



# In Search of a Workable Sentencing Model

On October 13, 2010, Chief Judge Jonathan Lippman announced the creation of the New York State Permanent Sentencing Commission. The Permanent Sentencing Commission is “charged with conducting a comprehensive and ongoing evaluation of sentencing laws and practices and recommending reforms to improve the quality and effectiveness of statewide sentencing policy.”<sup>1</sup> Its creation was prompted, at least in part, by the temporary Commission on Sentencing Reform established in 2007 by Executive Order, which recommended the creation of a permanent sentencing commission.<sup>2</sup>

Among other responsibilities, the Permanent Sentencing Commission is charged with the task of examining ways to “simplify[] New York’s increasingly complex sentencing statutes.”<sup>3</sup> This task comports with the temporary commission’s similar recommendation. Noting that “determinate sentencing has been the unmistakable trend in New York” the temporary commission stated that “it makes sense to continue this positive trend by moving even closer to an all determinate felony sentencing structure in New York.”<sup>4</sup> It seems inevitable that the Permanent Sentencing Commission, like its predecessor, will recommend that the trend be continued and that New York adopt a mostly determinate sentencing scheme.

While a determinate sentencing scheme certainly promotes the goal of simplicity, there are substantive benefits of an indeterminate sentencing scheme that determinate sentencing simply fails to realize. Chief among these benefits is promoting successful and productive reentry and reintegration, an important statutory sentencing goal in New York since 2006.<sup>5</sup> Indeterminate sentencing provides incarcerated people several opportunities, well in advance of their maximum sentence, to be evaluated for release. These early release opportunities promote successful reentry and reintegration in two ways: first, they provide natural incentives for incarcerated people to rehabilitate themselves through programming and a positive disciplinary record; and second, they increase the likelihood that individuals will be released when they are ready to live law-



1 See October 13, 2010 Press Release, State of New York Unified Court System, available at [www.courts.gov/press](http://www.courts.gov/press).

2 See *The Future of Sentencing in New York: Recommendations for Reform* (2009). This report is available at [http://criminaljustice.state.ny.us/pio/csr\\_report2-2009.pdf](http://criminaljustice.state.ny.us/pio/csr_report2-2009.pdf).

3 Press Release, *supra* note 1.

4 *The Future of Sentencing in New York*, *supra* note 2 at 27-28.

5 See Penal Law 1.05(6) providing that the purpose of our criminal justice system is to “insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, the promotion of their successful and productive reentry and reintegration into society, and their confinement when required in the interests of public protection.”



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abiding lives in the community and not needlessly held beyond this point.<sup>6</sup> Releasing people when they are ready to be released rather than simply holding them to a date certain (or 85% of a date certain) minimizes the long-term negative impact of prison, which significantly impairs a person's ability to successfully reintegrate into the community.<sup>7</sup> It is also more cost-effective because individuals are not needlessly imprisoned — at the cost of about \$44,000 per year<sup>8</sup> — after they have proven their readiness to be safely released.

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“ This is  
New York, and  
there's no law  
against being  
annoying. ”

William Kunstler

.....

Thus, determinate sentencing tends to favor simplicity over reintegration and cost-effectiveness. This raises the question: is there a way for the Sentencing Commission to fashion a determinate sentencing scheme that still preserves the important goal of promoting reintegration while also saving New Yorkers needless tax dollars imprisoning people who are no longer a danger to the community? The answer is “yes” if the Sentencing Commission is willing to roll back fifteen years of tough-on-crime policy-making to revitalize New York's languishing Temporary Release program.

### **The History of New York's Temporary Release Program**

To understand the untapped promise that the Temporary Release program holds in both promoting successful reentry and reintegration and saving over-stretched tax dollars, it is important to know what the Temporary Release program is and its history in New York. Initiated in 1970, the Temporary Release program allows incarcerated people nearing the end of their sentences (usually about two years from release) to be released to the community for rehabilitative programming. The most utilized and best-known Temporary Release program is work release, which allows participants to work in the community during the day, initially returning to the facility at night, then on weekends until they need only report once per week. By facilitating a structured transition from incarceration to release, the Temporary Release program reduces recidivism and enhances public safety. Even better, it accomplishes this while simultaneously saving New Yorkers millions of dollars each year.

Despite the program's reentry promoting and cost-saving benefits, the eligibility criteria have been severely restricted over the past 15 years so that now any person in prison serving a sentence for a violent felony is essentially barred from participation. This restricted eligibility came by way of two Executive Orders: Executive Order 5,<sup>9</sup> issued in 1995, which generally bars those convicted of violent felony offenses; and Executive Order 9,<sup>10</sup> issued in 2007, which tightens

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6 Admittedly for the past few decades, the full value of indeterminate sentencing has not been realized because parole release decisions have focused more on punishing the parole applicant than on genuinely evaluating the applicant's readiness for release. As a result, in New York the indeterminate sentencing scheme has not lived up to its ideal. This issue is addressed in the article in this issue entitled “NYASCDL Supports Call for Parole Reform,” which explains why the NYASCDL is supporting a legislative proposal to amend Executive Law 259-i.

7 The long term impact of prison and how it impairs a person's ability to successfully reintegrate into the community is aptly described in a working paper by Craig Haney entitled, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*. This paper was prepared for a 2002 “From Prison to Home” conference sponsored by the U.S. Department of Health and Human Services. It is available at: <http://aspe.hhs.gov/hsp/prison2home02/Haney.htm>.

8 See Legal Action Center, *Drug Law Reform 2008 – Dramatic Cost Savings for New York State*, available at: [www.lac.org/pdf/RDL08\\_Cost\\_Savings\\_Report\\_12\\_08.pdf](http://www.lac.org/pdf/RDL08_Cost_Savings_Report_12_08.pdf).

9 This Executive Order can be found at 9 NYCRR 5.5.

10 This Executive Order can be found at 9 NYCRR 6.9.

the restrictions in Executive Order 5 and eliminates many of its exceptions.<sup>11</sup> These Executive Orders have all but gutted the Temporary Release program. At its peak in 1994, 27,937 individuals participated in the program; by 2009, program participation had plummeted to 2,191, a decline of more than 90%. As a result, today the Temporary Release program is one of New York’s most under-utilized resources for cost-savings and enhanced public safety.

The program’s drastic reductions did not result from a thoughtful weighing of its costs and benefits, but instead from the political turmoil generated by a few isolated, high-profile arrests of participants who committed crimes while in the program. In response to these high-profile arrests, and soon after being elected, Governor Pataki issued Executive Order 5 barring people convicted of violent felonies from participating in the program. In so doing, he overlooked the best available evidence at the time, set forth in the Department of Correctional Services’ own 1995 report, *Comparison of Temporary Release Absconders and Non-Absconders: 1993-1994*. This report established that allowing people with violent felony convictions to participate in the program did not increase crime rates among program participants. Indeed, when those convicted of violent felonies were permitted to participate in Temporary Release, a very small percentage of program participants — approximately 3% — were arrested for new crimes. This report also revealed that participants who were imprisoned for violent felonies absconded or committed new crimes at lower rates than other program participants.

Nonetheless, it was the politically-driven policy of restrictive eligibility criteria that led to the more than 90% reduction in program participation. While it is undoubtedly true that fewer participants overall means that fewer participants will abscond or be arrested while in the program, by adopting this restrictive policy the State has lost a significant opportunity to promote the successful reentry and reintegration of incarcerated people in one of the most cost-effective manners available.

### **The Promise of a Revitalized Temporary Release Program in a Determinate Sentencing Scheme**

Any discussion about a shift to determinate sentencing must also include a discussion about revitalizing the Temporary Release program. A vibrant Temporary Release program is the best way to compensate for the shortcomings of determinate sentencing in promoting the successful reentry and reintegration of imprisoned people.

Like the prospect of being released to parole, the opportunity to participate in Temporary Release provides incarcerated people incentives to engage in positive programming and behavior throughout the course of their incarceration. Moreover, participation in Temporary Release in and of itself is a best reentry practice. This is best illustrated by comparing the transition of those who do not have the opportunity to participate in Temporary Release with the fortunate few who do. Lacking the opportunity to participate in Temporary Release, most people are abruptly discharged from prison with \$40 and a bus ticket; they have no savings, little work experience, few job skills, and little hope of finding living-wage employment. In contrast, those who participate in the Temporary Release program gradually transition from prison, initially leaving for work during the



“*They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.*”

Benjamin Franklin  
*Historical Review of Pennsylvania 1759*



<sup>11</sup> For a discussion of the few available exceptions to these exclusions by way of a Violent Felony Override, see [www.communityalternatives.oerg/pdf/temporaryrelease.pdf](http://www.communityalternatives.oerg/pdf/temporaryrelease.pdf).

“It has not been unknown that judges persist in error to avoid giving the appearance of weakness & vacillation.”

Felix Frankfurter  
*Craig v. Harney*,  
331 U.S. 367, 392 (1947)

day and returning at night, then leaving for the week and returning on weekends, until eventually they need only report on a weekly basis. During this transition, they work regular hours and earn a living wage, gaining job skills, experience and confidence. The program also requires that participants save a percentage of their wages in their inmate account, helping them to develop better financial discipline.<sup>12</sup> Most participants also use this transition time to re-connect with family members and build supportive relationships in the community. As a result, by the time Temporary Release participants are discharged from prison, they have financial savings, a living-wage job, a stable home, and often positive supportive relationships in the community. Thus, it is no surprise that research shows that Temporary Release programs are effective at promoting successful reentry, thereby reducing recidivism.<sup>13</sup>

A full commitment to revitalizing the Temporary Release program should also include an investment in staff needed to counsel participants on the common problems experienced in transitioning from prison to the community and to provide participants career counseling, soft-skill development, and job coaching. Such an investment would go far in ensuring that most participants succeed in the program, thereby reducing the potential that participants will re-offend while in the program or after their discharge from DOCS custody.

Even with this investment, the Temporary Release program is an exceptionally cost-effective program; indeed, a vibrant Temporary Release program is a sure way to reduce the staggering cost of our prison system. The Temporary Release program - particularly work release - saves state taxpayers money in two important ways. First, it costs significantly less to house work release participants than to house “traditional prisoners.” For example, in 2007 it cost state taxpayers \$31,000 per year to house each traditional prisoner, but only \$7,500 per year to house each work release participant, resulting in a \$23,500 per year savings for each work release participant.<sup>14</sup> Second, because individuals involved in the work release program earn a taxable income, this program generates local, state and federal tax revenues.<sup>15</sup> A 2008 working paper issued by the Center for Community Alternatives explored the cost-savings of the Temporary Release program, concluding that between 1995 and 2007, the diminished use of the program cost New Yorkers at least \$1.25 billion.<sup>16</sup>

12 Indeed, in 2009 alone, Temporary Release participants saved over \$2,404,353 in wages. See Department of Correctional Services (DOCS), *Temporary Release Program: 2009 Annual Report*, at 10.

13 Seiter, Richard P., and Karen R. Kadela. 2003. “Prisoner Reentry: What Works, What Does Not, and What is Promising,” *Crime and Delinquency*, 49(3): 360-88. This article summarizes several studies showing that work release programs are “effective in reducing recidivism as well as improving job readiness for ex-offenders.” *Id.* at 373-74. Drug treatment programs that use work release as a transitional phase (as New York’s CASAT program does) show particularly promising results. *Id.* at 375-76.

14 See *Temporary Release Program: 2007 Annual Report*, at 10. The \$31,000 figure in this report is clearly lower than actual costs, which are estimated to be closer to \$44,000 per year. See Legal Action Center, *supra* note 8. Nonetheless, for purposes of this article, we will use the conservative \$31,000 figure in DOCS’ 2007 report in calculating cost-savings.

15 *Temporary Release Program: 2009 Annual Report*, at 10 (noting that in 2009 alone, the 2032 Temporary Release participants earned a total of \$5,049,821 and paid a total of \$1,478,880 in federal, State, and local taxes).

16 Entitled, *How New Yorkers Could Save Millions: The Potential Cost Savings and Public Safety Benefits of the Temporary Release Program*, this paper is available at <http://www.communityalternatives.org/pdf/TemporaryReleasePolicyPaper.pdf>.

## Conclusion

Given the remarkable reentry potential and cost-saving benefits of the Temporary Release program, it is unfortunate that the politics surrounding a few high-profile cases have effectively decimated the program over the past 15 years. The formation of a Permanent Sentencing Commission provides an opportunity to re-examine the reentry potential of the Temporary Release program. This is particularly true if the Commission is inclined to recommend the adoption of a mostly determinate sentencing scheme.

In examining sentencing in New York, it is hoped that the Permanent Sentencing Commission will be mindful of the sage advice of Hon. Michael A. Wolff, who has lectured and written on sentencing policy. In a 2008 Brennan Lecture, Judge Wolff noted that while “we must acknowledge that the reason for sentencing is to punish,” sentencing policy must be achieved with a considerable amount of information and thoughtfulness because “if we chose the wrong punishments, we make the crime problem worse, punishing ourselves as well as those who offend.” Judge Wolff went on to offer this advice:

If we are to think rationally about what is in our own best interest – that is, public safety – we should try and determine what reduces recidivism.<sup>17</sup>

Determinate sentencing may promote the goal of simplicity, but such sentences do little to meaningfully reduce recidivism by promoting a person’s successful reentry and reintegration into the community. Revitalizing the Temporary Release program is a proven means to address the shortcomings of determinate sentencing. It is a way to heed Judge Wolff’s advice and to rationally and effectively promote what is best for our communities. **A**

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<sup>17</sup> Michael A. Wolff, *Brennan Lecture, Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 New York University Law Review, 1389, 1395.

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