novel second-look sentencing provision on the idea that Americans’ views of offenses evolve with time. 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

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6 See MODEL PENAL CODE: SENTENCING § 305.6 (Tentative Draft No. 2, 2012).
7 See id.
8 See id.
vacillate between very serious and not so serious.9 And because these are moral views, it is difficult to determine which view is true or correct. There is no good reason, then, to think that new sentencers will reach better or more just results than the original sentencers in any case. In fact, the original sentencers are likely in a better position to determine an offender’s desert. They can better assess the offender’s 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. The Model Penal Code, in contrast, is explicitly rooted primarily in retributivist ideals—on what the offender justly deserves as punishment.10 There is a lack of fit, then, between the functioning of the proposed Code provision and its rationale. Utilitarian considerations are masquerading as retributivism here, making it difficult to honestly and effectively address the law. So long as the Code is committed to retributivism, though, the second-look sentencing approach remains unsound. Reliable assessments of an offender’s desert best lie with the decisionmakers in place at the time the crime was committed.

I. SECOND-LOOK SENTENCING

Drafters of the new Model Penal Code on Sentencing have devised a provision that allows 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 or imprisonment.

2. After first eligibility, a prisoner’s right to apply for sentence modification shall recur at intervals not to exceed 10 years.

9 See infra text accompanying notes 66–85.

10 See MODEL PENAL CODE: SENTENCING § 1.02(2) (Tentative Draft No. 1, 2007).
4. Sentence modification under this provision should be viewed as analogous to a resentencing in light of present circumstances.\textsuperscript{11} The inquiry shall be whether the purposes of sentencing [which focus primarily on retribution but also include other secondary purposes such as deterrence, incapacitation, and rehabilitation]\textsuperscript{12} 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

\begin{itemize}
\item The comments explain that “the judicial decisionmaker should engage in a thought process that resembles a de novo sentencing decision.” \textit{Model Penal Code: Sentencing} § 305.6, cmt. f (Tentative Draft No. 2, 2012). “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.” \textit{Id.}
\end{itemize}

\begin{itemize}
\item 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.” \textit{Model Penal Code: Sentencing} § 305.6 (Tentative Draft No. 2, 2012) (emphasis added). Section 1.02(2) provides:
\end{itemize}

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 reintegraiton 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) . . . .

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.\textsuperscript{13}

In sum, the draft Code encourages jurisdictions to adopt legislation authorizing
the sentencing court to modify the sentences of offenders who were sentenced
fifteen years earlier.\textsuperscript{14}

The comments to the draft state that there are two primary reasons that
prompted the drafters to fashion such a novel approach. First, the drafters are
concerned about the “extraordinarily long sentences” imposed in American
criminal cases.\textsuperscript{15} Indeed, the incarceration rate in the United States is vastly
greater than that of other Western democracies,\textsuperscript{16} and long prison sentences—
especially in the area of drug offenses—regularly span decades.\textsuperscript{17} Second, the
drafters stated that “§ 305.6 is rooted in the belief that governments should be

\textsuperscript{13} \textsc{Model Penal Code: Sentencing} § 305.6 (Tentative Draft No. 2, 2012).
\textsuperscript{14} \textit{See} id.
\textsuperscript{15} \textit{Id.} (remarking that the “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”).
\textsuperscript{16} \textit{See} id., cmt. (“American criminal justice systems make heavy use of length prison terms—
dramatically more so than other Western democracies—and the nation’s reliance on these severe
penalties has greatly increased in the past 40 years). “As a proportion of its population, the United
States in 2009 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.” \textit{Id.}
\textsuperscript{17} \textit{See} Erik Luna, \textit{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, \textit{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”);
Pol’y 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.”).
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.nung to this concern, the drafters opined that § 305.6 “reflects a profound

Pursuant to this concern, the drafters opined that § 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. A second-look
mechanism [like § 305.6] is meant to ensure that these sanctions remain
intelligible and justifiable at a point in time far distant from their original
imposition.”

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

Second, there are “predictable political risks” associated with asking judges (or other
decisionmakers) to shorten some offenders’ sentences. As the comments to § 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

\footnote{\textsc{Model Penal Code: Sentencing} § 305.6, cmt. (Tentative Draft. No. 2, 2012).}
\footnote{Id.}
\footnote{Id.}
\footnote{Early versions of § 305.6 called on the original sentencing court to engage in resentencing. \textit{See id.} There were significant doubts among the membership of the ALI, though, that this would work
in some jurisdictions. \textit{See id.} There was concern that this approach “would add to the workload of
already burdened 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.” \textit{Id.}
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 would be voted out of
office.” \textit{Id.} Because of these concerns, the drafters of § 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. \textsc{Model Penal Code} § 305.6
(Tentative Draft No. 2, 2012); \textit{see id.} at cmt.}
\footnote{\textsc{Model Penal Code: Sentencing} § 305.6, cmt. (Tentative Draft. No. 2, 2012).}
attention upon the releasing authority.” Additionally, there is the concern that § 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. The commenters estimate that only about two or three percent of offenders will be able to take advantage of the provision. The commenters also note, however, that, “in standing populations,” these offenders will be larger in number simply because they do not cycle through the corrections system as quickly. While this contributes to the financial cost of implementing § 305.6, it also heightens the impact that the provision could have on rates of imprisonment. In all, the drafters have concluded that the benefits of implementing § 305.6 outweigh the costs. In fact, there has been a remarkable consensus that a second-look approach like the one envisioned by § 305.6 is necessary in our criminal justice system.

23 Id. The judges of the ALI seemed so concerned about these political risks that they convinced the membership to revise an earlier draft of § 305.6 that placed second-look authority squarely in the courts that originally sentenced the offender. See Kevin R. Reitz, Model Penal Code: Sentencing Reps. Discussion (D.D. No. 3, 2010), at *10–*11; see also MODEL PENAL CODE: SENTENCING, § 305.6, cmt. (Tentative Draft No. 2, 2012) (“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.’”).


25 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.”).

26 Id.

27 See id. (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, Reps. Discussion (Discussion Draft No. 3, 2010) (“We may begin with a foundation of relative consensus. At the broadest 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 concern related to second-look sentencing that the drafters fail to mention but that they likely did not fail to consider is that § 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 run its course. This finality interest is considered important for several reasons. First, finality is valuable for achieving deterrence. The severity, certainty, and swiftness of punishment are central components of deterrence, so undermining the severity and certainty of punishment—or the certainty of the extent of punishment—undermines the deterrence value of punishment. 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 make out its case because witnesses’ memories fade and evidence disappears as time passes. Finality has also been said to further rehabilitation. The certainty and finality of a punishment is often essential for an offender to accept his 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. Further, finality preserves limited government resources.

28 See Meghan J. Ryan, Finality and Rehabilitation, 4 Wake Forest J.L. & Pol’y 121, 123 (2014). Note, however, that “[t]he doctrine of finality is somewhat difficult to circumscribe.” Id. at 122.

29 See id. at 125.

30 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 . . . .”); 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”).

31 See Ryan, supra note 28, at 125.

32 See id. at 126.

33 See id. It examining the relationship between finality and rehabilitation, though, it is important to scrutinize the type of rehabilitation that is sought. See id. 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, 2 Va. J. Crim. L. __, __ (forthcoming 2015). It is important to distinguish between change in the offender’s character and change in the offender’s behavior, though. See Ryan, supra note 28, at 144–49. While it may be difficult in practice to determine whether an offender’s character or behavior have changed, whether they have both changed, or whether neither has changed, understanding the relationship between this
As the drafters of § 305.6 recognized, second-look sentencing will expend resources because, pursuant to the provision, a group of offenders will be entitled to resentencing, which requires additional court time and maybe even government-funded attorneys. Lastly, finality is also said to provide closure for victims. It limits the number of times that victims must recount their stories. But under § 305.6, victims would have the opportunity to once again publicly share their victimizations and could in fact feel pressure—whether externally or internally—to do so. 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 petitions for writs of habeas corpus that federal courts may consider because the drafters were concerned about maintaining—or bolstering—the finality of convictions. The finality interest is so strong that courts have even concluded that preserving finality trumps change and finality is important to determine whether finality might bolster or undercut these goals. See id.

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34 See Ryan, supra note 28, at 126.
35 See Model Penal Code: Sentencing § 305.6, cmt. (Tentative Draft No. 2, 2012); Ryan, supra note 28, at 126. Section 305.6(3) provides that “[t]he department of corrections shall ensure that prisoners are notified of their rights under the provision, and have adequate assistance for the preparation of applications, which may be provided by nonlawyers.” Model Penal Code: Sentencing § 305.6(3). 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.
36 See Ryan, supra note 28, at 126.
37 See Model Penal Code: Sentencing § 305.6, cmt. (Tentative Draft No. 2, 2012); Ryan, supra note 28, at 126–27. Finality also serves the interests of comity and federalism in some circumstances. See Ryan, supra note 28, at 126.
38 See 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.”).
examining colorable claims that convicted offenders are actually innocent and were wrongly convicted.\textsuperscript{39}

The costs of second-look sentencing, such as its effect on finality, consumption of government resources, and potential political divisiveness, may be significant, but that does not necessarily mean that second-look sentencing is not justified. Indeed, the drafters of § 305.6 determined that the benefits of the provision outweigh the costs, and the ALI membership is already in the process of encouraging jurisdictions to adopt second-look sentencing.

II. TREMENDOUS SUPPORT FOR SECOND-LOOK SENTENCING

The consensus in support of § 305.6 extends beyond the membership of the ALI; it seems that everyone who has commented on the provision supports it.\textsuperscript{40} Most of the arguments in favor of § 305.6 parallel the explanations provided in comments to the draft provision. For example, pardon attorney Margaret Colgate Love and Professor Cecelia Klingele argue these same virtues of a second-look approach and conclude that that an approach such as the one set forth in § 305.6—one that is “principled and fair” and offers “expedien[cy]”—“is one

\textsuperscript{39} See Meghan J. Ryan, \textit{Taking Dignity Seriously: Excavating the Meaning of the Eighth Amendment} (2014) (manuscript on file with author); 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”); 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’”); Lardie v. Birkett, No. 05-CV-74766-DT, 2008 WL 474072, at *3 (E.D. Mich. Feb. 19, 2008) (noting that “the Sixth Circuit’s Herrera opinion does not alter this entrenched habeas principle”); 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, *2–3 (6th Cir. Sept.5, 2007)).

\textsuperscript{40} Perhaps not surprisingly, however, there is quite a bit of overlap between ALI membership and commentators on § 305.6.
worthy of emulation.” 41 Professor Sarah French Russell offers another justification for the provision, explaining that “[e]xposing judges to stories of rehabilitation” 42—something made more possible under §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.” 43 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.” 44

Professor Richard Frase perhaps most thoroughly analyzes the implications of adopting a second-look sentencing approach. In an article in the Federal Sentencing Reporter, Frase elaborates on the justifications for second-look sentencing. 45 He states that our current “system openly tolerates very long sentences that have become unjustified due to changed circumstances.” 46 There are “numerous, valid grounds for sentence modification,” he says, and they “must be accommodated . . . to avoid the injustice and waste of sentences that no longer fit the crime and/or the offender.” 47 Like the drafters of § 305.6, Frase also acknowledges some of the concerns with adopting such a second-look provision. First, Frase reiterates that adopting such a provision could impose tremendous

41 Love & Klingele, supra note 27, 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).
43 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 (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”).
44 See Russell, supra note 42, at 519.
46 Id. at 200.
47 Id. at 201.
costs on a state.\textsuperscript{48} He explains that, because § 305.6 does not appoint a gatekeeper to limit the petitions for resentencing pursuant to this provision, “it can be assumed that virtually all inmates will file a petition at some point after they have served fifteen years.”\textsuperscript{49} 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.\textsuperscript{50} Further, Frase points out that, to the extent that criminal defendants employ publicly funded counsel to assist them in petitioning for § 305.6 resentencings, this could be a further drain on state resources.\textsuperscript{51} Also, Frase suggests that providing for resentencing may be worthless in practice.\textsuperscript{52} 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 § 305.6.\textsuperscript{53} State courts may apply such a provision so narrowly as to provide sentencing relief in only a tiny fraction of cases.\textsuperscript{54} This may cause criminal defendants to become disillusioned with the practice and may actually increase disfavored sentencing disparities among criminal offenders.\textsuperscript{55} Moreover, if courts only rarely reduce sentences based upon changed circumstances as authorized by § 305.6, then the tremendously long sentences that currently plague our nation will not be resolved.\textsuperscript{56} The final concern about adopting a § 305.6-like provision that Frase identifies is that creating such a safety valve at the back end

\textsuperscript{48} See id. at 200 (commenting on an earlier draft of § 305.6—Council Draft No. 2, 2008—that also mentions the costs of implementing the provision); see also Love & Klingele, supra note 27, 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”).

\textsuperscript{49} Frase, supra note 45, at 200.

\textsuperscript{50} See id.

\textsuperscript{51} See id.; see also supra note 35 (offering the draft’s position on publicly funded counsel under the provision).

\textsuperscript{52} See Frase, supra note 45, at 200.

\textsuperscript{53} See id.

\textsuperscript{54} See id.

\textsuperscript{55} 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.”).

\textsuperscript{56} See id. (“If relief is highly sporadic, . . . unjustified lengthy sentences will remain in force . . . .”).
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.\textsuperscript{57} Drawing an analogy to the safety valve of parole for harsh sentencing in indeterminate sentencing systems, Frase suggests that the existence of such a back-end release may translate into judges imposing more severe sentences than when no such safety valve exists.\textsuperscript{58} Despite all of these concerns, however, Frase concludes that the justifications for adopting a provision like § 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.”\textsuperscript{59} 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 § 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 numbers of individuals incarcerated in America is incredibly concerning.\textsuperscript{60} Further, the goals that the drafters have explained as undergirding § 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.\textsuperscript{61} Sure, the drafters have identified some drawbacks of § 305.6—such as the costs it may impose on courts

\begin{footnotesize}
\textsuperscript{57} See id.
\textsuperscript{58} See id. (“State experience with parole-abolition guidelines suggests that when front-end decision makers have to take responsibility for these consequences [of excessive punishment, spiraling costs, and overcrowding], they tend to legislate, charge, and impose fewer very severe penalties.”).
\textsuperscript{59} Id. at 201.
\textsuperscript{60} See MODEL PENAL CODE: SENTENCING § 305.6, cmt. (Tentative Draft No. 2, 2012) (stating that “[t]he Institute calls for a new approach to prison release in cases of extraordinarily long sentences for two reasons . . . 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.
\textsuperscript{61} See generally MODEL PENAL CODE: SENTENCING § 305.6 (Tentative Draft No. 2, 2012) (explaining some of the reasons for creating § 305.6).
\end{footnotesize}
and that it could fuel criticisms of judicial decisionmakers employing the provision—but the drafters conclude that these costs are justifiable in light of these worthy goals. There is at least one concern implicated by § 305.6, though, that has not really been discussed; this is the concern that § 305.6 undermines the importance of the original public’s determination of the seriousness of the criminal offense at issue.

The comments to § 305.6 explain that “societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation or comparable periods.”62 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 fugitives” as examples of this phenomenon.63 With respect to many of these examples, this societal shift in seriousness is virtually undeniable. With respect to other examples, less of a consensus exists among the current public that the seriousness of these offenses have 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.”64 Throughout time, in this nation and across cultures, moral values have changed.65 It would be surprising if they do not continue to change as time progresses.

Although the drafters of § 305.6 astutely note that moral values change over time, their 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

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62 See id.
63 Id.
64 Model Penal Code: Sentencing § 305.6(6) (Tentative Draft No. 2, 2012).
65 See Moral Relativism, Stanford Encyclopedia of Philosophy (2008), http://plato.stanford.edu/entries/moral-relativism/ (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).
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 unachievable. In fact, history suggests that many of our views on the seriousness of offenses cyclical in nature.66

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.67 In the 1900s, however, drugs laws became more onerous.68 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 soon began to swell.69 Subsequent federal legislation introduced severe mandatory minimum sentences for drug offenses, heightened enforcement, and even authorized death as punishment for selling heroin to minors.70 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.71 In 1971, though, President Nixon announced the country’s “War on Drugs.”72

66 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.”).

67 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.”).

68 See FRIEDMAN, supra note 67, at 355 (explaining that, while drug laws were inconsequential in the nineteenth century, “[t]his situation changed radically in the twentieth century”).

69 See id. at 355–57.

70 See Boldt, supra note 67, at 285–96.


72 See Boldt, supra note 67, at 286–87; Ryan, supra note 28, at 137; see also JENKINS, supra note 71, at 224 (noting that “drug scares . . . peaked in the critical year 1914, when the federal
Federal efforts to stop drug use continued to grow, and sentences for violating the drug laws also grew, with the government imposing even more stringent mandatory minimum sentences for those convicted of violating the drug laws.73 Despite this steady growth of drug prohibition and enforcement, in recent years, these efforts have reversed course. For example, sentences for drug crimes have been reduced;74 Attorney General Eric Holder has instructed federal prosecutors to refrain from charging certain low-level, nonviolent drug offenders with offenses levels that would trigger mandatory minimum sentences;75 the Obama Administration has announced a plan to grant clemency to a large number of nonviolent drug offenders;76 and some states have actually legalized the use of government effectively prohibited cocaine and opiate drugs, and in 1936–37, the time of the national regulation of marijuana”). Later that decade, though, President Carter called for the decriminalization of marijuana for personal use. See Michael Tonry, Rethinking Unthinkable Punishment Policies in America, 46 UCLA L. REV. 1751, 1780 (1999).


drugs such as marijuana.\textsuperscript{77} The second-look sentencing provision of § 305.6 is also largely aimed at reducing sentences of drug offenders,\textsuperscript{78} bolstering this relatively recent about-face in perceptions about the seriousness of drug use.

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 1930s, when J. Edgar Hoover shined a light on the offense genre after a series of sexually-motivated murders of children.\textsuperscript{79} Over the course of a couple of decades, states passed “sexual psychopathy” laws to treat sex offenders and return them to society.\textsuperscript{80} As time passed, the pressing concern about sex offenses abated,\textsuperscript{81} but then, led by feminists of the time, swelled again in the 1970s.\textsuperscript{82} After once again subsiding, concern about sex offenses grew anew.\textsuperscript{83} In the 1980s, sexual assaults were set as a criminal justice priority.”\textsuperscript{84} And since approximately 1990, states have imposed more stringent sentences for sex offenders.\textsuperscript{85}

Of course it is ordinarily difficult to discern whether differences in punishment reflect changing views about the seriousness of a punishment or changing philosophical views on the purpose 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. Retribution, or at least some version of it, can be tied to

\textsuperscript{78} See supra text accompanying note 63.
\textsuperscript{79} See Roxanne Lieb et al., Sexual Predators and Social Policy, 23 CRIME & JUST. 43, 53 (1998); see also JENKINS, supra note 71, at 224 (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.”).
\textsuperscript{80} See Lieb et al., supra note 79, at 53.
\textsuperscript{81} See id. at 91 (noting that “sexual psychopathy laws came into general disfavor in the United States by the 1980s”).
\textsuperscript{82} See id. at 53.
\textsuperscript{83} See id. at 54.
\textsuperscript{84} See JENKINS, supra note 71, at 190.
\textsuperscript{85} See Lieb et al., supra note 79, at 44. Further, related civil laws, such as sex offender registration laws and civil commitment laws for sex offender, have been passed in many states. See id.
the earliest legal punishments. In the early 1900s, though, utilitarian ideals crowded out retribution as the primary considerations in sentencing offenders. During this time period, many offenders received lesser 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. And retribution is arguably the most important punishment purpose under the Model Penal Code. According to the Code, “[t]he general purpose[] of the provisions on sentencing . . . [is] . . . 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.” Only when it is “reasonably feasible” should sentencers consider utilitarian purposes of punishment such as deterrence and rehabilitation in sentencing offenders. This approach to sentencing is known as “limiting retributivism,” and, not surprisingly, retributivism plays an important,

86 See 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.”)

87 See id. 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.”).


89 MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (Tentative Draft No. 1, 2007).

90 Id. at § 1.02(2)(a)(ii). Further, in no instance shall a sentence “render sentences . . . more severe than necessary to achieve the[se] purposes.” Id. at § 1.02(2)(a)(iii).
and limiting, role in punishment under this theory.\textsuperscript{91} Despite the importance of retributivism under the Code, utilitarian ideals are cycling back into fashion.\textsuperscript{92} In this environment, commentators have expressed that many sentences are too long and much punishment is too harsh. Section 305.6 is 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 to maintain law and order.\textsuperscript{93} Punishment then restores the equal distribution of these burdens among citizens.\textsuperscript{94} 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.\textsuperscript{95} Punishment serves the purpose of expressing to the community that this message is untrue and that the victim is in fact of equal worth.\textsuperscript{96} 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 determine the amount of an offender’s desert—at

\textsuperscript{91} See id. at § 1.02(2), cmt. (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”); \textsc{Norval Morris}, \textsc{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 \textsc{Norval Morris}, \textsc{The Future of Imprisonment} 58–80 (1974) (describing an earlier view of limiting retributivism).

\textsuperscript{92} See Ryan, \textit{supra} note 33, at ___.

\textsuperscript{93} See Herbert Morris, \textit{Persons and Punishment}, 52 \textsc{Monist} 475, 476–78 (1968).

\textsuperscript{94} See id. It “restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt.” \textit{Id.} at 478.

\textsuperscript{95} See Jean Hampton, \textit{An Expressive Theory of Retribution}, in \textsc{Retributivism and Its Critics} 12–13 (Wesley Cragg ed. 1992).

\textsuperscript{96} See id.
least to the extent that they attempt to do so—by their own moral intuitions.\footnote{97} 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).\footnote{98} But do these judges possess superior moral intuitions about desert? Judges are not ordinarily trained on the moral intuitions of desert.\footnote{99} 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 around the courthouse—but having a sense of what sentence may be typical differs from having a sense of what sentence is appropriate. Moreover, sentencing decisions do not usually explain what part of a sentence is due to desert considerations rather than, for example, resulting from considerations such as deterrence. Accordingly, judges’ experience in sentencing is of limited use in determining what punishment an offender actually deserves. Robinson argues 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.”\footnote{100} As Robinson concedes,


\footnote{98} See Meghan J. Ryan, The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments Clause Determinations, 64 FLA. L. REV. 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) (1975). 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”).


\footnote{100} Paul Robinson, supra note 97, at 149 (emphasis added).
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.”101 Still, within the current criminal justice system, there are limited options for deciders of desert, mainly judges and juries. And their decisions are usually cabined by the desert decisions of legislatures, which set limitations on available punishments.

The ALI’s new provision on second-look sentencing perhaps expands the options of possible desert decisionmakers by unwittingly highlighting that the options include current judges and juries, as well as the original judges and juries in a case. To the extent that we care about retribution, then,102 we must pin the seriousness assessment to some point in time. The drafters of § 305.6 adopt 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 relevant 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 § 305.6 resentencing is supposed to take place. The crime was committed against the public at that time; it was committed against that public—whether that means a judge or jury sentencer at the offender’s original trial—is in a better position to determine the extent of the harm caused by the offense. Moreover, the original public—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.

101 Id. at 149.
102 See supra text accompanying note 89 (explaining that “retribution is arguably the most important punishment purpose under the Model Penal Code”).
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 this respect. An offender’s desert is determined as of the time he commits his crime. It cares nothing of the future. 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. Moreover, it increases the distance between the offense/offender and the desert assessor, thus 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 and offender.

The passage of time between the commission of the offense and the determination of punishment could sometimes be useful under a retributive framework in bringing to light new information that bears on determinations of offenders’ just deserts. The harm caused by the offense and the mental state of the offender are generally considered central to desert determinations. As time continues on, new research may reveal insights about how a particular victim, or

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103 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) (“Finally, retributivism is deontological and backward-looking. In contrast to forward-looking consequentialist 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 of 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.

104 See Ryan, supra note 86, at 1062–63.
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. New information might also reveal that there were defects in an offender’s original sentencing—such that it was influenced by racism, sexism, or other illegitimate factors. If new information can better inform assessments of desert, 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, passage of time could also possibly be useful in providing space that could guard against sentencers inappropriately acting 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.105 This idea of allowing punishers’ inflamed passions to subside before deciding a defendant’s life course is similar to what we see in the context of claims that pretrial publicity impede a defendant’s right to a fair trial. In the infamous case of Sheppard v. Maxwell,106 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 Fugitive107—claimed that “the massive, pervasive and prejudicial publicity that

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105 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, supra note 86, at 1053–56 (distinguishing vengeance from the “just deserts” of retributivism).


107 See Sam Sheppard Biography, BIOGRAPHY.COM, http://www.biography.com/people/sam-sheppard-12987136 (last visited Oct. 17, 2014); see also Fox Butterfield, DNA Test Absolves Sam Sheppard of Murder, Lawyer Says, N.Y. TIMES, Mar. 5, 1998 (“New DNA evidence taken from the exhumed body of Dr. Sam Sheppard provides the most compelling piece of evidence that he
attended his prosecution” deprived him of a fair trial. 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 scenario.

One important measure that trial courts can take to avoid this prejudice is to “continue the case until the threat [of prejudice due to pretrial publicity] abates.” The theory is that the passage of time will allow the media attention, along with the public’s impassioned response to the crime, to die down 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 comments to, § 305.6 suggest that this was a consideration in drafting the provision, however. And a sentencing after fifteen years have elapsed is perhaps excessively protective in this regard. Moreover, the average time that it takes an offender to get to trial—around nine months—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 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.

was wrongfully convicted of murdering his wife in a trial that transfixed America more than four decades ago . . . .”).

108 *Sheppard*, 384 U.S. at 335.

109 *Id.* at 335, 358.

110 *Id.* at 363.

111 See Brian J. Ostrom & Roger A. Hanson, *Efficiency, Timeliness, and Quality: A New Perspective from Nine State Criminal Trial Courts*, NAT’L INST. JUST. & STATE JUST. INST. 14 (1999), available at https://www.ncjrs.gov/pdffiles1/nij/178403-1.pdf. A 1999 study found that, in the eight state criminal trial courts studied, it took on average 265 days from an arrest in a felony case to disposition of the case. *See id.* If plea bargains were strained out from this sample, this average would likely significantly increase. *See id.* at XV (“The majority of cases are resolved by guilty pleas, and trials are rare in all courts.”).
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. Moreover, it ends up 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—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 this punishment? This point is a question 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. That does not change the fact that the offender may deserve the punishment, though.

Perhaps the drafters of § 305.6 do 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.” This may be an effort to account for harm to the original public that the offender caused. Indeed, victims are some of the individuals harmed by the criminal offender. The language that victims need to be notified only “if they can be located with reasonable efforts,” however, sheds some doubt on the extent to which the draft provision will account for the victims’ views on the wrongfulness of the offender’s conduct. Further, many of the

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112 See Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 Wis. L. Rev. 1049 (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”).
113 Cf. Ryan, *supra* note 38, 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 serves—as the general prison population).
114 *MODEL PENAL CODE: SENTENCING* § 305.6(6) (Tentative Draft No. 2, 2012).
115 Id.
Taking Another Look at Second-Look Sentencing

offenses contemplated by § 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.\footnote{See id. at § 305.6, cmt. (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 . . . ”).} Of course the criminalization of an activity—whether that be murder or “jaywalking”—suggests that the legislature has determined that the general public is also harmed in some way by an offender’s criminal conduct. Although prosecutors are charged with representing the public’s interests at trial, just as with the resentencing judges (or other decisionmakers), prosecutors 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-elects, 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 determining the seriousness of criminal offenses by laying out sentencing guidelines. Because § 305.6 does not require a new legislative assessment of punishment and resentencers are not beholden to mandatory minimum sentences,\footnote{See id.} however, the legislature has very little role in reassessments of desert under § 305.6. As a result, representatives of the original public—those often most capable of determining offense seriousness at time zero—are generally left out of § 305.6 resentencing assessments.

Criticizing § 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 may go free. This may 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 § 305.6. But the legislature is more representative than any single judge. And the second-look sentencing provision of § 305.6 risks unequal treatment of individual offenders based upon who they happen to luck upon as their resentencer. Perhaps thinking along the same lines, Frase, in responding to an early draft of § 305.6, explained that determining whether a shift in societal views is “sufficiently clear and substantial enough 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.” 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. 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 at the time the conduct was committed would be better positioned to know what is a deserved response to this conduct. In the same way, §305.6 departs from the theory of limiting retributivism which supposedly grounds the Model Penal Code.

Perhaps the drafters of § 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 § 305.6 revolves around utilitarian considerations. The drafters explain that “[a]dvancements in empirical knowledge,” “risk-assessment methods,” and general research can improve the reliability of deterrence assessments and rehabilitation practices. 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

119 Frase, supra note 45, at 198. Frase further stated that when “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.
120 See supra text accompanying notes 89–91.
§ 305.6 is in many ways similar to traditional parole determinations, which are also based on utilitarian considerations of rehabilitation and future dangerousness.\(^\text{122}\) 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 § 305.6’s approach “offers a wholly new institutional model . . . that substitutes a judicial decisionmaker for the administrative parole board.”\(^\text{123}\) As with the underlying theory of the Model Penal Code, these comments suggest that rehabilitation is only supplemental to the retributive foundation of the Code. But § 305.6 does not hold up as a retributively-based approach. Even if the drafters sense that § 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 . . . .”\(^\text{124}\) In fact, the drafters arguably could not abandon retribution as relevant under § 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 lower limits on the appropriate punishment to impose.\(^\text{125}\) Utilitarian considerations like deterrence and rehabilitation are of lesser importance under this sentencing approach.\(^\text{126}\)

\(^{122}\) The drafters of § 305.6, though, took great pains to distinguish § 305.6 resentencing from parole determinations. See, e.g., MODEL PENAL CODE: SENTENCING § 305.6(6) (Tentative Draft No. 2, 2012) (stating that § 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 emphasizing that “§ 305.6 has been designed largely out of deep dissatisfaction with the discretionary-release framework of indeterminate sentencing systems in the United States”).

\(^{123}\) MODEL PENAL CODE: SENTENCING § 305.6, cmt. (Tentative Draft No. 2, 2012).

\(^{124}\) MODEL PENAL CODE: SENTENCING § 305.6(6) (Tentative Draft No. 2, 2012).

\(^{125}\) MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (Tentative Draft No. 1, 2007).

\(^{126}\) Id. at § 1.02(2)(a)(ii).
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 with superior powers of assessing an offender’s desert. This approach suggests that 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. Society’s views of desert continue to evolve as time marches forward, and 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 in a better position 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 it. Second-look sentencing could 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 and the supposed lesser importance of utilitarian ideals, second-look sentencing appears not to be motivated by retributivism. It is really utilitarianism cloaked as retributivism that animates this new provision of the Code.