Sentencing with *GungaWeb* : Speculations on the Value of Rule-Based Systems in a World of Badly Drafted Statutes

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ABSTRACT

A current commercial web-based JDSS in New York State criminal law assists hundreds of judges statewide with questions of sentencing, lesser included offenses, plea bargaining and statutory interpretation. Maintenance of this system's rule base with respect to sentencing has revealed instances where interactions between statutes imply conflicting rules. Resolution of such conflicts requires a varied set of strategies; occasionally no satisfactory resolution is possible. Most such problems have been found to arise not from open textured terms deliberately employed, but from avoidable deficiencies in drafting. Rather than view these anomalies as limitations on the rule based approach, one may view them as an opportunity to promote a resolution by consensus preferable to the traditional common law approach of scattered lower court decisions ultimately clarified by authoritative appellate ruling. The current call for re-codification of the NY penal laws presents an opportunity to employ such systems in a systematic way when drafting legislation.

INTRODUCTION

This is a practical paper. In it, I will discuss some of the concrete problems encountered in building and maintaining a real commercial Judicial Decision Support System in a real domain, namely the domain of New York State criminal law. The particular JDSS involved bears the name *GungaWeb*, a system whose roots lie in the days of DOS and whose history and development have been traced in prior papers spanning over ten years of research (Woodin, 1990), (Woodin, 2001). Today, I will focus on a single aspect of this criminal law JDSS, namely its treatment of sentencing law. Building on theory, I will first briefly review how the system developed from a rule-based program written in Prolog, into a web-based system written in HTML and JavaScript. What we shall see is that it is a relatively straightforward, if laborious, task, to model a statutory structure like the New York Penal Law in either declarative rules or procedural routines that capture the essence of the substantive law. However, we will then turn to several examples of practical difficulties arising from the language of the statutes that are not easily resolved within rule-based formalism. We will examine how the system presently handles these difficulties, consider the proposition that the fault in fact lies not in the model but in the system being modeled, observe that a rule-based JDSS still serves its function where it alerts the judge to instances where the statutory enactments diverge from rationality, and conclude by speculating that a further use for such systems may be as an aid to those drafting legislation.

THEORETICAL CONTEXT

As stated, this is a practical paper, about a practical system. No claim is made that the theory or methods used are at the cutting edge of AI and Law. In contrast to the "schematic-holistic approach" to sentencing envisioned by Tata (1996), *GungaWeb's* sentencing functions do no more than compute (and document) the set of permissible sentences for a given offense and offender, leaving selection of the most appropriate sentence from that set entirely to the sentencing judge, similar to the system described by Tata as having been created by Bainbridge (1991). Here, as there, "The sentencing law component is intended to assist the magistrate by checking that the chosen sentence complies with relevant sentencing law. This part of the system is arguably more like an expert-system than a simple retrieval system, although it only answers the question, 'Is this sentence legally competent?' rather than, 'What is the appropriate sentence for this case?'." The system is thus within the type of "judicially acceptable" JDSS favored by Schjølberg (2001), and it avoids most of the criticisms leveled at prior attempts at "expert systems" by, for example, Greinke (1994).

What instead has been attempted by the author over the past ten years is to work out, using fairly well-understood techniques, first of declarative and subsequently of procedural rule-based programming, the full implications of a real legal domain of significant size. That a measure of success has been achieved, (judging by commercial acceptance), supports the defenses of rule-based systems made by Bench-Capon (1994), and demonstrates that real work on JDSS can and should be done now, with the tools at hand, provided that appropriate deference is given to the limitations of such systems. The point of this paper is to point up several species of limitation that arise, not from any deficiency in the rule-based approach, but from various deficiencies in legislative drafting.

STATEMENT OF THE PROBLEM

Sentencing in a criminal case in New York State involves a delicate balance between judicial discretion on the one hand, and legislative regulation on the other. Selection of an appropriate sentence upon conviction has traditionally been the subject of judicial discretion. The sentence ultimately selected by the judge, however, must be one of those legally authorized by statute. Depending on the kind and degree of offense of which the defendant is convicted and the defendant's criminal record, the range of sentences open to the judge will be more or less severely restricted. The serious consequences of a failure to observe limitations on discretion include reversal, retrial or dismissal, and these in turn raise two challenges for judges. The first is to recognize the circumstances in a given case which may invoke application of the various limiting statutes. The second is to accurately implement a statute whose application has been triggered by the facts of a given case. The statutes governing sentencing in New York State become ever more complex with each legislative session. The need for powerful tools to assist judges in meeting these challenges is manifest.

FIRST STEPS AND TRANSITION TO THE WEB: *GUNGA CLERK* TO *GUNGAWEB*

In 1989, the legal domain of criminal sentencing in New York State was addressed using the rule-based logic of Turbo Prolog. Title, classification and elements of each statutory offense were represented in a Prolog data structure and aggregated into a database of offenses. A compact body of sentencing rules was developed which accurately represented the law of sentencing and was capable of generating, with respect to any particular offense and defendant history, a list of all legal sentencing alternatives with citations to authority for each potential sentence. The system, either linked to a case management database or in a standalone environment, proved a powerful and efficient tool, maintained and employed in the author's court for several years, until advent of the web mandated an updated design. Conversion of the Prolog system to a web-based application involved several steps dependent upon the pre-existing

knowledge base and logic of the expert system.

First, using the database of the expert system, HTML files were generated for each offense in the New York Penal Law. A transitional Prolog program was used to create table layouts for title, class, text, lesser included offenses, pleas and sentences. The declarative Prolog rule-base for sentencing was translated into HTML forms linked to procedural JavaScript functions. This task was considerably informed by the study that had gone into formulating the sentencing logic as Prolog rules. To create a comprehensive web-based product, complete statutory text of the state Penal Law was added and enhanced by hyperlinked cross references to internally defined terms. This step also required the exercise of considerable judgment; indeed it is a continuing process. The final product was "dressed up" to present an attractive and easily navigable display, and was tested on numerous browsers and versions (see Figure 1).

With the cooperation and assistance of the departments of Legal Information and Records Management for the New York State Unified Court System and the UCS Division of Technology, a network license was negotiated and the application installed on the statewide judicial intranet. In the wake of fairly widespread acceptance by the judicial system, the application was released on CD-ROM and marketed as well to New York practitioners in the private sector. Now in its fourth year of deployment, the system has

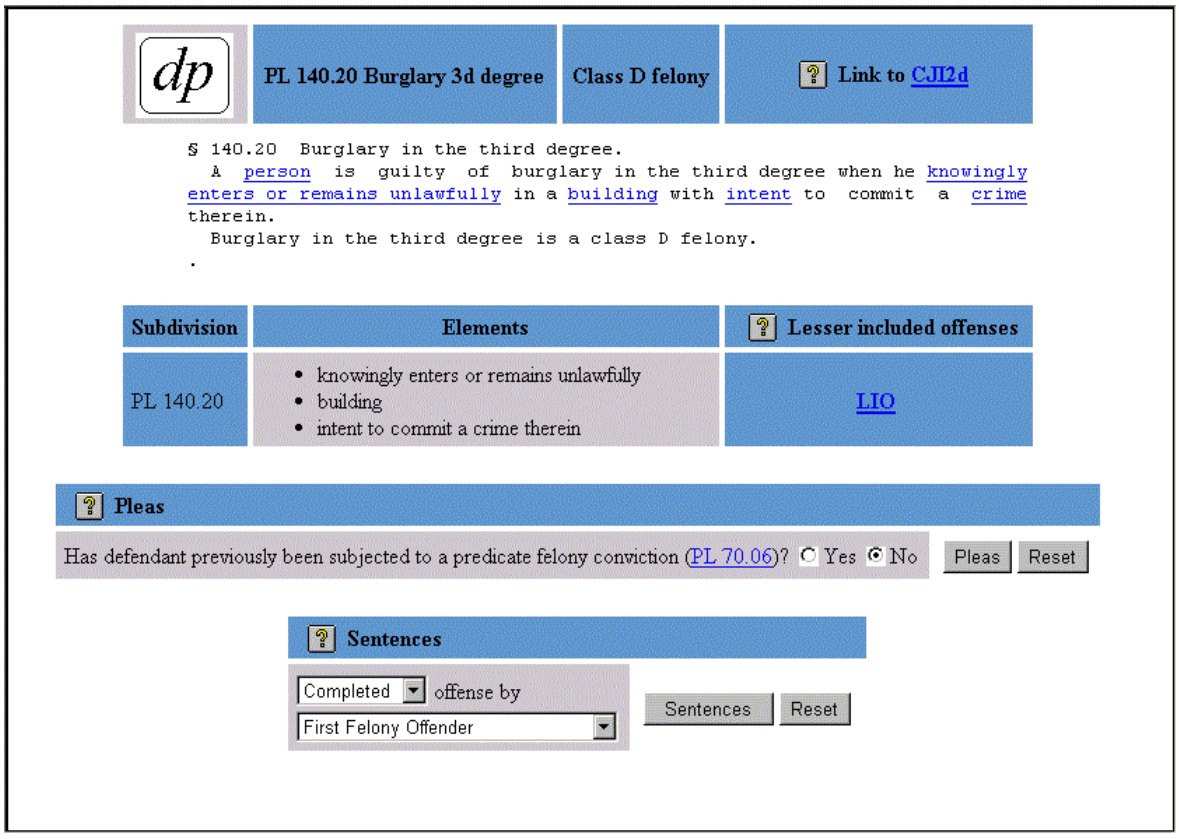
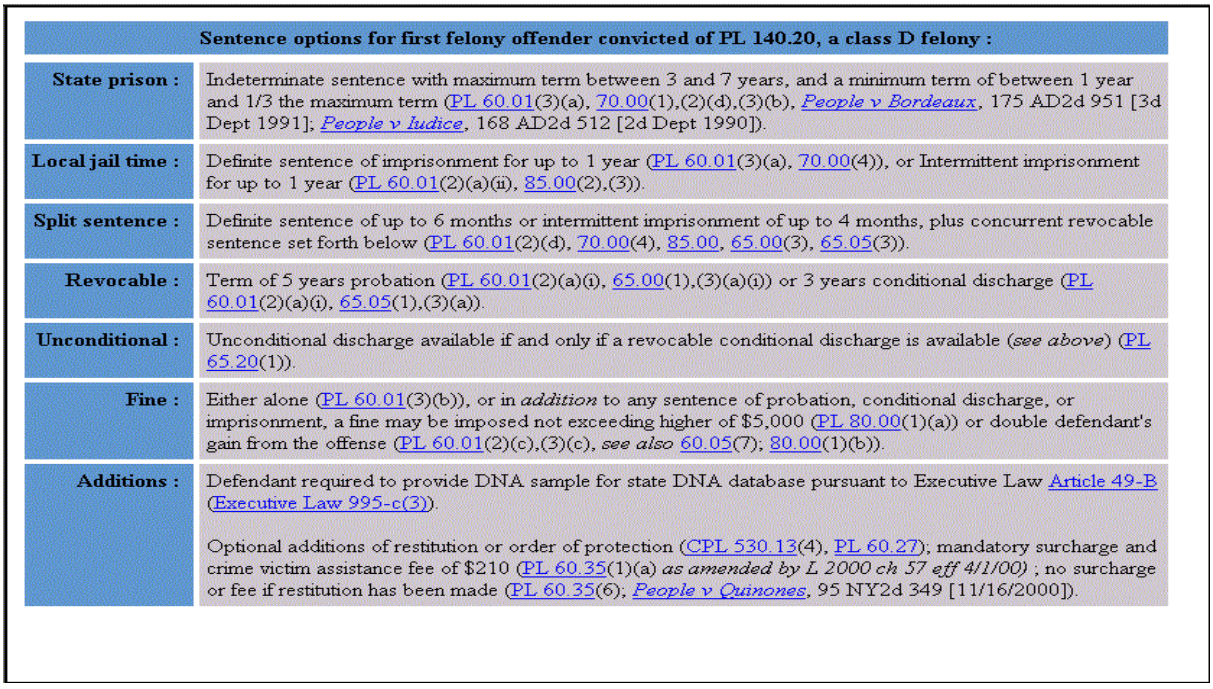


Figure 1



Sentence options for first felony offender convicted of PL 140.20, a class D felony :	
State prison :	Indeterminate sentence with maximum term between 3 and 7 years, and a minimum term of between 1 year and 1/3 the maximum term (PL 60.01(3)(a), 70.00(1),(2)(d),(3)(b), *People v Bordeaux*, 175 AD2d 951 [3d Dept 1991]; *People v Iudice*, 168 AD2d 512 [2d Dept 1990]).
Local jail time :	Definite sentence of imprisonment for up to 1 year (PL 60.01(3)(a), 70.00(4)), or Intermittent imprisonment for up to 1 year (PL 60.01(2)(a)(ii), 85.00(2),(3)).
Split sentence :	Definite sentence of up to 6 months or intermittent imprisonment of up to 4 months, plus concurrent revocable sentence set forth below (PL 60.01(2)(d), 70.00(4), 85.00, 65.00(3), 65.05(3)).
Revocable :	Term of 5 years probation (PL 60.01(2)(a)(i), 65.00(1),(3)(a)(i)) or 3 years conditional discharge (PL 60.01(2)(a)(i), 65.05(1),(3)(a)).
Unconditional :	Unconditional discharge available if and only if a revocable conditional discharge is available (*see above*) (PL 65.20(1)).
Fine :	Either alone (PL 60.01(3)(b)), or in *addition* to any sentence of probation, conditional discharge, or imprisonment, a fine may be imposed not exceeding higher of $5,000 (PL 80.00(1)(a)) or double defendant's gain from the offense (PL 60.01(2)(c),(3)(c), *see also* 60.05(7); 80.00(1)(b)).
Additions :	Defendant required to provide DNA sample for state DNA database pursuant to Executive Law Article 49-B (Executive Law 995-c(3)). Optional additions of restitution or order of protection (CPL 530.13(4), PL 60.27); mandatory surcharge and crime victim assistance fee of $210 (PL 60.35(1)(a) *as amended by L 2000 ch 57 eff 4/1/00)* ; no surcharge or fee if restitution has been made (PL 60.35(6); *People v Quinones*, 95 NY2d 349 [11/16/2000]).

Figure 2

been migrated to an external internet location (www.gungaweb.com), to enable private and public sector users to access it from a single location. The sentencing function in particular (see Figure 2) has proven to be of particular value to courts, judges and law clerks across the State.

PRACTICAL CONSIDERATIONS

Extending and maintaining this system, numerous instances have arisen where there is no clear rule, or more than one rule is possible based on an informed reading of the statutes. In these instances, the preferred approach has been either to follow the most likely "rule" and disclose the rationale for the choice, or else to declare that no firm conclusion is possible, state both rules, and alert judges to the need to decide the issue if and when it is presented in an actual case. It has been found that most such problems do not arise from "open-textured" terms deliberately employed for their effect, but rather are caused by deficiencies in drafting that could have been eliminated had they been anticipated.

An example of intentionally employed "open texture" in a sentencing statute is the use of the term "unduly harsh" in several Penal Law sections calling for increased or mandatory imprisonment under certain aggravating circumstances (*See* Penal Law sections 60.07, involving criminal attacks on operators of for-hire vehicles, PL 70.00 specifying terms of imprisonment for non-violent felonies, PL 70.02 specifying terms of imprisonment for a violent felony offense, PL 70.15 specifying terms of imprisonment for misdemeanors and violations, and PL 265.09 calling for an additional consecutive sentence of five years for criminal use of a loaded firearm). In each such case, a particular enhanced sentence is mandated, unless the judge "having regard to the nature and circumstances of the crime and to the history and character of the defendant", finds on the record that such sentencing provision "would be unduly harsh and that not imposing such sentence would be consistent with the public safety and would not deprecate the seriousness of the crime." What factors must combine to constitute "undue harshness" must be determined on a case by case basis, and that determination is intentionally left by the Legislature

to the judge who is charged with weighing those factors.

Examples abound, however, where conflicts arise in New York penal statutes due to poor drafting. Four concrete instances include (1) a poorly conceptualized definition of just where in the statutes particular "attempted offenses", are deemed "defined", (2) a recent anomaly in the sentencing of "juvenile offenders" convicted of certain "hate crimes" that leads to specification of a mandatory minimum sentence that exceeds the longest permissible maximum sentence for the particular offense, (3) a statutory scheme for sentencing "persistent felony offenders" that has been in place for many years, but which in reality contains a logically null proposition, and (4) a logically inconsistent scheme for sentencing "youthful offenders." In these cases, incorporation into the JDSS requires a detailed analysis of probable legislative intent (in cases (1) and (4)), or what amounts to a "punt" (in cases (2) and (3)) of simply calling attention to the issue, without attempting a logical resolution.

"AN OFFENSE DEFINED IN THIS ARTICLE": ATTEMPT?

An example of terminology which should be precise but is not, is the phrase "an offense defined in this article", or "an offense defined in [article X]." Most crimes in New York State are defined in a single section contained in a particular article of the Penal Law, however some are not. The offense of "Attempt" is one example. According to PL 110.00, "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." For the definition of conduct that tends to effect such commission, reference must then be had to the definition of the attempted substantive offense (rape, robbery, *etc*.), which is contained in the Penal Law Article on that topic (Articles 130, 160, respectively).Thus, when a sentencing provision is made applicable to "any offense defined in Article 130" and no direction is given with respect to attempts, does that sentencing provision apply to an attempt to commit an Article 130 offense, or not?

For example, a recent amendment to PL 65.10(4-a) provides for certain mandatory conditions to be attached to any probationary sentence imposed upon conviction for an offense "defined" in article 130, 235, or 263, or PL 255.25 (all containing offenses related to sexual conduct) where the victim was under the age of eighteen at the time of the offense. Query: Is an attempt to commit one of these offenses a crime that is "defined" under the article containing the substantive offense, or under Article 110? One view is that Article 110 defines the crime of attempt. An alternate view is that an attempt constitutes a lesser included offense of the substantive crime and therefore the definition of the substantive crime also defines the essential elements of the attempt. *GungaWeb* presently takes the view, for purposes of this statute, that Article 110 "defines" the crime of attempt, and thus that the new probation condition is not mandatory upon conviction for an attempt. This conclusion is based on the developer's judgment that the Legislature intended to attach the condition only to offenders who have committed completed crimes. This judgment has been disclosed in commentary accompanying the system, and must henceforth be monitored in light of any case law that is generated confirming or invalidating it.

By contrast, other recent New York legislative acts (PL Article 485 on "Hate Crimes"; PL Article 490 enacting the "Anti-Terrorism Act of 2001") provide explicit direction with respect to attempts. For example, according to PL 485.00, a person commits a "hate crime" when he or she commits a "specified offense" and intentionally selects the victim or commits the offense in substantial part because of a perception or belief regarding a protected attribute of a person (such as race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation), whether or not that perception or belief is in fact correct. The list of "specified offenses" is set forth in PL 485.00. It spans ten separate Articles of the Penal Law, and applies to offenses specifically listed, "or any attempt or

conspiracy to commit any of the foregoing offenses." Attempts are thus specifically included within the scope of the act. A similar approach has been taken in the "Anti-Terrorism Act of 2001." In these two recent enactments, the Legislature has recognized the existence of the issue identified above, and has specified its resolution. What then does the failure of the Legislature to address the issue in respect to attempts in general say to the JDSS developer who must determine whether a new sentencing provision applicable to crimes "defined" in a particular article should be triggered by conviction of the attempt to commit such an offense? The issue remains open.

CLASS A-I FELONIES, HATE CRIMES, AND JUVENILE OFFENDERS

Sometimes, conflicts are created when new legislation is engrafted onto old, without comprehensive integration or recodification.

A "juvenile offender" (JO) under New York law is a 13 year old individual who is held criminally responsible for intentional or reckless murder, or a 14 or 15 year old held criminally responsible for either murder or any other of a list of some fifteen violent felonies (*see* CPL 1.20(42)). By specific Legislative command (PL 60.00(2), 60.10) JO's sentenced to prison are sentenced under a specific statute (PL 70.05). However, some of these "JO" offenses are also "specified offenses" for purposes of the "Hate Crimes" act alluded to in the prior example, and therein lies the mischief.

A provision of the Hate Crimes sentencing section (PL 485.10(3)(d)) increases the "minimum maximum" of an indeterminate prison term from 3 to 4 years when a juvenile offender is sentenced for a class *B* felony pursuant to PL 70.05 (the general JO imprisonment section). So, it appears clearly contemplated that a JO may be convicted of a hate crime and receive an enhanced sentence therefor (even though CPL 1.20(42) has not been correspondingly amended to include among those enumerated substantive crimes for which a juvenile may be held criminally responsible, a "hate crime" contrary to PL 485.05). Now consider: PL 485.10(4) provides that upon conviction of a hate crime, where the specified offense is a class *A-I* felony, the minimum term of the indeterminate sentence shall be "*not less than 20 years*." But, PL 70.05 otherwise specifies the indeterminate terms for JO's, and it provides that upon conviction for the particular class A-I felonies of kidnaping in the first degree (PL 135.35) or arson in the first degree (PL 150.20), the maximum term of the indeterminate term must be "at least twelve but *shall not exceed fifteen years*." So, literal application of PL 485.10(3)(d) for the minimum, and PL 70.05 for the maximum term yields the absurd result, where the "specified offense" of the hate crime is PL 135.20 or 150.20, of a mandatory minimum term of "no less than 20 years", and a mandatory maximum term of "at least 12 and not to exceed 15 years."

It is likely that this drafting error occurred through the tacit but erroneous assumption that the maximum sentence for any A-I sentence would be "life imprisonment", as is the case for all A-I felonies *except* first degree arson and kidnaping, committed by JO's.

GungaWeb at present makes no attempt to specify a sentence under these conditions (which it appears no amount of "judicial construction" can remedy), other than to note the need for legislative attention.

PERSISTENT FELONY OFFENDER SENTENCING : A LOGICAL NULLITY?

A firmly embedded landmark in the statutory landscape of New York criminal law for many years has been the "three strikes and you're out" principle embodied in present Penal Law section 70.10, providing for sentencing of "persistent felony offenders." As commonly understood and applied, this law permits a court to impose a sentence of life imprisonment upon a deserving defendant who is being sent to state

prison for the third time. A careful reading discloses what appears to be a technical defect in this statute. Whether it is of any legal consequence is purely conjectural; nevertheless here it is. PL 70.10(2) provides:

> 2. Authorized sentence. When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized by section 70.00, 70.02, 70.04 or 70.06 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A-I felony. In such event the reasons for the court's opinion shall be set forth in the record.

The plain language of this section appears to state that where the defendant before the court would otherwise be sentenced pursuant to, for example, Penal Law section 70.02 (a violent felony offender), and the court has determined the defendant is a persistent felony offender, then in lieu of the sentence of imprisonment authorized by 70.02 for the crime of which the defendant stands convicted, the court may impose the sentence of imprisonment authorized by 70.02 for a class A-I felony.

But, there is no sentence of imprisonment authorized by section 70.02 for a class A-I felony.

The plain language of this section also states that where the defendant before the court would otherwise be sentenced pursuant to Penal Law section 70.04 (a second violent felony offender), and the court has determined the defendant is a persistent felony offender, then in lieu of the sentence of imprisonment authorized by 70.04 for the crime of which the defendant stands convicted, the court may impose the sentence of imprisonment authorized by 70.04 for a class A-I felony.

But, there is no sentence of imprisonment authorized by section 70.04 for a class A-I felony.

The plain language of this section further states that where the defendant before the court would otherwise be sentenced pursuant to Penal Law section 70.06 (a second felony offender), and the court has determined the defendant is a persistent felony offender, then in lieu of the sentence of imprisonment authorized by 70.06 for the crime of which the defendant stands convicted, the court may impose the sentence of imprisonment authorized by 70.06 for a class A-I felony.

But, *there is no sentence of imprisonment authorized by section 70.06 for a class A-I felony.*

The fact is, sections 70.02, 70.04 and 70.06 provide no sentence at all for a class A-I felony (PL 70.06(1) even specifically excludes A-I felonies from that section's coverage). Only section 70.00 provides a sentence of imprisonment for a class A-I felony (a maximum term of life, and a minimum term of not less than 15 nor more than 25 years). But, according to the perceived plain language of PL 70.10(2), this alternative sentence is not to be imposed upon a defendant determined to be a persistent felony offender, unless the defendant would otherwise be sentenced under section 70.00 for the crime of which he stands convicted.

Since the other violent and multiple offender sentencing statutes (PL 70.06 and, presumably, PL 70.02, 70.04 and 70.08) are mandatory in nature (*see, People v Scarbrough*, 66 NY2d 673), the only persistent felony offenders who would otherwise be sentenced under section 70.00 appear to be nonviolent felony offenders with two or more prior felonies committed so long ago (over ten years) that they no longer qualify as predicate convictions for purposes of second felony offender treatment.

This reading of the statute, whatever its logical appeal, yields results so far removed from what has been commonly taken to be its meaning, purpose and intent, as to be almost certainly legally incorrect. Yet, one must argue that a statutory scheme for sending persons to prison for life should be worded precisely and followed precisely, and it should not have to depend for its validity on a construction that ignores, glosses over, or explains away the meaning derived from its plain terminology and explicit grammatical structure. Perhaps it would have been more correct to state "by those sections", instead of "by that section" or, better, simply to explicitly provide in section 70.10 the sentence to be imposed upon a persistent felony offender. In any event, absent any case law authority to the contrary, *GungaWeb* continues to report the availability of discretionary life sentences for persistent felony offenders, subject only to the above observations.

YOUTHFUL OFFENDER SENTENCING : INTERNALLY INCONSISTENT SCHEME?

To be distinguished from a “juvenile offender” (JO) under New York law is a “youthful offender” (YO), being a person at least 16 and less than 19 years old, or a person charged as above with being a juvenile offender, who is *relieved* from criminal responsibility for the commission of an offense and, in essence, “given a second chance” by the criminal justice system. A sentence is still imposed, notwithstanding the substitution of a “youthful offender finding” for a criminal “conviction.”

Youthful offender sentencing with respect to felonies is governed by a statutory scheme which first declares the youthful offender adjudication is not a “conviction” for an offense, and then commands that a sentence be imposed upon the youthful offender “as if” the offender *were* convicted of an offense of the lowest specified felony grade (class E). Accordingly, all of the sentencing provisions applicable to a conviction for a class E felony should be available for imposition upon a youthful offender. However, in practice, application of the various sentencing provisions varies. For instance, CPL 390.15 providing for a mandatory HIV test, upon request of the victim, of a defendant convicted of a sex offense, expressly states that it includes YO findings within the definition of “conviction” for purposes of that section. Likewise, CPL 530.13, providing for orders of protection for victims of offenses, is expressly made applicable “in addition to any other disposition, including a conditional discharge or youthful offender adjudication.” Thus, both sanctions are expressly made applicable in the case of a youthful offender.

On the other hand, the DNA database registration provision (Executive Law Article 49-B) does not expressly reference YO, and it states that it applies only to a “designated offender”, defined as “a person convicted of and sentenced” for any one or more of the specified felonies. In practice, it is not applied to youthful offenders, even though PL 60.02 states they should be sentenced “as if” they were “convicted” of a class E felony and there are class E felonies for which registration is required of an adult defendant upon “conviction” (*see, e.g.*, PL 130.25, rape in the third degree).

Similarly, for purposes of the Sex Offender Registration Act (Corrections Law Article 6-C), a “sex offender” includes only a “person who is convicted of any of the offenses set forth in subdivision two or three of this section” (Corr. Law 168-a) It has been held inapplicable to youthful offenders, even though PL 60.02 states they should be sentenced “as if” convicted of a class E felony and there are class E felonies listed in Corrections Law 168-a for which registration would be required of an adult defendant.

Such omissions may conceivably be reconciled with PL 60.02, if the provisions are viewed as mere “incidents” of the sentence, and not as part of the sentence itself. For example, another “incident” of a sentence may be the requirements and effects of the so-called “Son of Sam Law” (Executive Law section

632-a), exposing certain assets of a criminal defendant to civil recovery by a crime victim. Since this law by its terms applies only to "funds of a convicted person" and to profits from a crime of which the defendant was "convicted", a youthful offender is, it seems, not subject to its terms. Logical conflict with PL 60.02 is avoided by adopting the view that the effects of this law are not part of the sentence itself, but are rather collateral effects that ensue only where there has been a "conviction."

Likewise, New York courts have held that the mandatory civil surcharge, imposed by PL 60.35 "whenever proceedings in an administrative tribunal or a court of this state result in a conviction for a felony, a misdemeanor, or a violation", is not to be imposed upon youthful offenders, because the youthful offender adjudication is not a "conviction." While this rule also appears to treat the surcharge as a mere "incident" of the sentence, it seems a closer case, because this rule is found in a section codified within the Penal Law article on sentencing. It is, arguably, part of the sentence, not a mere incident of it, and thus if a YO should be sentenced "as if" he were convicted of a crime, he should be surcharged "as if" he had been convicted of a crime. *GungaWeb* however follows the authoritative case law on this issue and declares the surcharge inapplicable to youthful offenders.

Note on *People v Andrew W.*

At the risk of prolonging this rather dreary litany, a final example relating to youthful offender sentencing is offered, both because through serendipity it arose in the author's own court, and because it sets up quite nicely the conclusion for this paper, which by now must be urgently sought by all.

In year 2000, the New York Legislature enacted the Sexual Assault Reform Act of 2000 (Laws of 2000, Chapter 1, *effective* 2/1/01). Along with a number of other amendments to existing law, that Act now provides for increased probationary terms of ten, instead of five years, for a defendant sentenced to probation after conviction of any "felony sexual assault", defined as including any felony defined in PL Article 130 (see PL 65.00(3)). In regular course, the provisions of this Act were analyzed and incorporated into *GungaWeb's* sentencing rule base.

In the Fall of 2001 a case arose in the author's own court that presented an issue of first impression under the new sentencing statute. Three young defendants entered pleas to sexual abuse in the first degree upon the understanding that the Court, if warranted by the results of the various pre-sentence investigations, would impose in each case a term of five years probation, and would consider granting to each defendant youthful offender status. In preparation for sentencing, it came to light that, since the date of the offense in each case was subsequent to February 1, 2001, sentencing would be governed by the Sexual Assault Reform Act. Clearly, the contemplated probationary sentence could be imposed only through imposition of a ten year probation term, if defendants were sentenced as adults. Since the Court, upon due consideration, did determine to grant to each defendant youthful offender status, it remained to be considered what sentence was called for under the Act under these circumstances. The precise question was: If a defendant pleads guilty to sexual abuse in the first degree (PL 130.65(2), a class D violent felony) committed after February 1, 2001, is adjudicated a youthful offender, and is sentenced to probation, is the mandatory term of probation 10 years or 5 years? As initially implemented in *GungaWeb*, the system called for a sentence of 10 years probation. As a case of first impression, however, the matter was brought before the Court for decision.

Defense counsel contended that "the new law is applicable for a conviction of a crime", and that since a YO adjudication does not constitute a "conviction", in the event the Court granted youthful offender status, the "agreed upon sentence" of five years probation was available. In answer to defendants'

argument, the Court noted PL 65.00(1) by its terms provides that *all* probation sentences are to be imposed only upon "conviction" of a "crime." Thus, by defendants' logic, a youthful offender could *never* be sentenced to a probationary term, of any duration (which is not the law -- many are so sentenced). Instead, PL 60.02 mandates that a youthful offender be sentenced *as if* he *were* "convicted" of a crime. The question is, *which* crime?

Ultimately, the arguments for a five year probationary term were found to lack merit for several reasons. First, the language of PL 65.00(3)(a)(iii), as amended, specifies that "*for a felony sexual assault*, the period of probation shall be ten years." Significantly, the provisions setting forth the various periods do not use the word "conviction"; rather, those provisions refer merely to a period required "*for* a felony sexual assault."

Second, although PL 60.02 calls for imposition of a sentence that would be authorized upon conviction for a class E felony, there are not one but *two different* probationary terms prescribed by PL 65.00(3) for class E felonies, namely the five year term applicable to class E felonies generally, and the special 10 year term applicable in the case of a class E felony which is also a "felony sexual assault" (*e.g.*, rape in the third degree, sodomy in the third degree, persistent sexual abuse, aggravated sexual abuse in the fourth degree, and female genital mutilation). Where the conviction underlying the YO adjudication is actually "for" commission of any of these class E felony sexual assaults, the 10 year period called for by PL 65.00(3) is in fact a probation term prescribed for a class E felony, and its imposition would be in accord with the plain language of both PL 60.02 and PL 65.00(3). Since there exist "felony sexual assaults" that are in fact class E felonies, the most consistent interpretation of PL 60.02 and PL 65.00(3) is to impose, upon replacement of a felony sexual assault conviction by a YO adjudication, the probationary term that would be imposed upon conviction for a class E "felony sexual assault."

Third, in the Court's view the purpose of PL 60.02 was to limit the *prison* exposure of felony youthful offenders to that faced by adults convicted of the lowest grade felony. It is not to limit rehabilitative provisions such as that provided by a doubled probation term. That purpose was not found to be offended by imposing the ten year probation term, for in the event the youthful offender violates probation he still faces upon revocation only the limited prison term applicable to class E felonies, not the longer prison term faced by an adult who violates the same probation.

Finally, comparison with misdemeanor sex offense YO sentencing provisions compelled the same result. PL 60.02(1) provides that in the case of a youthful offender finding substituted for an offense other than a felony, the court must impose a sentence authorized for the offense for which the youthful offender finding was substituted. In the case of a class A misdemeanor sex offense (*e.g.*, PL 130.20), the prescribed doubled probationary term for the offense itself, and therefore the probationary term to be imposed upon a youthful offender, is six years. It was thought to be anomalous in the extreme to impose a six year probationary term upon a youthful offender who has committed a misdemeanor sex offense, and a five year probationary term upon a youthful offender who has committed a felony sex offense.

Thus, based on analysis of the language of the pertinent statutes and the purpose behind youthful offender legislation, the Court imposed a term of ten years probation (*People v Andrew W.*, __ Misc2d __ [Greene County Court, 10/15/01]), from which judgment the defendants have appealed. An appellate ruling on the issue will either confirm the initial conclusion reported by *GungaWeb*, or indicate the need to revise its rule base.

CONCLUSION-- JDSS IN PURSUIT OF RATIONAL JUSTICE

While a legislature is free to draft laws that are indeterminate, vague, or illogical, a court before which is presented an issue raised by such a law may not avoid judgment, but must overcome the obstacle by either construing the statute or declaring it void. Four problematic statutory anomalies have been identified in this article. While they may at first blush appear minor, even picayune, in practice any one may have significant impact on a defendant's liberty, and thus become a major issue. The following points are noted:

1. The anomalies identified are indeed subtle enough as may escape review by courts in any systematic way. Rather, the likely occurrence will be the silent creation of a collection of individual cases, each resolving the issue in random fashion, without reflective consideration, and thus each being of little precedential value.

2. The anomalies were in fact only discovered in the process of building, extending and testing the existing JDSS described herein.

3. None of the anomalies are examples of useful or desirable "open texture" in legislation. The Legislature did not create them intentionally in order to allow judges discretion to fashion judgments tailored to particular cases. Doubtless, the lawmakers were not even aware of them. Whereas the deliberate use of open texture is a legitimate drafting device, statutes containing logical deficiencies are simply bad laws that produce absurd results. If we incorporate them into our models, they will render our models absurd as well. A better use of JDSS, it is suggested, is to use the rational models they employ to identify, expose, and so suppress such anomalies, either through proactive analysis of cases as they arise or, better still, earlier in the legislative drafting process.

While it may be too much to ask that a system be designed that can draft real legislation in light of the many competing pressures for compromise and dispatch, the current call by the New York Office of Court Administration and the State's Chief Judge for re-codification of the New York Penal Law after study by a Temporary Commission presents an opportunity for thoughtful application of these ideas. If a Temporary Commission such as that proposed to redraft the state's penal code were to take pains to encode and test its proposals in a JDSS prior to their enactment, numerous hypothetical cases may be generated and many flaws in the logical scheme identified before they become law.

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