Pace Law Review

Volume 19
Issue 2 *Winter 1999*
Health Law Symposium

Article 5

January 1999

Proposal for Senior Offender Law

Peter M. Leavitt

Proposed Legislation

Proposal for Senior Offender Law

Honorable Peter M. Leavitt[1]

[There are] cases which, though within the words of the law, [are] notoriously not within its intention, and are therefore relievable by an equitable exercise of discretionary power.

—Thomas Jefferson, 1808[2]

I. Introduction

Mr. Orville Redlo is a sixty-four-year-old veterinarian's assistant and animal health technician in a small-town animal hospital near Saratoga, in New York's horse country. Never blessed with children, Mr. Redlo and his wife of forty years have come to regard their neighbors and his co-workers at the animal hospital as their own family. Although they managed to put a small nest egg aside for retirement, Mrs. Redlo has, unfortunately, been diagnosed with a degenerative disease that will deprive her of her sight in a short time. Her medical bills far exceed the limits of Mr. Redlo's meager health insurance. Their nest egg has long since disappeared, and their small cottage has been mortgaged to the hilt. To make matters worse, he has been forced to work less

1. Judge Leavitt is currently County Court Judge for the County of Westchester. From January 1984-December 1993, Judge Leavitt was Town Justice for the Town of New Castle. Before ascending to the bench, Judge Leavitt was in private practice for approximately eighteen years, and prior to that served as an Assistant District Attorney for both the Westchester and Kings County District Attorney's Offices.

Judge Leavitt would like to thank his Law Clerk, Albert J. Degatano and Judicial Intern, Kate Cerrone, for their invaluable assistance in the preparation of this proposal.

2. *Famous Quotes and Quotations: Best Quotes and Familiar Quotations* (visited Nov. 18, 1998) <http://www.bemorecreative.com/homecq3.html>.

hours - thereby reducing further his ability to pay for his wife's care - so that he can be home as much as possible to help her adjust to a suddenly sightless world.

Mr. Redlo has led a quiet, but exemplary, life. He has never been involved in any way with the criminal justice system, much less been arrested for, or convicted of a crime. Although he is himself an active member of several service and charitable organizations, he is too proud to ask for help despite his dire financial predicament.

The veterinarian he works for is so well regarded by horse breeders and trainers that, during the racing season, his business increases a hundred-fold. Mr. Redlo is a valued employee, and at such times he is often entrusted with large sums of money for deposit or safekeeping. One night, after a particularly busy, exhausting day during the season, Mr. Redlo finds himself alone at the animal hospital with an enormous amount of cash. His employer has been out on call all day, and is not even aware of the size of the day's receipts. Tired, desperate and racked with anxiety and guilt over his inability to provide for his wife when she needs him most, Mr. Redlo makes a rash, life-altering decision and steals fifty-five thousand dollars.[3] By the end of the season, when things have settled down, the theft is discovered. By that time, Mr. Redlo has used the money to pay some of his wife's bills. He is eventually indicted for grand larceny in the second degree.

Despite his outstanding reputation, the high esteem with which he had formerly been held in the community and the unquestioned motive for his actions, Mr. Redlo's motion to dismiss the indictment in furtherance of justice is - reluctantly - denied and, given the overwhelming evidence against him, he enters a plea of guilty. At sentencing, both he and his attorney present eloquent and impassioned arguments, extolling his stellar background and explaining his anomalous conduct.

---

3. A significant portion of elder crime seems to arise from desperate economic circumstances. "Crimes such as fraud, embezzlement, and theft are the crimes [for] which the elderly are more often arrested." William E. Adams, Jr., *The Incarceration of Older Criminals: Balancing Safety, Cost and Humanitarian Concerns,* 19 NOVA L. REV. 465, 471 (1995)(citing Kyle Kercher, *The Causes and Correlates of Crime Committed by the Elderly,* 9 RES. ON AGING 257, 257 (1987)(citations omitted)). Many of those arrested for shoplifting are first-time offenders. *See* Adams (citing Daniel J. Steffensmeier, *The Invention of the "New" Senior Citizen Criminal,* 9 RES. ON AGING 281, 301 (1987); Manuel Voga & Mitchell Silverman, *Stress and the Elderly Convict,* 32 INT'L J. OF OFFENDER THERAPY AND COMPAR. CRIM. 153, 158 (1988)).

Mr. Redlo's employer even appears on his behalf and joins his plea for mercy and leniency, assuring the court that if Mr. Redlo is not incarcerated he will continue to employ his old assistant, who has agreed to work at a reduced rate in order to make at least partial restitution. The judge is sympathetic and he announces that because such a disposition would, indeed, serve the interest of justice for all concerned, he imposes a sentence of probation for a period of five years, rather than imprisonment. The court also imposes as special conditions of Mr. Redlo's probation, that he maintain continuous employment and make restitution to his employer at a specific monthly rate. A rate which, Mr. Redlo assures the judge, is quite reasonable given his salary as an animal health technician and the financial support which has been pouring in from the people of his community to defray his wife's medical expenses. The court also grants Mr. Redlo's application for a Certificate of Relief from Disabilities.

Thus, Mr. Redlo returns to his wife and his work, determined to rebuild what he regards as his shattered reputation, and to justify his employer's faith and recompense his loss. Barely three months later, however, Mr. Redlo's animal health technician's license is revoked as a consequence of his felony conviction,[4] and his applications for reinstatement are repeatedly denied. Without a license, the best position which his employer can offer is cleaning the animal cages and stalls - a job normally reserved for local teenagers - at minimum wage. Meantime, given Mr. Redlo's inability to regain his license, the employer has had to hire another assistant, so that Mr. Redlo now has no hope of returning to his previous employment even if his application for reinstatement of his license were to be granted upon the termination of his sentence. The employer now has no real hope of receiving any significant restitution for his losses.

Although his employer is willing to accept a substantially reduced rate of restitution, or even forego it entirely until Mr. Redlo can better afford to pay, his probation officer has no choice but to file a violation of probation with the court. Once again, the court is moved by Mr. Redlo's situation and restores him to probation - with a reduced rate of restitution - despite the violation. But now, of course, Mr. Redlo is in even worse financial straits than he was before - paying his mortgage and providing food for himself and his disabled wife have become seriously problematic - and he could hardly rely on the charity of those who have already given

4. *See* N.Y. EDUC. LAW §6709 (McKinney 1980).

> so much, even were he inclined to do so. Soon he is reduced to shoplifting canned goods from a supermarket in the nearest city - where he is not known - to survive. When he is caught and charged with petit larceny, a routine check reveals that he has a criminal record and he is held in lieu of bail which he cannot possibly post. Another violation of probation is filed with the court. This time, however, the court has little choice but to revoke Mr. Redlo's probationary sentence and impose a sentence of imprisonment, which - due to the fact that his original conviction was for a class C felony - must be an indeterminate period of at least one to three years.[5]

As this hypothetical demonstrates, a first-time offender, regardless of age, circumstances, or history, will carry the stigma of a criminal conviction for the rest of his life. Even when prosecutors and defense attorneys agree that harsh punishment will be unproductive, negotiating the most lenient treatment still results in destructive effects on the defendant, his dependents, and even on his former employer, who will have no hope of restitution from a person who has no assets and cannot work to raise the money. Instead of one less criminal on the streets, the conviction of some defendants results in one less productive member of society.

For some hardened criminals who stand no chance of rehabilitation, the lifelong stigma is appropriate and even necessary, as a constant reminder that the criminal justice system will not tolerate their straying from the law again. However, other offenders are not hardened criminals. These defendants suffer from an isolated instance of poor judgment, yet suffer from the burden of a criminal record long after the effects of their offenses could have been remedied. This hardship is particularly poignant and unduly harsh when the defendant is elderly.

Of course, public policy dictates that a person who has committed an act fitting every element of a crime should be punished. Public policy also stands for the principle that those who

---

5. *See* N.Y. PENAL LAW § 65.20 (McKinney 1965); N.Y. SENTENCE CHARTS I & X (McKinney 1997). For all class C felonies, including grand larceny, "the minimum period of imprisonment of an indeterminate sentence of imprisonment must be not less than one year nor more than one-third the maximum term imposed." N.Y. PENAL LAW Chap. 40 Part 2-E commentary at 7 (1997)(citing N.Y. PENAL LAW § 70.00(3)(b) (McKinney 1986) (amended 1998)).

can be rehabilitated should, within the bounds of the law, be rehabilitated through the criminal justice system. Some commentators have reasoned that "the extent to which age is a factor in sentencing depends upon the weight given to each of the four theories of punishment: retribution, deterrence, prevention, and rehabilitation."[6] According to these theories, the law can function in a number of distinct ways: to punish the defendant to counteract the harm done to the victim; to deter the defendant and others from committing crimes; to remove the defendant from society to prevent further harm; or to furnish the defendant with skills so that he can return to society as a contributing member.[7]

Although these models are often used to explain and justify criminal laws, the reality is that punishment is not so compartmentalized in its application. Some cases and some defendants may call into play any number of these concerns. For example, some elderly criminals may be repeat offenders over a long period of time and may be well deserving of retribution and prevention. They may be far beyond the stage where deterrence or rehabilitation could have any effect. In contrast, other elderly defendants are subject to a single moment of bad judgment late in life, and may warrant, and may respond well to, rehabilitative treatment.

While not abandoning the other functions of punishment, the criminal justice system has recognized that certain groups of people are entitled to discretionary treatment when, in the court's view, imposing the law as customarily applied will result in unfair, prejudicial treatment that would contravene the truest ends of justice. A teenager who has imprudently engaged in criminal behavior may be found a youthful offender.[8] Through such a vehicle of discretion in the law, the court may recognize those youths who would only be harmed or further corrupted by a conviction, and may remove that "conviction" label when fashioning a punishment.

---

6. Adams, *supra* note 3, at 476 (citing Victoria K. Kidman, *The Elderly Offender: A New Wrinkle in the Criminal Justice System,* 14 J. CONTEMP. L. 131, 142-46 (1988)).

7. *See* Adams, *supra* note 3, at 476 (citing Kidman, *supra* note 6, at 142-43).

8. *See infra* notes 63-84 and accompanying text.

The reality is that conviction likewise futilely prejudices offenders who have led model lives, only to commit their first offenses late in life. Although lenient treatment could help them cope with the harsher consequences of their offense, both to restore their good reputation and make restitution to the harmed party, a conviction often renders them powerless to do either.

This proposal demonstrates that, currently, a judge is powerless to allow some defendants who commit their crimes late in life to avoid the stigma of a criminal conviction, even where that stigma places burdens on the defendant that are unduly harmful and not deserved. Part II shows the ways in which any discretion that the court could apply is rendered inapplicable by the dynamics of New York State law. In particular, it will demonstrate that the only vehicle in the law allowing such discretion in the disposition of indictments, the motion to dismiss in furtherance of justice, is not available to protect elderly defendants such as Mr. Redlo. It will also explore the fact that there is no post-conviction device - such as a Certificate of Relief from Disabilities - which adequately serves this purpose. Part III examines an existing mechanism to protect youths from unjust conviction and will examine the ways that this law, if applied to the elderly, could provide protection from the unjust results of some convictions. Part IV proposes a new statute, a Senior Offender Law, to give the court discretion in imposing convictions and punishment upon elderly defendants in particularly vulnerable circumstances, for whom the conviction would impose consequences that would not serve public policy.

II. Background: The Current Law

New York provides a statutory framework through which a court may preemptively intervene where it is anticipated that a criminal prosecution will cause hardship to the defendant beyond what justice would require.[9] As will be examined, however, this redress is not available in all cases. Specifically, it is neither available to the hypothetical Mr. Redlo, nor to the majority of the elderly in like situations.

Under New York Criminal Procedure Law § 210.40, a court, *sua sponte*, or at the request of either party, can dismiss

9. *See* N.Y. CRIM. PROC. LAW § 210.40 (McKinney 1979).

an accusatory instrument in furtherance of justice.[10] This provision has been praised as innovative and used by other states as a model to address dismissals in furtherance of justice.[11] Under this law, even where an indictment is legally sufficient, it may be dismissed in furtherance of justice.[12]

Historically, the courts used this provision to dismiss indictments where the specter of prosecution and the consequences of conviction were determined to be disproportionately harsh upon the defendant.[13] For example, in *People v. Davis,*[14] a twenty-year-old college student was indicted for the felonious possession of a narcotic drug.[15] The court found, upon the recommendation of the Probation Department, that the defendant's behavior was "an isolated instance and not characteristic of his general behavior pattern."[16] In addition, it was demonstrated that the defendant possessed a "most exemplary moral background, . . . extraordinarily high academic standing [at Tulane University], and that he planned to contribute to society through either the fields of medicine or teaching."[17]

The indictment in that case was dismissed primarily because "a conviction . . . if allowed to stand, might well prove to be an insurmountable impediment in the pursuit of his professional career."[18] The court considered two factors: (1) "the nature of and facts surrounding the crime" and (2) the defendant's potential as a contributing member of society.[19] The court observed:

> The criminal law is at best an imperfect instrument. Necessarily, it speaks in absolute terms and occasionally catches in its net one

---

10. *See id.*; *see also* John F. Wirenius, *A Model of Discretion: New York's "Interests of Justice" Dismissal Statute*, 58 ALB. L. REV. 175, 176-77 (1994).

11. *See* Wirenius at 175 (citing Sheila Kles, *How Much Further is the Furtherance of Justice?*, 1989 ANN. SERV. AM. L. 413, at 468-71).

12. *See* N.Y. CRIM. PROC. LAW § 210.40(1).

13. *See* N.Y. CRIM. PROC. LAW § 210.40 commentary (McKinney 1993) (citing People v. Clayton, 41 A.D.2d 204, 206 (N.Y. Sup. Ct. 1973)). *See, e.g.*, People v. Graydon, 330 N.Y.S.2d 259, 262-63 (Sup. Ct. 1972); People v. Quill, 177 N.Y.S.2d 380, 381 (Sup. Ct. 1958).

14. 286 N.Y.S.2d 396 (Sup. Ct. 1967).

15. *See id.* at 397.

16. *Id.* at 398.

17. *Id.*

18. *Id.*

19. *Davis*, 286 N.Y.S.2d at 399.

> who, should he be convicted of an offense, would suffer more grievously than justice would require, taking into consideration the nature of his offense, his background, and the possible future consequences of such conviction.[20]

Thus, New York at one time accepted that, in some cases, the interests of justice were best served by dismissing indictments where the defendant would experience more harm from the conviction than that which was necessary to maintain the integrity of a sound criminal justice system.[21] However, the efficacy of this approach was seriously questioned in the appellate courts, where it was feared that the broad discretion granted to trial courts might not serve the public's interests as effectively as it did the interests of defendants.[22] Finally, in *People v. Belge*,[23] the Court of Appeals strongly expressed its dissatisfaction with the existing statutory language, bemoaned the absence of any "specific criteria for the responsible exercise of the discretion granted," and suggested that the legislature should "require the [trial] court to articulate the manner and extent to which the particular case meets such criteria."[24] The statute was amended in 1979,[25] but the language which the legislature adopted in order to address these deficiencies was taken from *People v. Clayton*,[26] a decision of the Appellate Division, Second Department, which actually pre-dated *Belge*.

In *Clayton*, the defendant was indicted on a charge of murder in the first degree.[27] At trial he was found guilty of murder in the second degree based, in part, upon his purported confessions.[28] Upon conviction in 1953, Clayton was sentenced to a term of imprisonment of thirty years to life.[29] Clayton's confessions were the subject of an evidentiary hearing in the United States District Court for the Eastern District of New York in

20. *Id.* at 400.

21. *See, e.g.,* People v. Graydon, 330 N.Y.S.2d 259 (Sup. Ct. 1972); People v. Quill, 177 N.Y.S.2d 380 (Sup. Ct. 1958).

22. *See* People v. Clayton, 41 A.D.2d 204, 208 (NY App. Div. 1973).

23. 359 N.E.2d 377 (N.Y. 1976).

24. *Id.* at 377.

25. *See* N.Y. CRIM. PROC. LAW § 210.40 commentary (McKinney 1998).

26. *See* People v. Clayton, 41 A.D.2d, 204, 208 (N.Y. App. Div. 1973).

27. *See id.* at 204-05.

28. *See id.* at 205.

29. *See id.*

1965, when Clayton filed a petition for a writ of habeas corpus.[30] The District Court found that Clayton's confessions were not voluntary.[31] Upon the decision of the United States Court of Appeals for the Second Circuit to affirm, Clayton was released on his own recognizance and a new trial was ordered.[32] While awaiting retrial, Clayton quickly assimilated into society and even secured employment.[33] On remand, the Court dismissed the indictment *sua sponte* in furtherance of justice, and the district attorney appealed.[34]

The trial court found that the following factors warranted a dismissal in furtherance of justice:

> the defendant had already served 19 years in prison; he could be re-tried only for murder in the second degree, which carries a penalty of an indeterminate sentence having a minimum of 20 years and a maximum of life; court time could be better used for other purposes; the defendant is presently free and working; and the prosecutor had once offered to accept a plea to manslaughter, punishable by a maximum imprisonment of 20 years.[35]

In the Court's view, these facts clearly showed that another felony conviction and prison sentence would seriously prejudice a reformed man who had become a productive member of the workforce.[36] Therefore, the indictment was dismissed in furtherance of justice.[37]

---

30. *See id.* This hearing was provided after Clayton had exhausted his state court remedies, in which his confessions were found to be voluntary. *See Clayton*, 41 A.D.2d at 208. These hearings were all held pursuant to the rule created by *People v. Huntley*, 204 N.E.2d 179 (N.Y. App. Ct. 1965), in that year, which stated that "in all cases heretofore tried and concluded and in which confessions were introduced and their voluntariness contested, . . . defendants [should] seek . . . a separate hearing as to voluntariness of a confession received in evidence against a defendant at his trial." *Huntley*, 204 N.E.2d at 182.

31. This decision was affirmed by the Court of Appeals, Second Circuit, and certiorari was denied by the Supreme Court. *See* United States ex rel. Clayton v. Mancusi, 326 F.Supp. 1366 (1972), *aff'd sub nom.*, Mancusi v. United States ex rel. Clayton, 454 F.2d 454 (2d Cir. 1972), *cert. denied sub nom.*, Montanye v. Clayton, 406 U.S. 977 (1972).

32. *See Clayton*, 41 A.D.2d at 205.

33. *See id.*

34. *See id.*

35. *Id.* at 207.

36. *See id.*

37. *See Clayton*, 41 A.D.2d at 207.

On appeal from the dismissal, the Appellate Division stated that the considerations weighed by the trial court were not necessarily relevant, since most of these facts reflected events occurring after the homicide for which the defendant was indicted.[38] The appellate court directed that the case be remanded for a hearing,[39] and specifically stated which factors the trial court should use on remand.[40] Conditions such as these, not contained in the statute, had never before been placed in a trial court's discretion when considering a motion for dismissal in furtherance of justice.

In imposing this new requirement, the appellate court observed that the trial court's judgments should be given deference when reviewing dismissals in the furtherance of justice, but "those judgments in turn hinge on the production of facts in the possession of the prosecution and the defendant. Moreover, the discretion of the court cannot be properly reviewed unless the record discloses the facts upon which the court's judgment was based."[41] The factors which the trial court had been directed to consider on remand were:

(a) The nature of the crime;
(b) The available evidence of guilt;
(c) The prior record of the defendant;
(d) The punishment already suffered by the defendant;
(e) The purpose and effect of further punishment;
(f) Any prejudice resulting to the defendant by the passage of time; and
(g) The impact on the public interest of a dismissal of the indictment.[42]

The trial court decided again to dismiss the indictment, but on different grounds.[43] The indictment was no longer dismissed to avoid overly harsh consequences to a rehabilitated person.[44] Instead, the court based its dismissal upon the questionable evi-

38. *See id.* at 205.
39. *See id.*
40. *See id.* at 207-08.
41. *Id.* at 208.
42. *See Clayton*, 41 A.D.2d at 208.
43. *See* People v. Clayton, 350 N.Y.S.2d 495, 496 (Sup. Ct. 1973).
44. *See id. Cf.* People v. Davis, 286 N.Y.S.2d 396 (Sup. Ct. 1967)(indictment dismissed to protect the future of a first time offender who was an otherwise exemplary college student).

dence of guilt, the fact that Clayton had already been sentenced and served prison time, the fact that "everyone seem[ed] to agree there [was] no purpose in further punishment," and the prejudice involved in trying him twenty-one years after the event.[45] Instead of dwelling on how a felony conviction would unfairly harm the defendant, the court focused on the appellate court's last factor and stated that there would be "an unfavorable impact on the public interest" if Clayton were to be convicted.[46] The court pointed out that Clayton had become involved in The Fortune Society, a program designed to aid ex-convicts "seeking to return to society."[47] The administrator of the Society had testified that Clayton was "an inspiration to other ex-convicts."[48]

When it amended the statute, the legislature imposed factors which virtually mirrored those applied in the *Clayton* case.[49] Under the Criminal Procedure Law § 210.40, as amended in 1979, "in determining . . . the existence of some compelling factor . . . clearly demonstrating that conviction or prosecution of the defendant . . . would constitute or result in injustice . . . the court must, to the extent applicable, examine and consider, individually and collectively, the following:"[50]

(a) the seriousness and circumstances of the offense;
(b) the extent of harm caused by the offense;
(c) the evidence of guilt, whether admissible or inadmissible at trial;
(d) the history, character and condition of the defendant;
(e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
(f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
(g) the impact of a dismissal upon the confidence of the public in the criminal justice system;
(h) the impact of a dismissal on the safety or welfare of the community;

45. Clayton, 350 N.Y.S.2d at 496.
46. *Id.* at 497.
47. *Id.* at 496.
48. *Id.*
49. *See* N.Y. CRIM. PROC. LAW § 210.40 (McKinney 1979).
50. N.Y. CRIM. PROC. LAW § 210.40 commentary (McKinney 1993).

(i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
(j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.[51]

As a result, the statute evolved into a vehicle for anticipating "guilt or innocence, . . . [no] longer dependent upon a showing that the defendant has been put at a disadvantage in the case."[52] Thus, although the genesis of this law is rooted in the plight of defendants such as the hypothetical Mr. Redlo,[53] changes in the statute have removed such defendants from its protection.[54] The Court of Appeals has decreed that the amended statute be strictly applied and, where trial courts have failed to adhere to the "Clayton" factors, dismissals have consistently been reversed.[55] It is well settled that dismissals in furtherance of justice must be used sparingly.[56] Even where a defendant's exemplary character and history as a law-abiding citizen is unquestioned, this alone is inadequate to justify a dismissal in furtherance of justice.[57] In most cases, therefore, though the court recognizes the unfortunate ruin of a defendant's prior laudable reputation, it must nevertheless deny the motion for dismissal.[58]

In *People v. Kelley*,[59] for example, an order of dismissal was reversed because it was based solely upon the defendant's exemplary background.[60] The defendant was a police officer, with

51. N.Y. CRIMINAL PROCEDURE LAW § 210.40(1)(a)-(j) (McKinney 1979).

52. N.Y. CRIMINAL PROCEDURE LAW § 210.40 commentary (McKinney 1993).

53. "The genesis of 'furtherance of justice' dismissals . . . [was] related to some factor that put the defendant at a disadvantage in the case." *Id.*

54. *See supra* notes 49-52 & accompanying text.

55. *See, e.g.*, People v. Rickert, 446 N.E.2d 419 (N.Y. 1983); People v. Andrew, 432 N.Y.S.2d 252 (App.Div. 1980).

56. *See, e.g.*, People v. Ortis, 152 A.D.2d 755, 755 (N.Y. App. Div. 1989); People v. Foster, 127 A.D.2d 684, 685 (Sup. Ct. App. Div. 1987); People v. Rucker, 144 A.D.2d 994 (Sup. Ct. App. Div. 1988).

57. *See Ortis*, 152 A.D.2d at 755 (citing People v. Diggs, 125 A.D.2d 189, 191 (Sup. Ct. App. Div. 1986); People v. Belkota, 50 A.D.2d 118, 122 (Sup. Ct. App. Div. 1975)).

58. *See, e.g.*, People v. Belkota, 50 A.D.2d 118 (Sup. Ct. App. Div. 1975)(although the community benefited from the defendant police officer's conduct during a drug investigation and although the defendants had good records as police officers, their convictions were upheld).

59. 141 A.D.2d 764 (N.Y. App. Div. 1988).

60. *See id.* at 765.

no prior record and an excellent reputation.[61] The appellate court noted that, although the defendant's place in society would be irreparably harmed by the conviction, "[t]his is not one of those 'rare' and 'unusual' cases that 'cries out for fundamental justice beyond the confines of conventional considerations.'"[62] Indeed, even where the most hard-hearted prosecutor could not but feel some degree of compassion for a defendant's plight - as in those all too prevalent cases involving defendants who have been diagnosed with the Human Immunodeficiency Virus (HIV) - the "interests of justice" do not necessarily mandate dismissal. In the late 1980's many courts were inclined to grant such motions for first-time offenders who were HIV positive,[63] reasoning that these defendants had already been given a life sentence by such a dread disease and that a traditional criminal disposition would not be productive or fair.[64] Normally, the factor that the courts used in these cases was the "history, character and condition of the defendant," such that the defendant's terminal medical condition justified vacating the conviction and imposing a less harsh punishment.[65] Parenthetically, this approach would seem particularly apt in cases such as Mr. Redlo's, and other elderly first-time offenders whose age, physical and/or mental condition, and exemplary background would merit consideration under the "history, character, and condition" factor.[66] However, any defendant's likelihood of success on this basis has since dwindled to nothing.

For example, in *People v. Sierra,*[67] the defendant pled guilty to two counts of criminal possession of a controlled substance.[68] Upon consideration of the defendant's motion to dismiss in fur-

61. *See id.*

62. *Id.* at 765 (citing People v. Belge, 390 N.Y.S.2d 867 (N.Y. 1976)).

63. *See, e.g.*, People v. Camargo, 516 N.Y.S.2d 1004, 1006-07 (Sup. Ct. 1986)(The New York Supreme Court, Bronx County, held that, although the defendant's guilt was "overwhelming," and although he had a prior record, the indictment was dismissed because, in light of the defendant's advanced stage of AIDS, "[n]o sentence . . . could compare with the severity of the many diseases being painfully and fatally suffered by this defendant."; People v. Gray, N.Y.L.J. June 26, 1986, Col. 3, at 18 (Friedman, J.)(Defendant died of AIDS prior to decision; court indicated that it would have granted the Clayton motion based upon his condition).

64. *See, e.g., Camargo*, 516 N.Y.S.2d at 1006-07.

65. *See* N.Y. CRIM. PROC. LAW § 210.40(1)(d) (McKinney 1979).

66. *Id.*

67. 566 N.Y.S.2d 818 (Sup. Ct. 1990).

68. *See id.*

therance of justice, the court found that the defendant was HIV positive and was suffering several HIV-related infections and ailments.[69] Nevertheless, the defendant's motion was denied.[70] The court determined that "[t]o allow an individual . . . to use his medical misfortunes . . . as a tool to totally bypass the justice system is unacceptable."[71]

Despite the horrific prospects and grievous suffering which haunt anyone who has been diagnosed with HIV, a dismissal in furtherance of justice on this basis alone is simply antithetical to both the letter and spirit of the statute. Dismissal in furtherance of justice is an extraordinary remedy which should be used sparingly, and only in that "'rare' and 'unusual' case where it 'cries out for fundamental justice'."[72] It grants the defendant a total and pre-emptive reprieve from both the demands of the criminal justice system and accountability for his actions and, thereby, deprives both society at large and the defendant's immediate victims of any chance for "justice" from their perspective. Moreover, granting dismissal based upon a defendant's condition creates, in effect, a class of defendants entitled to dismissal simply because they share that condition; a result which turns the statute on its head.[73] And, for these very reasons, a motion for dismissal in furtherance of justice was as inappropriate and ultimately unsuccessful for our hypothetical Mr. Redlo as it has been for those real defendants who have been diagnosed with HIV.[74]

While there is another, post-conviction, statutory device which is ostensibly intended to provide relief where the consequences of conviction may be overly and unnecessarily harsh, it too was essentially worthless to Mr. Redlo. Under Article 23 of

---

69. *See id.*

70. *See id.* at 819.

71. *Id.*

72. People v. Insignares, 491 N.Y.S.2d 166, 175 (App. Div. 1985)(citing People v. Belge (N.Y. 1976)). *See, e.g.*, People v. Ortiz, 152 A.D.2d 755, 755 (N.Y. App. Div. 1989); People v. Foster, 127 A.D.2d 684, 685 (Sup. Ct. App. Div. 1987); People v. Rucker, 144 A.D.2d 994 (Sup. Ct. App. Div. 1988).

73. *See* N.Y. Crim. Pro Law § 210.40 (McKinney 1979).

74. *See, e.g.*, People v. Murray, 634 N.Y.2d 985 (Sup. Ct. 1995)(defendant was not entitled to dismissal of indictment based on the fact that he had AIDS); People v. Pender, 593 N.Y.S.2d 447, 449 (Sup. Ct. 1992)("The mere fact that a defendant charged with a serious crime has contracted AIDS should not serve as a talisman for automatic dismissals in the furtherance of justice.").

the New York Corrections Law, a "certificate of relief from disabilities" may be granted to relieve a defendant convicted of a felony from any automatic forfeiture of rights, such as the right to run for public office, and to lift any automatic bar to employment due to the felony conviction.[75] This ameliorative device is available to first-time offenders.[76] In practical effect, however, the certificate of relief from disabilities does not prevent a licensing board from denying a professional license to a convicted felon. The certificate of relief statute contains the following provision:

> A certificate of relief from disabilities shall not, however, in any way prevent any judicial, administrative, licensing or other body, board or authority from relying upon the conviction specified therein as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege.[77]

This provision has operated to allow the Board of Education of New York, which has the authority to grant and revoke professional licenses, to deny licensure to professionals who were convicted of felonies, even when a certificate of relief from disabilities had been granted by the courts.[78] In *Plantone v. New York Department of State, Division of Licensing Services*,[79] the petitioner was convicted upon his plea of guilty of attempted arson in the third degree and conspiracy in the fourth degree.[80] Petitioner was a real estate salesperson who risked the loss of his license due to his felony conviction.[81] At sentencing, the court granted a certificate of relief from disabilities.[82] Finding

75. *See* N.Y. CORRECT. LAW § 701(1) (McKinney 1966)(amended 1985).

76. *See* N.Y. CORRECT. LAW § 700(1)(1) (McKinney 1966)(amended 1972).

77. N.Y. CORRECT. LAW § 701(3) (McKinney 1966)(amended 1985).

78. *See, e.g.,* Matter of Maneri v. New York State Department of State, 240 A.D.2d 748 (N.Y. App. Div. 1997)(Secretary of State revoked a real estate broker's license and notary public commission even though the defendant had been granted a relief from disabilities); Matter of Pulaski Inn, 182 A.D.2d 1116 (N.Y. App. Div. 1992)(fact that liquor licensee's president had been granted a relief from civil disabilities did not preclude the removal of the Inn's liquor license by the State Liquor Authority).

79. 674 N.Y.S.2d 560 (App. Div. 1998).

80. *See id.* at 561.

81. *See id.*

82. *See id.*; *see also* N.Y. CORRECT. LAW § 700 et seq. (McKinney 1966) (amended 1972).

that it was "well settled that a certificate of relief from disabilities does not preclude a licensing body from exercising its discretion to revoke a license over which the licensing body has authority,"[83] the Appellate Division held that the certificate merely precluded automatic revocation of petitioner's license.[84] Despite the certificate, the licensing board could revoke his license on the basis of his conviction, as long as its determination that the petitioner was "untrustworthy" was not arbitrary or capricious.[85]

Thus, the granting of a certificate of relief from disabilities, designed by the court to preserve the defendant's productive employment, does not guarantee the relief from this particular onus of a conviction. Mr. Redlo still lost his license as an animal health technician. Moreover, were he to seek employment in another field which did not require licensure he would still, upon inquiry, have to disclose his status as a convicted felon. A certificate of relief from disabilities does not alter or effect in anyway the underlying judgment of conviction.[86]

III. The Youthful Offender Procedure

Unlike a dismissal in furtherance of justice - which preempts the entire prosecutorial process - or a certificate of relief from disabilities - which leaves the judgment of conviction entirely intact, though it may occasionally blunt an effect thereof - the youthful offender procedure empowers the court to vacate the judgment of conviction, but only after the prosecution has run its full course.[87]

The Youthful Offender Procedure has been in existence for over half a century.[88] The only problem for Mr. Redlo is that it only operates for the benefit of defendants between the ages of

83. *Plantone,* 674 N.Y.S.2d at 561 (citing Matter of Maneri v. New York State Department of State, 240 A.D.2d 748 (N.Y. App. Div. 1997); Matter of Pulaski Inn, 182 A.D.2d 1116 (N.Y. App. Div. 1992); Matter of Alaimo v. Ambach, 91 A.D.2d 695 (N.Y. App. Div. 1982)).

84. *See Plantone,* 674 N.Y.S.2d at 561 (citations omitted).

85. *See id.*

86. *See* N.Y. CORRECT. LAW § 701 (McKinney 1966)(amended 1985).

87. *See* N.Y. CRIM. PROC. LAW § 720.10 (McKinney 1986).

88. *See* N.Y. CRIM. PROC. LAW § 720.10 commentary (McKinney 1971) (amended 1986).

sixteen and nineteen.[89] Under this statute, an eligible youth may be relieved of the stigma and consequences of a criminal conviction.[90]

After conviction, and before imposing sentence, the court must order a "pre-sentence investigation."[91] Upon receipt of the report of said investigation, the court may find the defendant a youthful offender if, "in the opinion of the court, the interest of justice would be served by relieving the eligible youth from the onus of a criminal record and by not imposing an indeterminate term of imprisonment of more than four years."[92] If the conviction is for a misdemeanor only, and the defendant has no prior youthful offender adjudications or criminal convictions, the court *must* find the defendant a youthful offender.[93]

In reaching their determination, most courts tend to focus on the following factors:

> the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior criminal record, prior acts of violence, recommendations in the presentence reports, defendant's reputation, the level of cooperation with authorities, defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life.[94]

If a defendant is found a youthful offender, "the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding . . . The court [then] must sentence the defendant pursuant to [specific guidelines in] the penal law."[95] If the conviction was not for a felony, the sentencing follows the usual guidelines set out in the Penal Law, with one limited exception.[96] If the sentence imposed upon a youthful offender

89. *See* N.Y. CRIM. PROC. LAW § 720.10(1) (McKinney 1971)(amended 1980) ("'Youth' means a person charged with a crime alleged to have been committed when he was at least sixteen years old and less than nineteen years old.").

90. *See id.*

91. N.Y. CRIM. PROC. LAW § 720.20(1).

92. *Id.* § 720.20(1)(a).

93. *Id.* § 720.20(1)(b).

94. People v. Cruickshank, 105 AD2d 325, 334 (N.Y. Sup. Ct. 1985)(citing People v. McCloskey, 92 A.D.2d 672 (N.Y. App. Div. 1983)).

95. N.Y. CRIM. PROC. LAW § 720.20(3). *See* People v. Soto, 315 N.Y.S.2d 30, 31 (App. Div. 1969).

96. "If the youthful offender finding was entered pursuant to [§ 720.20(1)(b)] of the criminal procedure law, the court must not impose a definite or intermittent

finding is substituted for a felony, "the court must impose a sentence [usually authorized for] a class E felony," with, again, one limited exception.[97] This sentencing mechanism shields youthful offenders from long prison terms.

The statute also shields the youthful offender from the onus of a conviction. Instead of a conviction, "the youthful offender finding and sentence merge into a 'youthful offender adjudication.'"[98] The youthful offender's conviction is vacated and replaced by a youthful offender finding.[99] Thus, the statute is designed so that a person adjudicated under the youthful offender procedure "is not to suffer any of the disabilities that follow upon conviction."[100] Specifically, the adjudication "does not operate as a disqualification . . . to hold public office or public employment or to receive any license granted by public authority."[101] In addition, all records of the finding are sealed.[102]

The Youthful Offender Procedure is a progressive legislative approach to the problems presented when young, but legally responsible, adults engage in criminal conduct. It allows courts, on an ad hoc basis, to shield an eligible youth from the stigma of a criminal conviction and a criminal record as a consequence of hasty, thoughtless, desperate or immature conduct which, though "criminal," has not yet - and may never - become

---

sentence of imprisonment with a term of more than six months." N.Y. PENAL LAW § 60.02 (McKinney 1979) (amended 1980); N.Y. CRIM. PROC. LAW § 720.20(1)(b) (McKinney 1971) (amended 1980). Section 720.20(1)(b) refers to the case in which the youthful offender finding is made because the defendant has no prior conviction or youthful offender finding. *See* N.Y. CRIM. PROC. LAW § 720.20(1)(b). This six-month maximum was imposed to circumvent any possible claims by youthful offenders to a jury trial. "There is no state or federal constitutional right to a trial by jury for offenses tried in a local criminal court and punishable by a term of imprisonment that is not in excess of six months." N.Y. CRIM. PROC. LAW § 720.20 commentary (McKinney 1980).

97. "The court must not impose a sentence of conditional discharge or unconditional discharge if the youthful offender finding was substituted for a conviction of a felony defined in article two hundred twenty of [Chapter 720 of the Criminal Procedure Law]." N.Y. PENAL LAW § 60.02 (McKinney 1980); N.Y. CRIM. PROC. LAW § 720.20(1)(b) (McKinney 1971) (amended 1980).

98. *See* N.Y. CRIM. PROC. LAW § 720.10(4) (McKinney 1971) (amended 1986).

99. *See* N.Y. CRIM. PROC. LAW § 720.20(3).

100. N.Y. CRIM. PROC. LAW § 720.30 (McKinney 1971).

101. N.Y. CRIM. PROC. LAW § 720.35(1) (McKinney 1971) (amended 1992).

102. *See* N.Y. CRIM. PROC. LAW § 720.35(2).

habitual or recidivist.[103] Moreover, since the procedure is a *post*-conviction mechanism, the prosecutorial process is not preempted.[104] The guilty defendant is not excused from responsibility for his actions.[105] Furthermore, neither society at large nor the particular victim of the defendant's actions are denied "justice." Adjudication as a youthful offender merely grants deserving defendants a much better chance to conform their conduct to societal expectations then they would have with a criminal record.[106] Additionally, a prior youthful offender adjudication may be considered in the determination of sentence for subsequent criminal convictions or upon latter applications for parole release so that the youthful offender who fails to take advantage of this opportunity may not use it to frustrate the righteous operation of the criminal justice system.[107]

IV. Resolution

The State of New York would greatly benefit from a provision in the Criminal Procedure Law giving courts discretion when sentencing the elderly defendant. A mechanism similar to that used for youthful offenders would allow courts to fashion dispositions which would be just for both the injured party and the defendant.[108] This provision would also help to alleviate the prevalent problems of prison overcrowding and the expense of supporting elderly inmates.[109]

A. *Goal*

The basic goal of a Senior Offender Procedure would be essentially identical to the Youthful Offender Procedure: to protect some seniors from the stigma of a conviction and a criminal record, when the defendant is a first-time offender and the acts that gave rise to the conviction were "hasty or thoughtless acts

103. *See, e.g.*, People v. Cruickshank, 105 A.D.2d 325, 336 (N.Y. App. Div. 1985)(citing People v. Drayton, 350 N.E.2d 377 (N.Y. 1976)).

104. *See* N.Y. CRIM. PROC. LAW § 720.10 (McKinney 1971)(amended 1986).

105. *See* People v. Caruso, 400 N.Y.S.2d 686, 688 (Sup. Ct. 1977).

106. *See* People v. Soto, 315 N.Y.2d 30, 33 (App. Div. 1969).

107. *See id.*

108. *See infra* notes 85-117 & accompanying text.

109. *See infra* notes 98-102 & accompanying text.

which, although crimes, [were] not the serious deeds of hardened criminals."[110]

Recognition that hasty or thoughtless criminal behavior by a first-time offender occurs in the very old as well as the very young is not a new concept. For example, some states, such as Tennessee, have recognized the age of the defendant, at either end of the spectrum, to be a mitigating factor that the court may consider when sentencing a criminal defendant.[111] The pertinent part of the statute reads:

> If appropriate for the offense, mitigating factors may include . . . The defendant, because of *youth or old age*, lacked substantial judgment in committing the offense.[112]

B. *Eligibility for Senior Offender Status*

The following definition of those defendants eligible for Senior Offender status is proposed:

> Senior Offender Procedure; Definition of Terms Modeled After New York Criminal Procedure Law § 720.10
> 1. "Senior" means a person charged with a crime alleged to have been committed when he or she was of advanced age.

The range of ages within which a person may be considered to be "of advanced age" should be determined based upon the facts and circumstances of each case. It is clear from logic and experience, as well as other cases, that numerical age alone is not a reliable measure as to how a particular person is affected by his or her age.[113]

The United States Sentencing Commission suggested a similar approach in a policy statement issued in 1989:

> Age is not ordinarily . . . relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. *Age may be a reason to go below the guidelines when the offender is elderly and infirm* and where a form of punishment

110. *Id.*

111. *See* TENN. CODE ANN. § 40-35-113(6) (1989).

112. *Id.*(emphasis added).

113. *See Sentencing Guidelines for United States Courts*, 52 Fed. Reg. 18046 (May 13, 1989)(age must be accompanied by "an extraordinary physical impairment" to affect sentencing. United States v. Cary, 895 F.2d 318, 324 (7th Cir. 1990)(citing *Sentencing Guidelines for United States Courts*, 52 Fed. Reg. 18046)).

(e.g., home confinement) might be equally efficient as and less costly than incarceration.[114]

When deciding whether a particular defendant is "elderly and infirm" such that the court is justified in imposing a lower punishment than those outlined in the federal sentencing guidelines, courts have performed a "facts and circumstances" type of analysis.[115] In *United States v. Carey*,[116] the Seventh Circuit considered whether a defendant's age and infirmity could justify a downward departure from the federal sentencing guidelines in a prosecution for check-kiting.[117] The defendant was a sixty-four year-old man who had undergone three surgeries attempting to reduce a brain tumor, was still dependent upon medication for problems arising from the tumor, and had just undergone exploratory surgery in an effort to rule out lung cancer.[118]

The Circuit Court found that, for age and physical condition to operate as factors in a downward departure from the sentencing guidelines, the physical condition had to be an extraordinary impairment.[119] In overturning the District Court's finding that defendant was "elderly and infirm," the Circuit Court held that the District Court had failed to specify facts supporting that, in Carey's circumstances, his age and cancer created an extraordinary physical impairment.[120]

Therefore, the extent to which "advanced age" may be taken into account should be dependent upon the facts and circumstances of each case. This consideration invites an inquiry such as: whether the defendant was prompted by an unfortunate circumstance that traditionally or usually affects the older population; or whether the defendant was prompted by a degenerative mental or physical ailment that traditionally or usually

---

114. *Id. See* Molly Fairchild James, *The Sentencing of Elderly Criminals*, 29 AM. CRIM. L. REV. 1025 (1992).

115. *See* United States v. Carey, 895 F.2d 318, 324 (7th Cir. 1990).

116. 895 F.2d 318 (7th Cir. 1990).

117. *See id.* at 318-20.

118. *See id.* at 320.

119. *See id.* at 324; *see also Sentencing Guidelines for United States Courts*, 52 Fed. Reg. 18046, 18102 (May 13, 1989) §§ 5H1.1 & 5H1.4.

120. *See Carey*, 895 F.2d at 324.

affects the older population,[121] such that he or she could be characterized as elderly.

A provision such as this performs a dual function. As the United States Sentencing Commission recognized, in addition to serving the protective function similar to that provided by the Youthful Offender Procedure,[122] it would have a cost-saving function. Some older inmates who have received prison sentences require special facilities due to physical handicaps caused by age, as well as expensive medication and physician care. Some demand around-the-clock care from the prison hospitals.[123] Even if not infirm, the elderly as a group require "specialized recreation, education, and work programs."[124] As compared to the cost of maintaining and providing for younger inmates, the cost to society of the elderly inmate is almost three times more.[125] The estimated cost to support an elderly inmate is $60,000 to $69,000 per year, in comparison to about $20,000 for the average inmate.[126] Adjudicating some of these elderly defendants as Senior Offenders would allow the court to reduce or eliminate prison sentences when both the effects on the inmate and the cost to society would far outweigh its beneficial effects.[127]

A defendant who succeeds in proving that he or she is "of advanced age" would be tried as an "apparently eligible senior,"

---

121. An issue as to proof of a mental ailment arises, because degenerative mental diseases such as Alzheimer's and senility already provide an affirmative defense to the element of intent under the New York Penal Law. *See* N.Y. PENAL LAW § 40.15 (McKinney 1984). As such, a defendant may be permitted to both claim this as a basis for a finding of "advanced age" under the statute, and also use it as an affirmative defense to the proof of intent. Therefore, it is important to ensure that a defendant, who fails to show "advanced age" is not prejudiced at trial when presenting a defense to intent because of mental ailment. Likewise, a senior who succeeds in proving advanced age at the pre-trial stage should not be unfairly advantaged in proving his or her affirmative defense at trial.

122. *See supra* notes 6-7 and accompanying text.

123. *See* Jason S. Ornduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 ELDER L. J. 173, 174 (1996)(citing Julian H. Wright, Jr., *Note: Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529, 563 (1990)).

124. Ornduff, *supra* note 123, at 175 (citations omitted).

125. *See id.* (citations omitted).

126. *See id.* at 175 n.16.

127. This approach to the elderly defendant would likewise help to solve the problem of prison overcrowding. Full consideration of this issue is beyond the scope of this paper. *See, e.g.*, Ornduff, *supra* note 123.

which would allow the prosecution to proceed against the defendant, but with one exception for privacy, as under the Youthful Offender Procedure.[128] Upon conviction, the court would determine eligibility for Senior Offender treatment, according to the following requirements:

2. "Eligible senior" means a person who is eligible to be found a senior offender. Every senior is so eligible unless:
   a. the conviction to be replaced by a senior offender finding is for (i) a class A-I or class A-II felony, or (ii) an armed felony as defined in subdivision 41 of § 1.20, except as provided in subdivision three of this section, or (iii) rape in the first degree, sodomy in the first degree, or aggravated sexual abuse, except as provided in subdivision three of this section; or
   b. such person has previously been convicted and sentenced for a felony; or
   c. such person has previously been adjudicated either a senior offender or a youthful offender following conviction of a felony.
3. Notwithstanding the provisions of subdivision two, a person who has been convicted of an armed felony offense or of rape in the first degree, sodomy in the first degree, or aggravated sexual abuse is an eligible senior if the court determines that one or more of the following factors exist:
   a. mitigating circumstances that bear directly upon the manner in which the crime was committed; or
   b. where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution.

Where the court determines that the eligible senior is a senior offender, the court shall make a statement on the record of the reasons for its determination, a transcript of which shall be forwarded to the state division of criminal justice services, to be kept in accordance with the provisions of § 837-a(3) of the executive law.

This framework for deciding eligibility, which forecloses defendants convicted of certain felonies, allows the court to recognize those defendants whose crimes are considered so

128. *See* N.Y. CRIM. PROC. LAW § 720.15 (McKinney 1971) (amended 1985); N.Y. CRIM. PROC. LAW § 720.10 commentary (McKinney 1986).

particularly heinous by society as to foreclose special protection. This treatment is consistent with the public policy concerns that the felony conviction onus serves to deter and prevent hardened criminals from becoming repeat offenders.[129]

The following definition sections would likewise follow the framework of the Youthful Offender Law:

4. "Senior Offender finding" means a finding, substituted for the conviction of an eligible senior, pursuant to a determination that the eligible senior is a Senior Offender.
5. "Senior Offender sentence" means the sentence imposed upon a Senior Offender finding.
6. "Senior Offender adjudication" is comprised of a Senior Offender finding and the Senior Offender sentence imposed thereon and is completed by imposition and entry of the Senior Offender sentence.

C. *Procedure for Arraigning and Prosecuting an "Apparently Eligible Senior"*

The next section provides privacy from public disclosure of the proceedings against the defendant, upon the court's initial finding that he or she is an "apparently eligible senior."

Senior Offender Procedure; Sealing of Accusatory Instrument; Privacy of Proceedings Modeled After New York Criminal Procedure Law § 720.15

1. When an accusatory instrument against an apparently eligible senior is filed with a court, the court, with the defendant's consent, must order that it be filed as a sealed instrument, though only with respect to the public.
2. When a senior is initially arraigned upon an accusatory instrument, such arraignment and all proceedings in the action thereafter may, in the discretion of the court and with the defendant's consent, be conducted in private.
3. The provisions of subdivisions one and two of this section requiring or authorizing the accusatory instrument filed against a senior to be sealed and the arraignment and all proceedings in the action to be conducted in private, shall not apply in connection with a pending charge of committing any felony offense as defined in the penal law. The provisions of subdivision one requiring the accusatory instrument filed

129. *See supra* notes 6-7 & accompanying text.

against a senior to be sealed shall not apply where such senior has been adjudicated a senior offender or convicted of a crime.

Subdivision three is modeled after 1978 and 1985 amendments to the Youthful Offender procedure law.[130] The 1978 amendment was prompted by a concern of the legislature to deter crime by publicly identifying those defendants who committed the most serious and violent felonies.[131]

In 1985, the legislature determined that public access to misdemeanor charges against a defendant who had been "previously convicted of or adjudicated for a crime" would likewise serve an important deterrent effect.[132] This framework is a good model for relieving the stigma of a criminal adjudication, and yet providing for the deterrence of certain crimes.

D. *Post-Conviction Procedure*

Senior Offender Determination; When and How Made; Procedure Thereupon Modeled After New York Criminal Procedure Law § 720.20

1. Upon conviction of an eligible senior, the court must order a pre-sentence investigation of the defendant. After receipt of a written report of the investigation and at the time of pronouncing sentence the court must determine whether or not the eligible senior is a senior offender. Such determination shall be in accordance with the following criteria:
   (a) If in the opinion of the court the interest of justice would be served by relieving the eligible senior from the onus of a criminal record and by not imposing an indeterminate term of imprisonment of more than four years, the court may, in its discretion, find the eligible senior is a senior offender; and
   (b) Where the conviction is had in a local criminal court and the eligible senior had not prior to commencement of trial or entry of a plea of guilty been convicted of a crime or found a senior offender, the court must find he is a senior offender.
2. Where an eligible senior is convicted of two or more crimes set forth in separate counts of an accusatory instrument or set forth in two or more accusatory instruments consolidated for

130. *See* N.Y. CRIM. PROC. LAW § 720.15 commentary (McKinney 1985).
131. *See id.*
132. *Id.*

trial purposes, the court must not find him a senior offender with respect to any such conviction pursuant to subdivision one of this section unless it finds him a senior offender with respect to all such convictions.

3. Upon determining that an eligible senior is a Senior Offender, the court must direct that the conviction be deemed vacated and replaced by a Senior Offender finding; and the court must sentence the defendant pursuant to [a new section] of the penal law.
4. Upon determining that an eligible senior is not a Senior Offender, the court must order the accusatory instrument unsealed and continue the action to judgment pursuant to the ordinary rules of governing criminal prosecutions.

E. *Sentencing*

The New York Penal Code referred to in the Senior Offender Law would provide for the sentencing of Senior Offenders as follows:

Authorized Disposition; Senior Offender Modeled After New York Penal Law § 60.02

1. If the sentence is to be imposed upon a Senior Offender finding which has been substituted for a conviction of an offense other than a felony, the court must impose a sentence authorized for the offense for which the Senior Offender finding was substitute, except that if the senior offender finding was entered pursuant to [the section providing that, if the conviction was had in a local criminal court and the eligible senior had not prior to commencement of trial or entry of a plea of guilty been convicted of a crime or found a senior offender, that he or she must be found eligible] the court must not impose a definite or intermittent sentence of imprisonment with a term of more than six months;[133] or
2. If the sentence is to be imposed upon a Senior Offender finding which has been substituted for a conviction for any felony, the court must impose a sentence authorized to be imposed upon a person convicted of a class E felony provided, however, that the court must not impose a sentence of conditional discharge or unconditional discharge if the Senior Offender find-

133. *See supra* note 96 for a discussion regarding the reasoning behind this provision.

ing was substituted for a conviction of a felony defined in Article 220 of the New York Penal Law.[134]

The practical effect of these sentencing guidelines will be the same effect achieved by the Youthful Offender sentencing guidelines.[135] Although the court can be lenient if the circumstances call for forbearance, the judge may also impose more severe punishment if necessary. The "widest array of sentencing options are available."[136] This array of options is made available through the Class E Felony sentencing structure, which is "subject to the general menu of sentences" authorized under New York law.[137]

F. *Post-Judgment Relief*

The next section of the Senior Offender Law would state that all post-judgment relief available to other defendants would likewise be available after a Senior Offender adjudication:

Senior Offender Adjudication: Post-Judgment Motions and Appeal Modeled After New York Criminal Procedure Law § 720.30

The provisions of this chapter, governing the making and determination of post-judgment motions and the taking and determination of appeals in criminal cases, apply to post-judgment motions and appeals with respect to senior offender adjudications wherever such provisions can reasonably be so applied.

G. *Effect of a Senior Offender Adjudication*

The last section of the Senior Offender Law would specify the central function of the Senior Offender adjudication. It would state that the Senior Offender would not suffer any of the debilities that usually attach to a conviction.

Senior Offender Adjudication; Effect Thereof; Records Modeled After New York Criminal Procedure Law § 720.35

---

134. *See* N.Y. CRIM. PROC. LAW § 220.10 et seq. (McKinney 1970) (amended 1996) (providing rules for entering pleas).

135. *See* N.Y. PENAL LAW § 60.02 (McKinney 1979) (amended 1980).

136. N.Y. PENAL LAW § 60.02 commentary (McKinney 1980).

137. N.Y. PENAL LAW Article 60 commentary (McKinney 1997 Main Volume).

1. A Senior Offender adjudication is not a judgment of conviction for a crime or any other offense, and does not operate as a disqualification of any person so adjudged to hold public office or public employment or to receive any license granted by public authority but shall be deemed a conviction only for the purposes of transfer of supervision and custody pursuant to § 259-m of the executive law.[138]
2. Except where specifically required or permitted by statute or upon specific authorization from the court, all official records and papers, whether on file with the court, a policy agency or the division of criminal justice services, relating to a case involving a senior who has been adjudicated a Senior Offender, are confidential and may not be made available to any person or public or private agency, other than an institution to which such senior has been committed, the division of parole and a probation department of this state that requires such official records and papers for the purpose of carrying out duties specifically authorized by law. However, that information regarding an order of protection or temporary order of protection issued pursuant to § 530.12 of this chapter[139] or a warrant issued in connection therewith may be maintained on the statewide automated order of protection and warrant registry established pursuant to § 221-a of the executive law[140] during the period that such order or protection or temporary order of protection is in full force and effect or during which such warrant may be executed. Such confidential information may be made available pursuant to law only for purposes of adjudicating or enforcing such order of protection or temporary order of protection.

By following the preexisting scheme present in the Youthful Offender Law, the Senior Offender Law could provide a procedure for seniors that is essentially the same procedure that has been utilized for youths since 1971.[141] By adopting the existing legislative framework, the Senior Offender Procedure will be based

138. *See* N.Y. EXEC. LAW § 259-m (McKinney 1977) (governing compacts with other states for out-of-state parolee supervision).

139. *See* N.Y. CRIM. PROC. LAW § 530.12 (McKinney 1977) (amended 1994) (governing the protection for victims of domestic violence and family offenses).

140. *See* N.Y. EXECUTIVE LAW § 221-a (McKinney 1994) (amended 1995) (authorizing the superintendent of state police to "develop a comprehensive plan for the establishment and maintenance of a statewide computerized registry of all order of protection" issued statewide).

141. *See* L.1971, c. 981, § 1.

upon a foundation that has been tested, revamped, and upheld as constitutional for over twenty years.[142]

V. Conclusion

Had an equivalent of the Youthful Offender Procedure been available for elderly defendants, our hypothetical Mr. Redlo would have been a prototypical candidate therefor. Given his exemplary background, strong community support and his employer's representations to the court, he would, in all probability, have been found a "senior offender." Mr. Redlo would not have had a felony conviction or criminal record and his professional license would not have been revoked. He would have been able to continue in his job and, thereby, maintain a degree of self-respect and self-sufficiency. His ailing wife would not have been deprived of his comfort, aid and support, and his employer would have continued to receive recompense for his monetary losses.

The Youthful Offender Procedure has been criticized as an unproductive, overly lenient exercise in futility, which accomplishes nothing more than to give budding criminals "one free bite at the apple."[143] This attitude reflects a short-sighted view of the nobler purposes of our criminal justice system and the very foundations of our criminal and penal laws. Moreover, even if it were a valid criticism of the Youthful Offender Procedure, it would be entirely meritless as an argument against a Senior Offender Procedure. One can hardly contend that someone in Mr. Redlo's situation was likely to embark upon a life of crime and, therefore, that the court would have done little more than ease his way upon that journey had his first criminal conviction been vacated.

---

142. *See, e.g.*, People v. Drummond, 359 N.E.2d 663 (N.Y. 1976); *cert. denied* 431 U.S. 908 (1976)(upholding early requirement, since removed from the statute, that eligibility for youthful offender treatment be conditioned upon the highest count of indictment was found to be violative of due process); Malinowski v. Casscles, 53 A.D.2d 954 (N.Y. App. Div. 1976); *appeal denied*, 360 N.E.2d 1109 (N.Y. 1976)(finding denying eligibility for youthful offender status to youth who was indicted for Class A felony was in all respects constitutional); Gold v. Bartenstein, 418 N.Y.S.2d 852 (1979)(finding Youthful Offender law did not violate the Equal Protection Clause of the United States Constitution).

143. Paul Shechtman, *A Good Deal for Criminal Justice,* March 20, 1997, N.Y.L.J. 2, Col. 3.

Rather than diluting society's ability to deter criminal behavior, such a provision would grant courts the discretion to fashion appropriate dispositions for those defendants whose life, background and circumstances indicate that they are not deserving of treatment as hardened or habitual criminals. In this way, courts can choose eligible defendants for senior offender treatment who will not regard society's benevolence merely as an invitation to further a criminal career. Without such a provision the courts are compelled to treat all elderly defendants as if they possessed latent criminal tendencies which only surfaced late in their lives. This philosophy, as we have seen, can have unduly harsh, and unnecessarily tragic, consequences.