

CHAPTER THREE: PUNISHMENT

INTRODUCTION

This chapter will focus on the New York sentencing scheme, including the changes that have affected sentencing over the years. The discussion will include sentencing ranges, types of offenders, and punishments other than imprisonment. The chapter will also discuss the history of the death penalty in New York, as well as the landmark case that catalyzed the abolishment of the death penalty in 2004. Prior to 2004, prisoners who were sent to death row spent their days in the Unit for Condemned Prisoners at Clinton Correctional Facility in Dannemora, near the Canadian border and transferred to Green Haven Correctional Facility, in Dutchess County, for execution. The Death Penalty Information Center provides further [information about the death penalty in New York](#).

SENTENCING REFORM IN NEW YORK STATE

In 1983, New York Governor Mario Cuomo created the 14-member New York State Committee on Sentencing Guidelines (COSG). The Committee was formed to create a sentencing guideline model following that of the United States Sentencing Commission's. Specifically, COSG was tasked with recommending changes necessary to implement a determinate sentencing structure with the goal of achieving proportionality and uniformity across offenses, offenders' criminal histories, and jurisdictions. The intention was to restrict the ranges by which judges could choose sentences. However, problems arose. The members could not agree on issues such as mandatory sentences, sentencing ranges, and re-classifications of offenses. The goals of the committee were thus never achieved. When Governor Cuomo submitted a bill to the Legislature based on COSG's report, it received a negative reaction and never passed through the legislative committee.¹

The Sentencing Reform Act of 1995

In response to the failed attempt at sentencing reform in 1983, the Sentencing Reform Act of 1995 ("the Act") was passed during the first year of Governor George Pataki's term. The Act created comprehensive changes to the Penal Law. It instituted determinate sentences for second violent felony offenders and second felony offenders convicted of violent felonies, even if their first offense was non-violent. The Act maintained the sentencing ranges from the old indeterminate scheme in which judges could choose a specific determinate sentence from a broad time range. Under the new structure, offenders would be required to serve 85% of their determinate term, and discretionary parole was abolished. The purpose of the Act was to promote "truth-in-sentencing." Compared to indeterminate sentencing, the Commission believed that determinate schemes promoted greater uniformity and fairness.

The Act further ended indeterminate sentencing for second-time felony offenders convicted of a violent felony. In its determination of the length of sentence for felony offenders, the focus of the sentencing scheme, the Legislature considered the seriousness of the crime against the nature of the offender. Such a determination is made with recognition of the great difficulty in determining whether the offender is likely to continue the criminal behavior, i.e., recidivate. This consideration is made with the added concerns of the impact that imprisonment will have on the offender and the offender's family, the impact of the failure to imprison on the community or when imprisoned, the return to the community, and the cost of imprisonment for an individual. However, unlike indeterminate sentences, determinate sentences allow parties to an offense, defendants and victims included, to understand the actual length of a sentence by eliminating subjective assessments of judges and parole boards.

Importantly, the Act further made determinate and indeterminate sentencing distinctions among

first and second felony offenders, first and second violent felony offenders, juvenile offenders, second child assault felony offenders, persistent felony offenders, misdemeanants, and violators. In other words, either an indeterminate or determinate sentence would be imposed depending upon the circumstances of the offense and type of offender. No single sentencing scheme was available across the wide spectrum of offenses.

For indeterminate sentences, the broad sentence ranges allowed judges to continue addressing the multitude of crimes in the extensive categories of non-violent, non-sex, and non-drug felony offenses. Judges would be allowed to impose sentences that reflect aggravating and mitigating circumstances of the crime such as the defendant's motivation for the offense, mental illness issues, extent of harm, quantity of the controlled substance involved, injury to the victims, the criminal history of the offender, etc. and decide whether to make a sentence run consecutively or concurrently.

The Sentencing Reform Act of 1998

In 1998, a new law extended determinate sentencing to first-time violent felony offenders. The legislation also added post-release supervision periods for offenders sentenced to determinate terms. This law represented the second phase of the truth-in-sentence initiative begun in 1995. Known alternately as the Sentencing Reform Act of 1998, or [Jenna's Law](#), this legislation amended the Penal Law by eliminating parole and establishing separate periods of post-release supervision for first-time violent felony offenders (added under new [§70.45](#)), and providing for victim notification when convicted violent felons are released, abscond, or escape from prison, or are released to the supervision of the Division of Parole. At the victim's request, prosecutors must contact the Department of Correctional Services of the victim's desire to be notified when the offender leaves prison. The law further increased incarceration periods by mandating that first-time violent offenders serve at least six-sevenths of their determinate sentences and increased the minimum sentence for Class B, C, and D violent felony offenses.²

Other Reforms

In 2000, sentences were enhanced for second child sexual assault felony offenders and hate crimes. Also in 2004, determinate sentencing was created for drug offenders, and in 2007, determinate sentences were extended to felony sex offenses classified as non-violent felonies. Today, there are separate indeterminate sentencing schemes for first-time non-violent, non-drug, non-sex felony offenses. Another set of sentencing rules involve both determinate and indeterminate sentences for second child sexual assault felony offenders (§70.07). Felony drug offenses would receive determinate sentences. But indeterminate schemes are used for persistent felony offenders, persistent violent felony offenders, and juvenile offenders. Under the current law, indeterminate sentences are reserved primarily for Class B through E non-violent, non-sex, non-drug felony offenses.

In 2007, Governor Eliot Spitzer, by executive order, created the New York State Commission on Sentencing Reform and appointed its first members. Importantly, this commission, unlike its 1983 predecessor, has an open-ended goal of recommending legislative fixes, including alternatives to incarceration, such as drug and community courts. The commission's overarching goal is to reduce crime while simultaneously reducing incarceration. The fiscal impact of the prison system is also a consideration. The Commission further recommended converting over 200 non-violent, non-sex, non-drug felony offenses from indeterminate to determinate sentences since determinate sentencing is seen as superior to indeterminate sentencing.³

PUNISHMENT IN THE PENAL CODE

New York has three basic punishment objectives: to deter, to incapacitate, and to rehabilitate, all of which are defined in the textbook. Types of punishments available in New York are incarceration in jail or prison, fines, restitution, conditional discharge, and probation. These sentences may be either singularly imposed (e.g., probation) or imposed in combination (e.g., prison and conditional release). New York also imposes mandatory surcharges on offenders. Surcharges are fees used for costs associated with criminal justice programs, such as sex offender registration, maintenance of the DNA databank, sex offender victim fees, and crime victim assistance fees. The fees attached are dependant upon the type of offense upon which the offender was convicted. The schedule of fees is imposed by [§60.35\(1\)](#) of the Penal Law.

Felony Offense Classifications

New York recognizes six felony classifications: A, B, C, D and E according to [Article 55](#). Class A felonies are further divided into two subcategories: A-I and A-II. Class A felonies receive the longest prison sentences, whereas Class E felonies receive the shortest. The first consideration for determining the length of sentence is the grade of the offense. New York recognizes a Class A felony, the most serious, as murder, and kidnapping, both in the first and second degree, and arson in the first degree. Class B, C, and D felonies are divided into violent and non-violent offenses. A website containing a [list of felonies by classification](#) is maintained by a New York defense attorney.

Types of Offenders

Felony Offender

[Article 70](#) identifies prison sentences according to the type of offender and offense involved. **Section 70.00** details the prison terms for felony offenders. Felonies in New York receive indeterminate prison terms, except as specified in **subsection (6)**. For felonies, the minimum term must be at least one year and the maximum must be at least 3 years. More specific minimum and maximum periods of prison are set by **subsections (3)** and **(2)** respectively.

- For Class A felonies, the minimum period of imprisonment shall be fixed by the court and specified in the sentence, and the maximum term shall be life imprisonment.
- Class A-I felony—The minimum period shall not be less than 15 years nor more than 25 years provided that the defendant has not received a sentence of life imprisonment, unless the defendant is convicted of murder in the first degree (§125.27) in which “such minimum period shall be not less than 20 years nor more than 25 years.”
- Class A-II felony—The minimum period shall not be less than 3 years nor more than 8 years 4 months.
- Class B felony—For the offense of third degree criminal sale of a controlled substance in or near school grounds (§220.44(2)), the minimum period must be fixed by the court at one-third of the maximum term imposed, which must be at least 6 years and not exceed 25 years. For all other Class B felonies, the minimum period shall be fixed by the court and shall not be less than 1 year nor more than one-third of the maximum term imposed, which must not exceed 25 years.
- Class C felony—The minimum must be at least 1 year and maximum must not exceed 15 years.
- Class D felony—The minimum must be at least 1 year and maximum must not exceed 7 years.

- Class E felony—The minimum must be at least 1 year and maximum must not exceed 4 years.

Subsection (4) specifies alternative definite sentences for Class D, E, and certain Class C felonies (§220 (Controlled Substances Offenses) and §221 (Offenses Involving Marihuana) for persons who are not second or persistent felony offenders. “[If] the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate or determinate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less.”

Subsection (5) provides guidance regarding life imprisonment without parole. “A defendant may be sentenced to life imprisonment without parole only upon conviction for the crime of murder in the first degree as defined in section 125.27.” A person sentenced to life imprisonment without parole will not be eligible for parole or conditional release.

Subsection (6) reserves determinate sentences for persons sentenced as violent felony offenders under §70.02 or second violent felony offenders under §70.06. The sentence includes a period of post-release supervision.

Second Felony Offender

Section 70.06(1)(a) defines a second felony offender as “a person...who stands convicted of a felony...other than a class A-I felony, after having previously been subjected to one or more predicate felony convictions.”

Second felony offenses are subjected to indeterminate terms. **Section 70.06(3)** provides the maximum term of an indeterminate sentence which must be fixed by the court as follows:

- (a) Class A-II felony— the term must be life imprisonment
- (b) Class B felony—the term must be at least 9 years and must not exceed 25 years
- (c) Class C felony—the term must be at least 6 years and must not exceed 15 years
- (d) Class D felony—the term must be at least 4 years and must not exceed 7 years
- (e) Class E felony—the term must be at least 3 years and must not exceed 4 years

Section 70.06(4)(a) provides that for a class A-II felony, the minimum term must be fixed by the court at no less than 6 years to 12½ years. For other felonies, described in **subsection (b)**, the minimum term is half of the maximum term imposed.

Section 70.06(5) states that a second felony offender may receive lifetime probation for a person convicted of a class A-II or class B felony.

When the court has found that a person is a second felony offender and the current sentence to be imposed is for a violent felony offense, the court must impose a determinate sentence of imprisonment according to the following terms:

- (a) Class B violent felony offense—the term must be at least 8 years and must not exceed 25 years;
- (b) Class C violent felony offense—the term must be at least 5 years and must not exceed 15 years;

- (c) Class D violent felony offense—the term must be at least 3 years and must not exceed 7 years;
- (d) Class E violent felony offense—the term must be at least 2 years and must not exceed 4 years.

Violent Felony Offender

Violent felony offenders have committed violent offenses enumerated in §70.02. Section 70.02 also indicates the corresponding sentence for each class of offenses. According to **Section 70.02(1)**, a violent felony offense is a class B, C, D, or E violent felony offense. Class A felonies are not included in Sections 70.02 (Violent Felony Offenses) and 70.04 (Second Violent Felony Offenses) because when these sections were adopted, A felonies already carried the highest sentence of life imprisonment.

According to Section 70.02(3), violent felony offenses are fixed to determinate terms before eligibility for parole. This section was amended in the Sentencing Reform Act of 1998. Judges now set prison terms within the following ranges, whereas under the previous law, judges set minimum and maximum terms within the allowable ranges. Current sentence ranges are indicated as follows and are effective September 1, 2009:

- (a) Class B felony—the term must be at least 5 years and must not exceed 25 years
- (b) Class C felony—the term must be at least 3 ½ years and must not exceed 15 years
- (c) Class D felony—the term must be at least 2 years and must not exceed 7 years
- (d) Class E felony—the term must be at least 1 ½ years and must not exceed 4 years

Second Violent Felony Offender

Section 70.04 describes second violent felony offenders and their sentences. A second violent felony offender is defined in **Section 70.04(1)(a)** as “a person who stands convicted of a violent felony offense...after having previously been subjected to a predicate violent felony conviction.” A prior conviction is a felony conviction, according to §70.02(2)(i) when the conviction was a class A felony or a violent felony.

Until September 1, 2009, a second violent felony offense will be subjected to a determinate term. According to **Section 70.04(3)**, the terms of a determinate sentence are fixed as follows:

- (a) Class B felony—the term must be at least 10 years and must not exceed 25 years
- (b) Class C felony—the term must be at least 7 years and must not exceed 15 years
- (c) Class D felony—the term must be at least 5 years and must not exceed 7 years
- (d) Class E felony—the term must be at least 3 years and must not exceed 4 years.

Effective September 1, 2009, the term for a second violent felony offender will be subject to an Enhanced indeterminate sentence according to the following scheme:

- (a) Class B felony—the term must be at least 12 years and must not exceed 25 years
- (b) Class C felony—the term must be at least 8 years and must not exceed 15 years
- (c) Class D felony—the term must be at least 5 years and must not exceed 7 years.
- (d) Class E felony—the term must be at least 4 years.

Persistent Felony and Persistent Violent Felony Offender

Section 70.10(1) defines a persistent felony offender as “a person, other than a persistent violent felony offender... who stands convicted of a felony after having previously been convicted of two or more felonies.”

Section 70.08(1) defines a persistent violent felony offender as “a person who stands convicted of a violent felony offense...after having previously been subjected to two or more predicate violent felony convictions.” The terms of imprisonment for a persistent violent felony offender are found in **subsection (3)**. Indeterminate sentencing has been authorized for persistent felony offenders.

Misdemeanant or Violator

Section 70.15 imposes definite sentences for misdemeanors and violations. **Subsection (1)** imposes sentences for class A misdemeanors not to exceed 1 year. **Subsection (2)** imposes a sentence of not to exceed three months for a class B misdemeanor. **Subsection (4)** imposes a sentence not to exceed 15 days for a violation.

Types of Sentences

New York’s sentencing system is a mix of indeterminate and determinate punishments, stemming from a history of indeterminate punishments infused with newer determinate sentencing schemes for some offenses. New York State has five imprisonment alternatives for felony offenders. Four of the most used are indeterminate sentences, determinate sentences, alternative definite sentences, and life imprisonment without parole. The fifth, intermittent sentences, are rarely used in New York.

Indeterminate Sentence

Section 70.00(1) describes the basic sentence for a felony. According to this section:

[A] sentence of imprisonment for a felony...shall be an indeterminate sentence. When such sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

With the exception of the mandatory life term of a class A felony, the maximum terms of imprisonment for other felonies are imposed by the court. According to **Section 70.00(2)**, the range of the maximum term of an indeterminate sentence shall be between three years and the following:

- (a) Class A felony—life imprisonment
- (b) Class B felony—not to exceed 25 years
- (c) Class C felony—not to exceed 15 years
- (d) Class D felony—not to exceed 7 years
- (e) Class E felony—not to exceed 4 years

The minimum indeterminate term is imposed by **Section 70.00(3)** which states that the minimum period of imprisonment under an indeterminate sentence shall be at least one year and shall be fixed as follows:

- (a) Class A felony—fixed by the court
 - (i) Class A-I felony—the minimum is not less than 15 years and not more than

25 years. However, for a person convicted of murder who receives a sentence other than death or life imprisonment without parole, the minimum range is between 20 and 25 years. Where the offender is convicted of murder in the second degree or aggravated murder, the sentence is life imprisonment without parole. Where the offender is convicted of attempted murder in the first degree or attempted aggravated murder, the minimum sentence is between 20 and 40 years.

(ii) Class A-II felony—the minimum is not less than 3 years and not more than 8 years 4 months (1/3 of maximum sentence)

(b) Class B felony—the minimum is not less than 1 year and not more than 1/3 of the maximum sentence imposed

Section 70.00(4) provides an alternative definite sentence provision for class D and E felonies:

When a person, other than a second or persistent felony offender, is sentenced for a class D or class E felony, and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate or determinate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less.

Section 70.00(5) contains the life imprisonment without parole sentencing provision:

Notwithstanding any other provision of law, a defendant sentenced to life imprisonment without parole shall not be or become eligible for parole or conditional release...[S]uch sentence shall be deemed to be an indeterminate sentence. A defendant *may* be sentenced to life imprisonment without parole upon conviction for the crime of murder in the first degree...A defendant *must* be sentenced to life imprisonment without parole upon conviction for the crime of terrorism...the crime of criminal possession of a chemical weapon or biological weapon in the first degree...or the crime of criminal use of a chemical weapon or biological weapon in the first degree...A defendant *must* be sentenced to life imprisonment without parole upon conviction for the crime of murder in the second degree or for the crime of aggravated murder.

Determinate Sentence

The major change to the Penal Law is that determinate sentences were added. Specifically, in cases of individuals convicted as violent felony offenders or second felony offenders, the court must impose a determinate sentence of imprisonment pursuant to §§70.02 and 70.04 respectively.

Determinate sentencing is a fixed sentencing scheme which could be reduced by good-time credits. Since 1995, determinate sentencing has been extended to almost all violent felony offenders. It was also extended to felony drug offenders. In New York, a determinate sentence consists of a minimum of one year imprisonment and a specified length of imprisonment without a minimum or maximum. A period of supervision is also imposed beyond release from prison. Determinate terms may range from a low of one to one and a half years to a high of 15 to 30 years.

The basic determinate sentence is outlined in **70.00(6)**. According to this section:

[W]hen a person is sentenced as a violent felony offender...or as a second violent felony offender...or as a second felony offender on a conviction for a violent felony offense...the court must impose a determinate sentence of imprisonment in accordance with the provisions of such

sections and such sentence shall include...a period of post-release supervision.

Definite Sentence

Definite sentences are those of one year or less and are available only for the lower classes of offenses (C, D or E felonies). A definite sentence is usually viewed as an alternative sentence that can be imposed in place of an indeterminate sentence where the court articulates special factors in authorizing its use.

Intermittent Sentence

Section 85.00(1) defines the intermittent sentence as:

[A] revocable sentence of imprisonment to be served on days or during certain periods of days, or both, specified by the court as part of the sentence. A person who receives a sentence of intermittent imprisonment shall be incarcerated in the institution to which he is committed at such times as are specified by the court in the sentence.

Subsection (2) indicates when this sentence may be imposed. This sentence is reserved for when each of the following conditions are met:

- (a) the court is imposing sentence, upon a person other than a second or persistent felony offender, for a class D or class E felony or for any offense that is not a felony; and
- (b) the court is not imposing any other sentence of imprisonment upon the defendant at the same time; and
- (c) the defendant is not under any other sentence of imprisonment with a term in excess of fifteen days imposed by any other court.

Additional Punishment Enhancements

The New York State Division of Criminal Justice Services website provides a recent [history of criminal justice legislation](#) related to punishment and sentencing enhancements, some of which will be discussed in the chapters that follow. For example, in 1999, the Clinic Access & Anti-Stalking Act of 1999 (Chapter 15) prohibits conduct that criminally interferes with health care services and places of religious worship. In 2001, the Anti-Terrorism Act (Chapter 16) was passed which created the Office of Public Security and established felony offenses for providing support for acts of terrorism and hindering terrorism prosecutions. The Anti-Terrorism Preparedness Act of 2004 (Chapter 16) changed the name of the Office of Public Security to the Office of Homeland Security and created felonies for storing or manufacturing biological agents.

Other Punishments

Conditional Discharge

New York does contain provisions for parole, which it terms “conditional discharge.” According to **Section 65.05(1)** “if the court, having regard to the nature and circumstances of the offense and to the

history, character and condition of the defendant, is of the opinion that neither the public interest nor the ends of justice would be served by a sentence of imprisonment and that probation supervision is not appropriate” then conditional discharge is to be at least for three years after release for felony convictions and one year for misdemeanors and violations.

Probation

Probation is set aside in cases where, according to **Section 65.00**: (i) Institutional confinement for the term authorized by law of the defendant is or may not be necessary for the protection of the public; (ii) the defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision; and (iii) such disposition is not inconsistent with the ends of justice.

Restitution

Restitution is a supplementary punishment that requires the defendant to pay back the fruits of the crime to the victim or pay for out-of-pocket losses, such as hospital expenses, transportation expenses, lost wages due to lost work, or babysitting costs, caused by the crime. The court determines the amount of the fruits of the offense and out-of-pocket expenses based on the victim impact statement provided to the court.

Fines

According to **Article 80(1)**, the court may impose a fine as a punishment.

1. A sentence to pay a fine for a felony shall be a sentence to pay an amount, fixed by the court, not exceeding the higher of
 - a. five thousand dollars; or
 - b. double the amount of the defendant's gain from the commission of the crime; or
 - c. if the conviction is for any felony defined in Article 220 or 221 of this chapter, according to the following schedule:
 - (i) for A-I felonies, \$100,000
 - (ii) for A-II felonies, \$50,000
 - (iii) for B felonies, \$30,000
 - (iv) for C felonies, \$15,000.

Victim Impact Statement

During sentencing, the victim has the right to make a statement to the court which may impact the amount of punishment the defendant receives. This procedure is defined in **§380.50** of the Criminal Procedure Law. If the offender is charged with a homicide, then a member of the victim’s family or the victim’s legal guardian will make the statement on the victim’s behalf. The victim impact statement includes allegations about the crime that were not fully explored during the proceedings or that materially varied from or contradicted the evidence at trial.

THE DEATH PENALTY

The death penalty has been through several iterations since Colonial times when there were many offenses punishable by death. In the late 1700s to early 1800s, the number of capital offenses was reduced to three: murder, treason, and arson of an occupied building. In the mid-1800s, murder was divided into two degrees. Only first degree murder was punishable by death.

In 1937, the death penalty was mandatory for first degree murder unless the jury recommended life imprisonment. In 1963, the Legislature reversed the language and imposed a mandatory life sentence for first degree murder, unless the jury recommended death. Capital trials were bifurcated into separate proceedings: one to determine guilt and the other to determine whether the sentence should be life imprisonment or death.

And in 1963, the death penalty was limited to murder in the first degree when the victim was a peace officer performing his or her official duties, when the defendant was serving a life sentence at the time of the crime, when the defendant was serving an indeterminate sentence of at least 15 years to life, or the defendant was immediately escaping from penal custody at the time of the crime. In 1967, in addition to these offenses, the death penalty was extended to include intentional murder, depraved indifference to human life murder and felony murder.

In 1968, depraved indifference to human life murder was removed from the list of eligible death offenses. In 1971, the killing of an employee of a local jail, penitentiary or correctional institution performing his official duties was added to the list. Because the U.S. Supreme Court invalidated the death penalty in 1972 on the grounds that it was cruel and unusual, New York tried to enact legislation that would overcome these problems. However, 1975 marked the beginning of 20 years of failed attempts to reinstitute the death penalty. Both Governors Hugh Carey and Mario Cuomo vetoed death penalty legislation.

In 1995, however, New York reinstated an expanded death statute that was signed into law by Governor Pataki. The new legislation included 12 categories of intentional (first degree) murder and included the sentence of life imprisonment without parole as an alternative to the death penalty with respect to offenders convicted of murder in the first degree. Death by lethal injection legislation was also passed.⁴

In 2004, the death penalty was declared unconstitutional, which it remains until today. Defendants convicted of first degree murder are now sentenced to life imprisonment without the possibility of parole. In *People v. LaValle*, the defendant's appeal stemmed from the penalty phase of his trial when the court was mandated to provide its "deadlock" instruction to the jury. The instruction is found in **Section 400.27(10)** of the Criminal Procedure Law. It describes how judges are to charge juries that are deliberating murder cases:

[T]he court shall deliver a charge to the jury on any matters appropriate in the circumstances. In its charge, the court must instruct the jury that with respect to each count of murder in the first degree the jury should consider whether or not a sentence of death should be imposed and whether or not a sentence of life imprisonment without parole should be imposed, and that the jury must be unanimous with respect to either sentence. The court must also instruct the jury that in the event the jury fails to reach unanimous agreement with respect to the sentence, the court will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life. Following the court's charge, the jury shall retire to consider the sentence to be imposed.

This instruction, according to the Court of Appeals, created an unacceptable risk that jurors favoring life without parole would support execution out of a concern that failure to reach a unanimous decision would result in a third unacceptable alternative: life *with* a chance of parole after 20 or 25 years of imprisonment.

In 2005, a legislative committee voted down a bill to reinstate New York's death penalty. The bill was killed in the Assembly by an 11-to-7 committee vote. In response, Governor Pataki accused the assemblymen of protecting criminals over New Yorkers.⁵ Today, there continue to be vocal supporters of

the death penalty in the Legislature.

PEOPLE v. LAVALLE
Court of Appeals of New York
783 N.Y.S. 2d 485 (2004)

Opinion By: Smith, J.

The issue in this case concerns whether the deadlock instruction for a jury in a capital murder case is constitutional.

Defendant was found guilty of first degree murder in the course of and in furtherance of first degree rape. On May 31, 1997, the body of Cynthia Quinn was found in the woods near her home in Yaphank in Suffolk County after she left in the morning for her customary jog. Her neck, chest, back, and arms were covered with 73 puncture wounds from a screwdriver-type instrument, and she had a broken rib, bruises on her arms and abrasions on her body. She had also been raped. Her body had been found by the police who were searching for her.

Two days after her murder, the police arrested defendant in connection with a robbery of another woman on the same day that Cynthia Quinn's body was found. In his interrogation, the defendant initially denied the robbery but eventually admitted that he had an encounter with the victim. He stated that he accidentally hit her car with his car, and when he pulled over, she got out and began yelling at and hitting him with her pocketbook. He grabbed her pocketbook, threw it over a fence, pushed her in her car to calm her down, and got into the car next to her. She then ran for help to a nearby house.

When the victim gave her statement two days earlier, she stated that the defendant had hit her with his car and forced his way into her car where she bit his finger and ran for help.

During the interrogation, the defendant also eventually admitted to the murder of Cynthia Quinn. He stated that he had been urinating on the side of the road. As she jogged past, she began yelling at him that he was a bum and should use a restroom. He became angry, backed her into the woods, and when she started waving a piece of metal at him, he grabbed it and started stabbing her. When she fell down, he raped her. He then sat down and cried.

The jury found defendant guilty of both first and second degree murder. After the penalty phase of the trial, the jury rendered a verdict that defendant be sentenced to death. The trial court dismissed the second degree murder guilty verdict since he was convicted on the first degree charge.

The issue in this case rose in the penalty phase of the trial. The defendant raised a motion that the deadlock instruction to the jury, pursuant to Criminal Procedure Law §400.27(10), prior to its deliberation of the appropriate sentence for defendant, was unconstitutional. The trial court instructed the jurors about their "duty to decide whether defendant should be sentenced to death or life without parole. But either choice had to be unanimous." The court further instructed the jurors that if they failed to agree, then the court would impose a sentence of life imprisonment with parole eligibility after defendant serves 20 to 25 years. In New York, jurors are required to know the consequences of a deadlock on the defendant. In its decision, the Court of Appeals stated, "No other death penalty scheme in the country requires judges to instruct jurors that if they cannot unanimously agree between two choices, the judge will sentence defendant to a third, more lenient, choice."

Two issues emerged in the court's consideration of the constitutionality of the deadlock instructions. First, the deadlock instruction interjects the fear that if jurors do not reach unanimity, the defendant may be paroled in 20 years and pose a threat to society. Thus, there is a fear about future dangerousness. Future dangerousness, however, is not an aggravating factor a jury may consider during the penalty phase. The Court of Appeals reasoned, "By interjecting future dangerousness, the deadlock instruction gives rise to an unconstitutionally palpable risk that one or more jurors who cannot bear the thought that a defendant may walk the streets again after serving 20 to 25 years will join jurors favoring death in order to avoid the deadlock sentence...For jurors who are inclined toward life without

parole, the choice is between death and life with parole...The choice of death [thus] results not through 'a comparison of views, and by arguments among the jurors themselves,' but through fear and coercion."

When constructing the statute, however, the Legislature did not construe a life with parole option. The New York State Legislature was, however, aware of the danger of the deadlock instruction on coercive verdicts. During deliberations on the death penalty statute in 1995, one legislator posed the concern that forcing jurors to choose one option or another unanimously, knowing that a failure to agree means that they would face a penalty less than either of the two that they are in dispute with puts additional pressure on jurors. Although the alternative sentence had been considered as a third option, the Legislature felt that when having a jury consider something as serious as the death penalty, they should be unanimous, and if they can't be unanimous, then the judge would enact a lesser penalty.

The Court of Appeals felt it improper that a jury should have to focus on predicting a defendant's future dangerousness. "The jury should instead focus on determining whether life or death is the appropriate punishment." Although the jurors in the instant case did not indicate that they were deadlocked, the issue is that jurors in a capital case are given an instruction that may coerce them into surrendering their beliefs. The "motivating fear in the minds of a juror in a numerical minority is likely to be that a vote for life without the possibility of parole is really a vote for life with the possibility of parole." Also, "as it stands now, in the event of a deadlock, the defendant might receive a sentence that none of the jurors could have considered or might even have considered palatable."

Second, the Court argued that the instruction does not satisfy the due process clause of Article I of the State Constitution. A "vote for life imprisonment or death, driven by the fear that a defendant might be parole-eligible if jurors fail to reach unanimity, does not satisfy the heightened standard of reliability required by our State Constitution...Our State Constitution does not permit a death sentence imposed by jurors who may have chosen that option based on rank speculation about a defendant's eventual release into society."

The Court nevertheless declined to create a new instruction. Instead it relegated that responsibility to the Legislature as the "legislative prerogative." The court recognized its power to "eliminate an unconstitutional sentencing procedure" but not the power "to fill the void with a different procedure, particularly one that potentially imposes a greater sentence than the possible deadlock sentence that has been proscribed."

The Court concluded that the deadlock instruction is therefore unconstitutional and that "under the present statute, the death penalty may not be imposed. Cases in which death notices have been filed may not go forward as capital first degree murder prosecutions." Accordingly, the judgment should be modified by vacating the sentence of death and remitting to the Supreme Court, Suffolk County for recommencing, and, as so modified, affirmed.

Following the Court's decision, the defendant was sentenced to life imprisonment without the possibility of parole.

REVIEW QUESTIONS

1. Unlike indeterminate sentences, determinate sentences:
 - A. are perceived as more lenient toward offenders.
 - B. remove sentencing discretion from the judge.
 - C. provide no conditional release.
 - D. are applicable to class A felonies.

2. In New York the death penalty is:
 - A. used only for Class B felonies.

- B. applicable only in certain counties.
 - C. unconstitutional.
 - D. widely used.
3. A supplemental punishment that requires the defendant to pay the victim back is called:
- A. conditional release.
 - B. restitution.
 - C. probation.
 - D. surcharge.
4. The overall purpose of the Sentencing Reform Act of 1995 is to:
- A. consider sentencing according to the seriousness of the crime and the nature of the offender.
 - B. create a sentencing guideline like the federal system.
 - C. remove determinate sentences.
 - D. treat all offenders as violent felons.
5. In New York, a persistent felony offender is one who:
- A. commits a first violent felony.
 - B. was previously convicted of one felony.
 - C. was previously convicted of two felonies.
 - D. keeps failing to appear in court.

REFERENCES

¹ Vinegrad, A. & Bloom, D. (2007, May 7). [New York's new Commission on Sentencing Reform](#). *New York Law Journal*. Retrieved July 27, 2009.

² New York State Commission on Sentencing Reform. (2009, January 30). [The future of sentencing in New York State: Recommendations for reform](#). Retrieved July 27, 2009.

³ Ibid.

⁴ Lentol, J., Weinstein, H. & Aubry, J. (2005, April 3). The death penalty in New York: A report on five public hearings on the death penalty in New York conducted by the Assembly standing committees on Codes, Judiciary and Correction, December 15, 2004 – February 11, 2005. Retrieved July 31, 2009.

⁵ Ibid.

ANSWERS

1. B; 2. C; 3. B; 4. A; 5. C