AN ACT to amend the penal law, the criminal procedure law and the correction law, in relation to eliminating mandatory minimums; “Eliminate Mandatory Minimums Act”

AN ACT to amend the criminal procedure law, in relation to authorizing certain persons confined in institutions operated by the department of corrections and community supervision to apply for a sentence reduction; “Second Look Act”

AN ACT to amend the correction law and the penal law, in relation to the early release of incarcerated individuals; “Earned Time Act”

I. INTRODUCTION

Each year, New York state prisons cage more people per capita than any other major Western democracy if New York were its own country.¹ This is the result of a policy of harsh sentencing practices born in the last half century. Until the 1970’s, New York only employed

mandated minimum sentences - prison and custodial sentences that judges are required to impose by statute - for murder and first degree kidnapping. However, in 1973, New York led the nation in establishing harsh mandatory minimum sentences by passing the so-called Rockefeller Drug Laws for narcotics sale and distribution. The same year, New York passed a “two-strike” law, which enhanced criminal penalties for those with prior records. In the 1970s and 1980s, New York passed sentencing laws that increased the length of prison sentences, enforced mandatory minimums, enhanced the power of prosecutors to coerce pleas, imposed long sentences and consecutive sentences even for minor offenses, reduced opportunities for early release through curtailing the use of parole, and reduced opportunities to earn an education while incarcerated. While the Rockefeller Drug Laws were partially repealed in 2004 and 2009, New York’s sentencing laws remain the state’s leading driver of mass incarceration. These laws continue to limit the ability of judges to consider the facts of an individual case, require long sentences often for minor offenses, and give prosecutors outsized power in plea negotiations. In 2021, New York incarcerated more than 31,000 people, and more than 337,000 New Yorkers have been incarcerated in their lifetimes.

Approximately 75 percent of incarcerated New Yorkers are Black or brown. This not only impacts the incarcerated individual but their entire families. Incarceration of a parent substantially increases the likelihood of their children growing up in poverty, which increases the

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4 N.Y. Penal Law § 70.04, 70.06 (McKinney 2022); CommunitiesNotCages.org, A Brief History of New York’s Sentencing Laws (2021), available at: https://www.communitiesnotcagesny.org/timeline.
5 Prosecutors have nearly complete authority and discretion in determining what charges to bring against individuals. As different offenses carry different mandatory minimum sentences, prosecutors often weaponize this power to threaten individuals with longer prison sentences via harsher charges if individuals choose to exercise their right to a trial, and then lose. See N.Y. STATE ASS’N OF CRIM. DEF. LAWS., THE NEW YORK STATE TRIAL PENALTY: THE CONSTITUTIONAL RIGHT TO TRIAL IS UNDER ATTACK 13 (2021), available at: https://cdn.ymaws.com/nysacdl.org/resource/resmgr/docs/nystrpenreportupdatedfinal.pdf.
7 See Parsons, supra note 3.
8 See Kamins, supra note 2.
likelihood that the child will be incarcerated in their lives.\textsuperscript{12} Due to the trauma of having an incarcerated parent, and the family’s loss of a breadwinner, the children of incarcerated parents are six times more likely to be incarcerated than their peers.\textsuperscript{13}

Importantly, subjecting people and their families and communities to cycles of multigenerational poverty and imprisonment has not enhanced community safety. Long prison sentences are not shown to have a deterrent effect on crime.\textsuperscript{14} Meanwhile, an epidemic of mass incarceration concentrated in Black communities has devastated entire New York neighborhoods.\textsuperscript{15} The state’s sentencing paradigm represents a half century of policy choices to invest resources in incarceration, rather than in resources for low-income communities.\textsuperscript{16} Greater community resources could prevent people from being incarcerated in the first place.\textsuperscript{17}

II. THE “COMMUNITIES NOT CAGES” SENTENCING REFORM BILLS

The Communities Not Cages suite of three sentencing reform bills is a long overdue overhaul of the most pernicious aspects of New York’s sentencing laws. The Eliminate Mandatory Minimums Act allows judges to consider the individual before them in sentencing rather than requiring them to sentence people to predetermined sentences and reduces the power of prosecutors to coerce pleas;\textsuperscript{18} the Second Look Act would enable those currently incarcerated with long sentences to petition judges for reduced sentences;\textsuperscript{19} and the Earned Time Act would enable those serving long sentences to earn credit to reduce their sentences by complying with prison rules and by participating in treatment, education, vocational training, and work programs.\textsuperscript{20}

As New York was the first state to enact harsh mandatory sentencing laws and provided other states a blueprint to do so, it is fitting for the state to lead the country in comprehensive sentencing reform that reduces mass incarceration.


\textsuperscript{17} \textit{Id}.

\textsuperscript{18} A.2036-A / S.6471 (NYS 2023), \url{https://www.nysenate.gov/legislation/bills/2023/s6471}.

\textsuperscript{19} A.531 / S.321 (NYS 2023), \url{https://www.nysenate.gov/legislation/bills/2023/s321}.

\textsuperscript{20} A.1128 / S.774 (NYS 2023), \url{https://www.nysenate.gov/legislation/bills/2023/s774}.
A. **Eliminate Mandatory Minimums Act**

Some federal judges lament that mandatory minimums cause them to sentence people to longer terms of imprisonment than they otherwise would, including life sentences.\(^{21}\) In New York, most felony convictions require judges to impose rigid mandatory minimum sentences that do not allow them to consider individual factors of a case.\(^{22}\) New York’s two and three strike laws compel judges to order particularly long sentences, including life sentences, if a person has a prior felony conviction.\(^{23}\) This is true even if the offense occurred while the individual was a child.\(^{24}\) Concurrent sentencing statutes also extend the amount of time a person can be incarcerated.\(^{25}\)

1. **The Eliminate Mandatory Minimums Act Provides a Person-First Approach to Sentencing**

The Eliminate Mandatory Minimums Act (A.2036-A AM Meeks / S.6471 Sen. Myrie), eliminates the rigidity in New York’s current sentencing paradigms by reducing mandatory sentences for all offenses, including mandatory consecutive sentences. As most felony convictions can require judges to sentence individuals to years, decades, or their entire lives, this bill would likely substantially reduce sentences people are required to serve and, in turn, will reduce the scourge of mass incarceration. It would enable judges to impose shorter carceral sentences, treatment programs, or non-carceral sentences. Importantly, the bill establishes rehabilitation and successful reentry into the community as the purpose of sentencing, and it directs judges to impose the “minimum sentence necessary” to achieve those goals. Instead of automatically sentencing people to long mandatory prison sentences, judges would be able to consider sentences that would be most effective in addressing the individual’s behavior and the unique circumstances of the offense – and to weigh factors such as a person’s age, history of trauma, disabilities, and substance abuse issues, among others -- and enable more people to remain with their families and communities. Notably, the bill does not change New York’s maximum allowable sentences, and judges could continue to impose long sentences in instances where they deem them appropriate. At sentencing hearings, judges receive pre-sentencing reports, which give them detailed information about the person before them. The Eliminate Mandatory Minimums Act enables judges to make informed decisions about the individual, and for defense attorneys and prosecutors

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\(^{22}\) See N.Y. STATE COMMISSION ON SENTENCING REFORM, *supra* note 6, at 3-4.

\(^{23}\) See N.Y. PENAL LAW §§ 60.01, 60.05, 70.04, 70.06, 70.07, 70.08, 70.10 (McKinney 2022).

\(^{24}\) See generally N.Y. PENAL LAW §§ 70.06, 70.07, 70.08, 70.10 (McKinney 2022).

\(^{25}\) See N.Y. PENAL LAW § 70.25 (McKinney 2022).
to present arguments for a disposition that is fair and not beholden to mandatory minimums. This bill would end the outsized power of prosecutors to extract pleas from individuals fearing long mandatory prison sentences.

B. Second Look Act

While the Eliminate Mandatory Minimums Act should reduce the number of New Yorkers sentenced to harsh terms in prison, the Second Look Act (A.531 AM Walker / S.321 Sen. Salazar), would provide a process for those currently serving unduly long sentences to apply for sentence reductions. Under present New York law, there is almost no process for judges to reduce an incarcerated individual’s sentence—no matter how much evidence there is that serving the remainder of that sentence would be fruitless for both the individual and the state. This causes families and communities to suffer from the loss of their loved ones. It also comes at a great cost to the State: in 2019, the average New York county spent more than $82,000 to incarcerate one individual for one year.

With roughly one in three incarcerated New Yorkers serving life sentences, and thousands more serving other lengthy sentences, judges, legal scholars, and other advocates have long recognized that New York law must be changed, so that community members do not languish in prisons for long sentences that do not benefit community safety.

1. The Second Look Act Will Allow Judges to Reconsider and Review Excessive Sentences

The Second Look Act would enable incarcerated individuals to file a resentencing motion to have courts review the propriety of their sentences after serving ten years of their sentence, or after serving “one-half of the minimum term of an indeterminate sentence where the minimum term exceeds ten years,” or after serving “one-half of a determinate sentence where the sentence equals or exceeds ten years.” Separately, a person could apply for resentencing with the consent of the prosecutor who brought the initial underlying charge against them. Courts could reduce

26 The City Bar has proposed similar legislation called the Second Chance Amendment. See “The Second Chance Amendment: Legislative Proposal,” New York City Bar Association, Jan. 23, 2019, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/the-second-chance-amendment-legislative-proposal. While the City Bar continues to support the Second Chance Amendment as an alternative approach, we fully endorse passage of the Second Look Act.


sentences to terms lower than current mandatory minimums, and they could reduce sentences to
time served, which would result in an individual being released. Courts could not increase the
length of an individual’s sentence merely because they filed a resentencing petition.

The Second Look Act would also create a rebuttable presumption for sentence reductions
to time served for those under 25 at the time an offense was committed, and for those over 55 years
old at the time of their application. Young people under 26 years-old have diminished capacity to
regulate their conduct as their prefrontal cortex is not fully developed.31 As people age, their
likelihood of engaging in unlawful conduct diminishes.32 Second Look recognizes this biological
reality and creates the presumption so that people who committed offenses when they were
biologically less mature can rebuild their lives. Similarly, the rate of recidivism for those over 55
is low, while the perils of incarceration cause people to age more quickly than their non-
incarcerated counterparts.33 As New York’s prison population grows older and sicker, the Second
Look Act could reduce the number of incarcerated elderly people.

Under the Second Look Act, individuals would have the opportunity to collect post-
sentencing information and other evidence of rehabilitation. Then, upon the individual’s
application, a resentencing hearing would be scheduled. Each hearing would be assigned to a judge
different than the initial sentencing judge. This second judge would have the ability to reduce an
incarcerated person’s sentence. The Act would provide all incarcerated individuals who have spent
a significant amount of time in prison the opportunity for a second chance.

2. The Second Look Act is widely considered by Advocates to Be the Gold Standard

In recent years, various iterations of “second look” initiatives have sprung up across the
country.34 The Second Look Act is a comprehensive version of a second look law and will provide
meaningful relief to those serving long sentences.

31 Mariam Arain et al., Maturation of the Adolescent Brain, 9 Neuropsychiatric Disease & Treatment 449, 451,
453 (2013).  
32 See Kathryn Monahan et al., Juvenile Justice Policy and Practice: A Developmental Perspective, 44 Crim. &
33 REBECCA SIBLER ET AL., VERA INST. OF JUST., AGING OUT: USING COMPASSIONATE RELEASE TO ADDRESS THE
Infirm-Prison-Populations%E2%80%94Fact-Sheet.pdf; DiNapoli, New York State’s Aging Prison Population,
OFFICE OF THE N.Y. STATE COMPTROLLER (April 2017), https://www.osc.state.ny.us/files/reports/special-
34 Nadel & Lee, Prosecutors in These States Can Review Sentences They Deem Extreme. Few Do., The MARSHALL
PROJECT (Nov. 11, 2022), https://www.themarshallproject.org/2022/11/11/prosecutors-in-these-states-can-review-
sentences-they-deem-extreme-few-do?utm_source=newsletter&utm_medium=marketing+email&utm_source=The+Marshall+Project+Newsletter+utm_campaign=f510965065-
EMAIL_CAMPAIGN_2022_11_15_10_15&utm_medium=email&utm_term=0_5e02cdad9d-f510965065-
174570331.
An important feature of the Second Look Act is that it empowers more individuals to initiate the review of a sentence, rather than solely enabling prosecutors to initiate the review. Data from other states has indicated that second look laws requiring that prosecutors initiate applications for reviews of excessive sentences are far less effective. For example, California’s prosecutor-led second look law has resulted in few incarcerated people being released—approximately only 0.0001% of people have been released since the 2019 law took effect. By contrast, in Washington DC where a petitioner-led Second Look Act was created, roughly 0.05% of the prison population has been released. Second look initiatives where prosecutors can gatekeep access to these motions disempowers those most impacted by harsh prison sentences from pursuing more equitable sentences.

Finally, the Second Look Act provides significant procedural protections. Significantly, it requires the New York State Department of Corrections and Community Supervision to give notice to all individuals within 30 days of them becoming eligible for a Second Look. It also requires that the reviewing judge be different from the sentencing judge, it establishes that the right to apply for resentencing is non-waivable, and it provides a right to a hearing where the person incarcerated may make a statement.

C. Earned Time Act

The Earned Time Act (A.1128 AM Kelles / S.774 Sen. Cooney) would permit incarcerated individuals to earn credit against a sentence for “good behavior” and time spent in in-prison programs. Incentivizing individuals to use in-prison programs that focus on self-improvement encourages rehabilitation. It will also reduce recidivism rates and reduce New York’s correctional costs.

New York’s failure to provide equitable structures for individuals to earn time off of their sentences through participation in vocational, treatment, and education and work programs causes people to serve longer sentences. It is also a missed opportunity for prisons to incentivize incarcerated persons to engage in prosocial services and programs that will give them tools to help them succeed post-incarceration. These anti-rehabilitative policies were not always in place. Rather, in 1987, good behavior allowances were open to all those serving an indeterminate sentence or reformatory sentence of imprisonment, with the exception of those serving a maximum sentence.

35 Id.

36 The nonprofit For the People advocated for the passage of California’s prosecutor-filed resentencing law, AB-2942. Its website tracks successful petitions under the statute. For the People, “By the Numbers,” database (Oakland, CA: For the People), archived December 1, 2021, https://perma.cc/EX9Z-MQ5Y. For California’s incarcerated population, see Jacob Kang-Brown, Chase Montagnet, and Jasmine Heiss, People in Jail and Prison in 2020 (New York: Vera Institute of Justice, 2021), 6, https://perma.cc/H7HW-8U3D.

term of life imprisonment.\footnote{1987 N.Y. Sess. Law Serv. 126 (McKinney)} This relatively generous policy allowed many incarcerated New Yorkers to earn time off of their maximum sentences without any time restrictions.

In the 1990’s however, the narrative around crime changed significantly. Increasingly strong tough on crime rhetoric created a sense of urgency and fear throughout the country.\footnote{Miller, \textit{Criminology}, WASH. POST (Apr. 23, 1989), \url{https://www.washingtonpost.com/archive/opinions/1989/04/23/criminology/3e8fb430-9195-4f07-b7e2-c97a970c96fe/}.} Meanwhile, a widely promulgated study titled “The Effectiveness of Correctional Treatment” by sociologist Robert Martinson began making waves in national headlines.\footnote{Id.} Arguing that rehabilitative programs in prisons were ineffective, Martinson gave further ammunition to the anti-rehabilitative mindset that was shifting the country towards more punitive policies.\footnote{Id.} By 1994, violent offense rates had increased 15 percent in eight years.\footnote{Eisen, \textit{The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System}, BRENNAN CENTER FOR JUST. (Sept. 9, 2019), \url{https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice}.} The federal government responded in drastic fashion, passing a sweeping crime bill in 1994 that increased the length of sentences.

The 1994 crime bill also “gave the federal stamp of approval for states to pass even more tough-on-crime laws.”\footnote{Ofer, \textit{How the 1994 Crime Bill Fed the Mass Incarceration Crisis}, ACLU (June 4, 2019), \url{https://www.aclu.org/news/smart-justice/how-1994-crime-bill-fed-mass-incarceration-crisis}.} States across the country responded quickly, enacting increasingly strict sentencing laws. This certainly included New York. Only one year after the federal crime bill was passed, the legislature enacted the Sentencing Reform Act of 1995, which included time limitations on previously unrestricted good behavior allowances. These amendments mandated that the total number of good behavior allowances an incarcerated person serving an indeterminate sentence could receive could not exceed “one-third of his maximum or aggregate maximum term.” Those serving determinate sentences could not receive a credit of more than one-seventh of time off. Numerous rehabilitative programs were also cut around this time.

Unsurprisingly then, when merit time was first established in 1997, it came with several limitations.\footnote{Earned Eligibility/Merit Time/Presumptive Release/Supplemental Merit Time/Limited Credit Time Allowance Programs, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, \url{https://doccs.ny.gov/earned-eligibility-merit-time-presumptive-release-supplemental-merit-time-limited-credit-time#--text=Merit%20Time%2C%20established%20in%201997%2C%20have%20avoided%20serious%20disciplinary%20charges}.} These limitations were only slightly loosened in 2004, when the Drug Law Reform Act extended merit time to individuals with Class A-II through Class E felony narcotics offenses.\footnote{Id.}
Today, the 1994 crime bill and the subsequent rise in mass incarceration has been widely criticized. Still, the punitive changes made during this time period remain. New York’s good behavior policy remains largely the same as it was in 1995. It is still limited to one-third for indeterminate sentences, although rules vary slightly depending on what type of sentence is being served. And merit time is similarly restricted. Under today’s law, New Yorkers may receive a 6-month credit for completing one of the following: a GED, an alcohol/substance abuse treatment program, a vocational trade certificate (with at least 6 months of programming), or at least 400 hours as part of a community work crew. However, that credit cannot reduce more than one-third, one-sixth, or one-seventh of an incarcerated person’s sentence depending on the type of offense they were originally sentenced for.47

These policies significantly lag behind the policies of other states. Throughout the country, legislation has already overturned the overly punitive policies of the 1990’s, enabling incarcerated people to earn significantly more time off their sentences. Alabama, Nebraska, and Oklahoma, for example, all permit incarcerated people to reduce their sentences by over 50 percent through good time credit.48

1. The Earned Time Act Will Ensure that all People Incarcerated in New York State Prisons Have a Fair Chance at Reducing Their Sentences

The Earned Time Act would provide critical reforms to New York’s carceral system. It has four central components. First it will give all incarcerated people the chance to earn good time and merit time, eliminating the current restrictions that only allow people convicted of certain offenses to access these programs. This enables all incarcerated New Yorkers to gain life skills that will help them successfully re-enter society at the end of their sentences.

Second, it would increase good time credit allowances to 50% and merit time to 25%. As noted above, good time is presently limited to 33% of a person’s sentence. This is significantly lower than what other states allow. Increasing the good time credit allowance to 50% will bring New York in line with other states across the country.

Third, the bill would create further procedural protections that ensure all incarcerated individuals are treated “similarly” and receive “fair and equitable” treatment in the withholding, forfeiting, and cancellation of earned time credits. Moreover, following any final determination, an incarcerated person would have the right to take an administrative appeal and will be advised of their right to speak with an attorney.

Finally, the bill would expand the number of opportunities available for incarcerated persons to earn merit time. Under the bill’s mandate, in institutions which provide no programming, all incarcerated individuals will have merit time credited to them automatically.


48 Id.
The bill would also expand the types of programs that are eligible to earn credits, enabling creative prison staff to increase program offerings.

2. The Earned Time Act Will Improve Community Safety While Giving Incarcerated People Skills

The Earned Time Act incentivizes compliance with prison rules, which may help reduce violence. Meanwhile, the public would also benefit. Through earned time programs, individuals can obtain higher education, they can learn tangible skills that will help in their job search, and they can participate in programing to manage substance use disorders and other addictions. These programs should help ensure a smooth transition when incarcerated people are released from prison and decrease recidivism rates in the process. A study conducted by the RAND institute, for example, found that incarcerated people who participate in correctional education programs have a 43% lower chance of recidivating than those who do not. By passing the Earned Time Act, then, legislators can increase public safety—both in and outside of correctional facilities.

III. CONCLUSION

For the foregoing reasons, the Civil Rights Committee, Corrections and Community Reentry Committee, Criminal Courts Committee, and Mass Incarceration Task Force urge the legislature to swiftly pass the Communities Not Cages suite of bills, and for Governor Hochul to sign them expeditiously.

Civil Rights Committee
Kevin Eli. Jason and Kathleen Rubenstein, Co-Chairs

Corrections and Community Reentry Committee
Alexis Flyer and Stephanie A. Holmes, Co-Chairs

Criminal Courts Committee
Carola Beeney and Anna G. Cominsky, Co-Chairs

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49 Lois M. *et al*, *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults*, RAND (2013), [https://www.rand.org/pubs/research_reports/RR266.html](https://www.rand.org/pubs/research_reports/RR266.html).