

2000

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Recommended Citation

David C. Leven, *Our Drug Laws Have Failed - So Where is the Desperately Needed Meaningful Reform?*, 28 Fordham Urb. L.J. 293 (2000).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol28/iss1/3>

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OUR DRUG LAWS HAVE FAILED — SO WHERE IS THE DESPERATELY NEEDED MEANINGFUL REFORM?

*David C. Leven**

New York has completely lost sight of the true nature of the crimes involved. . . . It is difficult to believe that the possession of an ounce of cocaine or a \$20 “street sale” is a more dangerous or serious offense than the rape of a ten-year-old, the burning down of a building occupied by people, or the killing of another human being while intending to cause him serious injury.¹

INTRODUCTION

When the Rockefeller drug laws² were enacted in 1973, there was an expectation that harsh, mandatory prison sentences would substantially reduce drug use and trafficking.³ However, rather than locking up drug kingpins, getting pushers off the street, and deterring drug use, these laws have filled our prisons with thousands of non-violent addicts who are unjustifiably denied drug treatment alternatives. Our current drug laws often impose harsh sentences on low level offenders—many of whom are serving draconian sentences for non-violent crimes—while drug trafficking and use have continued virtually unabated.

New York State’s drug laws impose harsh mandatory prison penalties for the possession or sale of even small quantities of narcot-

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1. *Carmona v. Ward*, 576 F.2d 405, 423 (2d Cir. 1978) (Oakes, J., dissenting).

2. N.Y. PENAL LAW Art. 220 (McKinney 2000). The current penal law was enacted in 1965 and underwent major revisions in 1973. WILLIAM C. DONNINO, PRACTICE COMMENTARY TO ART. 220, 5-6 (McKinney 1999). Under these laws, controlled substance felonies are classified according to the type and weight of the drug that is sold or possessed. *E.g.*, N.Y. PENAL LAW § 220.18. For each drug felony, a minimum and maximum sentence is imposed according to sentences established by the legislature. *Id.* at Art. 70.

3. Governor Rockefeller, testifying before a Joint Assembly Codes and Senate Codes Committee meeting, called these new measures “so strong, so effective, so thoroughly enforced that only the most foolhardy or unreasonable would risk his own freedom by jeopardizing the lives of others.” Gov. Nelson A. Rockefeller, Testimony at Joint Hearing Before Senate and Assembly Codes Comm. (Jan. 30, 1973), in PUBLIC PAPERS OF NELSON A. ROCKEFELLER 1260 (1973).

ics. These penalties apply without regard to the circumstances of the offense or the individual's character or background, essentially eliminating judicial discretion in most cases. For example, these laws mandate a prison term of fifteen years to life for anyone, including an adolescent, convicted of selling two ounces or possessing four ounces of a narcotic substance.⁴ No other state in the nation requires such harsh sentences.⁵ Even under the notoriously harsh federal laws, the minimum sentence for the conviction of selling 500 grams of cocaine, nearly eighteen ounces, is only five years.⁶

The Second Felony Offender Law,⁷ enacted in New York the same year as the Rockefeller drug laws, has only served to magnify the severity of our drug laws.⁸ This law requires increased prison sentences for all repeat offenders who have committed any second felony within ten years of a prior felony conviction.⁹ It applies regardless of the nature of the felonies (both could be non-violent drug offenses) and whether the offender led an exemplary life between committing the two crimes is irrelevant. This law is so harsh that a person convicted twice of selling a few vials of crack might serve seven years in prison.¹⁰

The injustice of the current laws will not be corrected by tinkering at the edges. New York's drug laws must be modified to return greater sentencing discretion to judges and to increase diversion of non-violent addicted drug offenders to addiction treatment and rehabilitation options. The authority of judges to make sentencing decisions and to tailor sentences to the needs of the individual, as well as those of public safety, must be restored.

4. N.Y. PENAL LAW § 220.43 (McKinney 2000) (explaining that sale of two ounces of a narcotic is a class A-I felony); N.Y. PENAL LAW § 220.21 (McKinney 2000) (noting that possession of four ounces of a narcotic constitutes a class A1 felony); N.Y. PENAL LAW § 70.00(3) (McKinney 2000) (setting sentencing guidelines).

5. HUMAN RIGHTS WATCH, VOL. 9, No. 2 (B), CRUEL AND USUAL: DISPROPORTIONATE SENTENCES FOR NEW YORK DRUG OFFENDERS 9 (1997).

6. Pub. L. No. 99-570, 100 Stat. 3207 (1986).

7. N.Y. PENAL LAW § 70.06 (McKinney 2000).

8. The unintended consequence of these laws is that New York sends a higher percentage of drug offenders, as new prison admissions, to prison than any other state in the country except for one. HUMAN RIGHTS WATCH, VOL. 12, No. 2 (G), PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS Fig. 6 (2000) (calculating drug offenders as a percentage of new admissions).

9. N.Y. PENAL LAW § 70.06 (McKinney 2000).

10. Such a sale would constitute a class D felony. *Id.* at § 220.06 (McKinney 2000). This is the second lowest category, which mandates a minimum sentence of four years to a maximum sentence of seven years. *Id.* at § 70.06(3)(d).

I. THE INEVITABLE FAILURE OF OUR DRUG LAWS

By any standard of measurement, our drug laws have failed. Despite the severity of these laws, almost fifteen million people nationwide continue to use illicit drugs.¹¹ Because drug selling is a lucrative business (globally worth an estimated \$400 billion),¹² drug laws cannot deter low level dealers who sell drugs to supplement inadequate incomes or to support their own drug habits. Neither do drug laws impede couriers or “mules,” who are often women forced or coerced into the business by drug dealing boyfriends. Nor are drug kingpins discouraged—they, like others in the business, realize that the risk of apprehension is slight and furthermore, are rarely foolish enough to be caught carrying narcotics. Even when caught, these top drug executives have valuable information to trade and can cut good deals with prosecutors in order to avoid harsh sentences.

Today, as when the Rockefeller drug laws were passed, up to one million people in New York State use drugs.¹³ This is not surprising; drugs such as heroin and cocaine are reported to be cheaper and more widely available than ever.¹⁴ The threat of imprisonment does not deter New York’s estimated 500,000 addicts or abusers¹⁵ from engaging in an activity which has become an integral part of their lives. Many of these addicts would welcome the opportunity to participate in a drug treatment program. Unfortunately, New York does not make drug treatment programs readily available to those in need.

11. OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., U. S. DEP’T OF HEALTH & HUMAN SERVS., SUMMARY OF FINDINGS FROM THE 1999 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE (1999) (estimating that 14.8 million American used illicit drugs in the thirty days prior to being surveyed), <http://www.samhsa.gov/oas/NHSDA/1999/Chapter3> [hereinafter 1999 SUMMARY].

12. William McDonald, *Agreeing With Nixon on How to Combat Drugs*, N.Y. TIMES, Oct. 9, 2000, at E8.

13. 1999 SUMMARY, *supra* note 11 (noting that 7% of New York State citizens use drugs).

14. Marsha Rosenbaum, *Are We Really Winning the War on Drugs?*, S.F. CHRON., Mar. 24, 2000, at A23.

15. Joseph B. Treaster, *Mayor’s Drug Strategy: New Plan for Chronic Problem*, N.Y. TIMES, Apr. 11, 1994, at B1 (estimating that there are 500,000 drug addicts in New York City); see also Michael Massing, *Help Addicts? Sure. We Promise. Really!*, N.Y. TIMES, Oct. 22, 1993, at A29 (explaining that New York City has 500,000 to 600,000 hard-core drug users).

Although the number of people sent to prison for drug crimes has increased tenfold in the last twenty years,¹⁶ the drug trade flourishes and drug use remains undiminished. Indeed, drugs are even easily accessible in prisons.¹⁷ Minor dealers, who are only marginally involved in the drug trade, are readily replaced. Even if the number of those sent to prison were increased an additional tenfold to 100,000, which is a virtual impossibility, only 20%, at most, of those who sell or use drugs in this state would be incarcerated. It would be unwise to incarcerate more offenders, particularly addicts, when 78% of drug offenders believe that putting drug users in jail has little effect on controlling the drug problem, and 46% believe that being imprisoned would make them more likely to use drugs.¹⁸ Prison-based drug treatment programs, even where they exist, often do not reach many drug offenders and are seldom successful because of the setting where the treatment is rendered, the dearth of qualified drug treatment providers in prisons, and the lack of effective aftercare for those who are released.

Further evidence of the failure of our drug laws in preventing drug use is gleaned from statistics on teenagers' use of drugs. Despite years of exposing teens to media and school-based anti-drug campaigns, drug use by high school students increased substantially in the 1990's. By 1999, the number of teens who use marijuana had almost doubled from the number of those surveyed in 1991, with almost half reporting that they had tried marijuana.¹⁹ Similarly, the number of those who had tried cocaine increased from 5.9% in 1991 to 9.5% in 1999.²⁰ High school students have relatively easy access to drugs. Almost 90% of high school seniors report that marijuana is fairly or very easily accessible, nearly 45% know where to find LSD, over 47% reported that cocaine is easy or fairly easy to get, and one-third know where to buy heroin.²¹ If we are

16. The number of individuals imprisoned for drug crimes has risen from 886 in 1980 to approximately 8520 in 1999. CORRECTIONAL ASS'N OF N.Y., FACT SHEET, TRENDS IN NEW YORK STATE PRISON COMMITMENTS (2000) (on file with the FORDHAM URBAN LAW JOURNAL).

17. According to a recently reported survey of drug offenders, 88% said they could get drugs in prison or jail. Carla Rivera, *California and the West: Prisons are a Hotbed of Drug Use, Survey Finds*, L.A. TIMES, August 25, 2000, at 3.

18. *Id.*

19. In 1999, 26.7% of teenagers surveyed reported that they use marijuana, compared to just 14.7% in 1991. *Student Drug Use Rose in the '90s*, U.S. SAYS, CHI. TRIB., June 9, 2000, at 4.

20. *Id.*

21. LLOYD D. JOHNSTON ET AL., U.S. DEP'T OF HEALTH AND HUMAN SERVS., NIH PUB. NO. 00-4690, MONITORING THE FUTURE: NATIONAL RESULTS ON ADOLESCENT DRUG ABUSE, OVERVIEW OF KEY FINDINGS, 1999, at 48 (2000).

unable to stop our children from using drugs, surely we cannot reasonably expect to prevent adults from doing so.

II. PROBLEMS RESULTING FROM CURRENT LAW

1. Expense

Over 22,000 drug offenders are now serving sentences in New York State prisons at an extraordinary cost.²² The state has spent almost \$2 billion to construct prisons to house these people.²³ Each year, the New York State spends an additional \$700 million to confine them.²⁴ And in the last two decades, the state has added an additional 46,000 beds, at a cost of more than \$4.5 billion.²⁵

Beyond these staggering costs, the shift of public monies from higher education to corrections is also problematic. Between 1988 and 1998, the state prison budget grew \$761.3 million, while budgets for state and city colleges were slashed by \$615 million.²⁶ Since 1989, more black New Yorkers have been sent to prison for drug crimes than have graduated from any of the sixty-four institutions comprising the State University of New York ("SUNY") system.²⁷ While 4054 African Americans got SUNY degrees in 1997, 4727 African Americans entered state prisons on drug offenses.²⁸ Even more discouraging, 4459 Latinos went to state prison for drug crimes and only 2563 graduated from SUNY schools.²⁹

2. Prison Overcrowding

Despite the enormous expenditure of state money to build more prisons, prisons are severely overcrowded. There are not enough drug treatment and other programs for inmates, which promotes idleness and heightens tension levels. Some 1600 inmates must share cells that were built for one person.³⁰ And more than 4000

22. CORRECTIONAL ASS'N OF N.Y., FACT SHEET, REFORM THE ROCKEFELLER DRUG LAWS (2000) (on file with the FORDHAM URBAN LAW JOURNAL).

23. *Id.*

24. *Id.*

25. CORRECTIONAL ASS'N OF N.Y., FACT SHEET, BASIC PRISON AND JAIL FACT SHEET (2000) (on file with the FORDHAM URBAN LAW JOURNAL).

26. ROBERT GANGI ET AL., CORRECTIONAL ASS'N OF N.Y. AND THE JUSTICE POLICY INST., NEW YORK STATE OF MIND?: HIGHER EDUCATION VS. PRISON FUNDING IN THE EMPIRE STATE, 1988-1998, at 3 (1998).

27. *Id.* at 7.

28. *Id.* at 7-8.

29. *Id.* at 8.

30. Telephone Interview with Anthony Annucci, Deputy Commissioner and Counsel, New York State Department of Correctional Services (Oct. 3, 2000).

inmates are double bunked in medium security prisons.³¹ Many of these inmates are low-level drug offenders.

3. Disproportionate Effect On Minorities

More than 94% of inmates confined in New York State prisons for drug offenses are minorities—48.7% are black and 45.5% are Latino.³² Yet, whites make up the vast majority of those who consume drugs.³³ According to the most recent National Household Survey on Drug Abuse (“NHSDA”) sponsored by the National Institute on Drug Abuse, there were an estimated 9.9 million whites (72% of all users) in 1998, and only two million blacks (15% of all users) who were current users of illicit drugs.³⁴ Although the survey does not annually gather statistics on drug selling by race, questions about drug selling were included in the 1991—1993 NHSDA surveys. During that period, blacks comprised only 16% of admitted sellers while whites made up 82%.³⁵

In New York, about 18% of the population is black.³⁶ Based on that percentage, compared to the national percentage of black drug users and sellers, one would expect that the percentage of blacks confined in New York State prisons for drug crimes would be about 17%. Instead, it is almost three times greater.³⁷ Of the hundreds of thousands of drug users and sellers in New York of all races, over 21,000 persons of color are serving sentences in state prison while less than 1500 whites are confined.³⁸ Assuming similar rates of drug users and sellers by race, in New York State blacks are more than eleven times more likely to be incarcerated for drug crimes than non-Hispanic whites.³⁹ This is an unacceptable disparity for which there is no adequate explanation or justification. The bedrock principles of justice and fairness are completely undermined by the grossly racially disproportionate number of minorities that we send to prison for drug crimes.

31. *Id.*

32. LINDSMITH CTR., THE ROCKEFELLER DRUG LAWS AND THE SECOND FELONY OFFENDER LAW (1999), at <http://www.lindesmith.org/library/focal18.html>.

33. OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., SUMMARY OF FINDINGS FROM THE 1998 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE 13 (1998).

34. *Id.*

35. HUMAN RIGHTS WATCH, *supra* note 8, at 20-21.

36. *Id.* at tbl.13.

37. *Id.* at tbl.15.

38. Numbers were extrapolated from the percentages of inmates confined for drug crimes by race.

39. HUMAN RIGHTS WATCH, *supra* note 8, at tbl.14.

4. Women And Their Children Needlessly Suffer

Since 1973, the number of women in New York State prisons has increased almost 900%.⁴⁰ Of these incarcerated women, 90% are women of color⁴¹ and 60% have been convicted of drug crimes. About 75% of them report that they are mothers.⁴² Not only are these women, many of whom are addicts without violent histories, punished, their children are penalized as well when their mothers are sent to a prison eight hours away. These children who are left behind suffer a serious and sometimes harmful disruption in their lives, making it far more likely that someday they also will be incarcerated.

Some women are serving long sentences for being drug mules, having been coaxed or coerced into carrying drugs for a boyfriend. Up to 95% of these women have had no previous criminal involvement.⁴³ Others have served long sentences because they refused a plea bargain. In some cases, although the minimum sentence would have been three years had they accepted a plea bargain, they are sentenced to the mandatory minimum of fifteen years upon conviction at trial.⁴⁴ There is no logical explanation to justify the disparity between the offered and imposed sentences, even assuming that the plea bargain was offered, in part, to induce the offender to convey information about a dealer. In many cases, the sentences imposed are cruelly disproportionate to the offense.

A bill to ameliorate this terrible injustice has been languishing in the legislature for several years despite bipartisan sponsorship by the powerful chairs of the Codes Committees (the criminal law

40. The number of women in New York State prisons has risen from 400 in 1973 to 3,500 in 1999. CORRECTIONAL ASS'N OF N.Y., WOMEN IN PRISON PROJECT, MANDATORY INJUSTICE: CASE HISTORIES OF WOMEN CONVICTED UNDER NEW YORK'S ROCKEFELLER DRUG LAWS ii (1999), available at <http://www.lindesmith.org>.

41. MARC MAUER ET AL., THE SENTENCING PROJECT, GENDER AND JUSTICE: WOMEN, DRUGS AND SENTENCING POLICY 3 (1999).

42. CORRECTIONAL ASS'N OF N.Y., *supra* note 40, at ii.

43. *Id.* at 22 n.1.

44. *Id.* at 22-23. One egregious example, from among many, is the case of Donna Charles, who is serving a seventeen year minimum sentence for her first conviction in 1987. A single mother, she had been working two jobs trying to save enough money to find an apartment for herself and her two children. Offered \$1,500 by an acquaintance's boyfriend, Ms. Charles agreed to carry a package of cocaine from New York to Memphis. Arrested on her way to the airport, she was offered a plea bargain of three years to life. Rather than accept the plea, she went to trial. Having spent the last thirteen years in prison, her children have grown up without her. Even the judge who sentenced her has supported her petition for clemency, noting that Ms. Charles is "not a danger to society. But the law gives judges no discretion." Terry Tang, *New York's Busted Drug Laws*, ROLLING STONE, Oct. 12, 2000, at 55.

committees) in both houses.⁴⁵ It would allow a sentencing judge, under certain circumstances that would ordinarily require a minimum sentence of fifteen to twenty-five years and a maximum sentence of life, to sentence an offender as a class B felon, rather than as a class A-I felon. This would permit the imposition of a minimum sentence between one year and one-third the maximum sentence, and a maximum sentence of three to twenty-five years.

5. Non-Violent People Are Incarcerated For Low Level Crimes

Thousands of drug offenders sent to prison every year have not engaged in any violent or dangerous criminal conduct, yet our drug laws, in many instances, mandate their imprisonment. Three out of every four—indeed, almost four out of every five—drug offenders sent to prison have never been convicted of a violent felony.⁴⁶ One-half have no prior drug felony convictions.⁴⁷ Only 9.7% have prior convictions for both drug and violent felonies.⁴⁸

Most of these drug offenders, whether first time or repeat offenders, were convicted of crimes in the lowest felony classes. In 1998, for example, 63% of drug offenders sent to prison were convicted of felonies involving small amounts of drugs.⁴⁹

III. MUCH CRITICISM — BUT NO CHANGE

In recent years, the Rockefeller drug laws have come under increasing criticism from a wide variety of sources. In 1994, New York's highest court, the Court of Appeals, observed that New York's sentencing laws have "resulted in the incarceration of many offenders whose crimes arose out of their own addiction and for whom the costs of imprisonment would have been better spent on treatment and rehabilitation."⁵⁰ In 1997, Human Rights Watch is-

45. A. 31, 1999-2000 Assem., Reg. Sess. (N.Y. 1999); S. 3032, 1999-2000 Sen., Reg. Sess. (N.Y. 1999). This bill would impose a one to three year prison sentence upon a defendant convicted of criminal possession of a controlled substance rather than the mandatory life sentence. *See id.*

46. Fully 77.5% have not been convicted of a violent felony. CORRECTIONAL ASS'N OF N.Y., *supra* note 22.

47. Of drug offenders, 50.9% have not been convicted previously of a drug felony. HUMAN RIGHTS WATCH, WHO GOES TO PRISON FOR DRUG OFFENSES?: A REBUTTAL TO THE NEW YORK STATE DISTRICT ATTORNEY'S ASSOCIATION, at <http://www.hrw.org/hrw/campaigns/drugs/ny-drugs.htm>.

48. HUMAN RIGHTS WATCH, PRESS RELEASE, OFFICIAL DATA REVEAL MOST NEW YORK DRUG OFFENDERS ARE NONVIOLENT, available at <http://www.hrw.org/hrw/press/1999/jan/y-drug0107.htm>.

49. HUMAN RIGHTS WATCH, *supra* note 47, at 2.

50. *People v. Thompson*, 633 N.E.2d 1074, 1080 (N.Y. 1994).

sued a comprehensive report critical of New York's drug laws.⁵¹ A year later, New York Court of Appeals Chief Judge Judith Kaye publicly declared that "many of our sentencing laws, particularly our tough, mandatory drug sentencing laws applied to nonviolent offenders, have proven less than effective in achieving their objective, and the cost has been very great."⁵² That same year, John Dunne, a former assistant attorney general who served under President Bush and was previously a Republican New York state senator,⁵³ proclaimed, on behalf of the then newly formed Campaign for Effective Criminal Justice, that:

The Rockefeller Drug Laws . . . have failed to achieve their goals. Instead, they have handcuffed our judges, filled our prisons to dangerously overcrowded conditions, and denied sufficient drug treatment alternatives to non-violent addicted offenders who need help. Government leaders must act now, as New York can no longer afford to ignore the human and fiscal cost of these counterproductive laws.⁵⁴

Other critics of our drug laws have included, among others, the late Cardinal John J. O'Connor,⁵⁵ Jeanine Pirro (the Westchester County district attorney),⁵⁶ Paul Shechtman (Governor Pataki's second director of criminal justice),⁵⁷ New York Attorney General Eliot Spitzer,⁵⁸ the Unified Court System's Committee on Alterna-

51. HUMAN RIGHTS WATCH, *supra* note 5.

52. Chief Judge Judith Kaye, The State of the Judiciary Address (March 23, 1998), available at <http://www.courts.state.ny.us/stofjud98.htm>.

53. This bipartisan organization, consisting of distinguished leaders in law enforcement, politics, business, the women's community, and clergy was formed to advocate for a greater reliance on drug treatment and judicial discretion. Campaign for Effective Criminal Justice, at <http://www.fcc.net/cecj/default.html>.

54. Press Release, Campaign for Effective Criminal Justice, <http://www.fcc.net/cecj/press.htm> (May 6, 1998). Mr. Dunne, as well as State Senate Majority Leader Warren Anderson, had supported the Rockefeller drug laws when they were passed.

55. Cardinal John J. O'Connor, *The Rockefeller Drug Laws*, CATH. N.Y., February 3, 2000, at 5.

56. Pirro has stated that "[t]here are [drug] cases that simply do not merit the kinds of sentences that the law requires." THE DAILY TIMES (Westchester), March 24, 1998, at 1.

57. According to Shechtman, "[a] rational criminal justice policy recognizes that prisons are expensive to construct and operate and that many non-violent offenders commit crimes to support their drug habits. These offenders need treatment more than lengthy incarceration." PAUL SHECHTMAN, DIV. OF CRIMINAL JUSTICE SERVS., CAPACITY OPTIONS PLAN 57 (1997).

58. E.g., Lara Jakes, *Acrimonious Contest Second Only to Senate*, TIMES UNION (ALBANY), Nov. 1, 1998, at T5 (explaining that Attorney General Spitzer supports restructuring drug laws to emphasize treatment rather than lengthy incarceration).

tive Criminal Sanctions,⁵⁹ Barry McCaffrey (Director of the Office of National Drug Control Policy),⁶⁰ as well as many newspaper editorialists and commentators.⁶¹

A 1999 Manhattan Institute report examined the cost effectiveness of imprisonment in New York.⁶² Co-authored by respected conservative criminologist Professor John J. DiIulio, Jr., it concluded that “[t]he main effect of imprisoning drug sellers . . . is merely to open the market for another seller.”⁶³ The report determined that “policy makers . . . need to revisit their mandatory—minimum drug laws that are increasing prison populations without demonstrably and cost effectively increasing public safety.”⁶⁴ Still, no reform legislation has been enacted.

IV. INSUFFICIENT REFORM PROPOSAL

Recent reform legislation submitted by the governor and passed by the New York State Senate⁶⁵ would enact some important changes, but would not adequately remedy the serious defects in our current drug laws. This bill implicitly recognizes that in some circumstances, the A-I sentences that now require minimum prison sentences of fifteen years to twenty-five years are too harsh. The bill would empower the Appellate Division to reduce the minimum sentence of certain first time offenders.⁶⁶ However, the offender must have no prior criminal convictions or evidence of involvement in the drug trade and the minimum sentence could only be reduced

59. “Obviously, alternative programs, particularly those that offer long-term residential drug treatment, are not only a cheaper form of supervision but also may do a better job than incarceration at rehabilitating certain offenders . . . [I]t is apparent that each year thousands of persons who present no, or a minimal, threat to public safety are being committed to state prison. And this is being done despite the exorbitant costs involved and despite the fact that community-based programs may well be as effective, or appreciably more effective, in rehabilitating these offenders.” REPORT OF THE STATE UNIFIED COURT SYSTEM’S COMMITTEE ON ALTERNATIVE CRIMINAL SANCTIONS 56, 69 (1996).

60. Christopher S. Wren, *White House Drug Official Fights Mandatory Sentences*, N.Y. TIMES, June 29, 1999, at B5.

61. *E.g.*, *Drug Reform Sense*, TIMES UNION (Albany), May, 16, 1999, at B4; *Follow the Leaders: Soften Harsh NY Drug Laws*, NEWSDAY, April 30, 1999, at A52; *Mr. Pataki’s Pallid Drug Reforms*, N.Y. TIMES, May 5, 1999, at A1.

62. ANNE MORRISON PIEHL ET AL., CTR. FOR CIVIL INNOVATION-MANHATTAN INST., CIVIC REPORT NO. 8, RIGHT-SIZING JUSTICE: A COST-BENEFIT ANALYSIS OF IMPRISONMENT IN THREE STATES (1999).

63. *Id.* at 14.

64. *Id.* at 3.

65. S. 5877-A, 1999-2000 Sen., Reg. Sess. (N.Y. 1999).

66. *Id.*

from fifteen to ten years.⁶⁷ This ten-year prison sentence would apply even if the role the offender played in the drug transaction was that of a courier in a singular event, the individual had no prior involvement in the drug trade and no prior criminal history, and the offender was gainfully employed and supporting minor children.

The bill is only a small step in the right direction. The standard for eligibility is far too stringent and would apply to only roughly 3% of first time drug offenders.⁶⁸ Moreover, a reduced sentence of ten years would still be far too harsh in many cases. Importantly, the bill allows the Appellate Division to retain discretion to determine sentences, even though it already has the inherent authority to reduce sentences in the interest of justice.⁶⁹ Discretion should be returned to the trial court, which is in the best and most objective position to determine the appropriate sentence.

The other principal provision of the proposal would slightly increase the number of addicts charged with low level offenses whose prosecution could be postponed, but only if both the prosecutor and judge approved.⁷⁰ This proposal essentially codifies existing practice, particularly in New York City. Unfortunately, there are two serious and interrelated problems with the practice.

First, prosecutors have made eligibility standards for entering treatment so stringent that only a small number of addicts are actually diverted to such program. As of 1999, approximately 2500 defendants had participated in the Drug Treatment and Alternative to Prison ("DTAP") programs⁷¹ while tens of thousands of drug-using offenders were incarcerated. The second flaw in the current diversion programs is that prosecutors are making these decisions at all. Although considerable weight should be given to the recommendations of prosecutors in the sentencing process, they should not have the authority to prevent judges from diverting drug addicts into treatment programs where appropriate. Judges should be allowed to make sentencing decisions without being handcuffed

67. *Id.*

68. By the end of 1998, only 624 first time offenders were serving prison time for class A-I felonies. HUMAN RIGHTS WATCH, BRIEFING PAPER, THE PATH TO PRISON: A RESPONSE TO THE GOVERNOR'S ASSESSMENT OF DRUG OFFENDER INCARCERATION RATES (1999), <http://www.hrw.org/hrw/campaigns/drugs/brief1-0513.htm>.

69. See N.Y. CRIM. PROC. LAW § 470.15(3)(c) (McKinney 1994).

70. For example, § 71.06.4 requires the People's consent for the imposition of parole supervision as the sentence. See S. 5877-A, 1999-2000 Sen., Reg. Sess. (N.Y. 1999).

71. WILLIAM J. FITZPATRICK, *Dealing with Drugs*, TIMES UNION (ALBANY), May 16, 1999, at B1.

by prosecutors. Although prosecutors may attempt to act in good faith, they lack the objectivity and the neutrality of judges in the sanctioning process. Their usurpation of this process is unjust and not in the best interest of justice or public safety.

This bill will not correct the basic flaw of the drug laws, namely, the blind imposition of lengthy prison terms without regard to the circumstances of the crime, the person's involvement in the drug trade, or the offender's history or background. For our justice system to work fairly, this must be corrected. The bill passed by the Senate, endorsing the governor's proposal, falls far short of adequate reform.

V. PROPOSED SENTENCING PRINCIPLES

The sanctions that drug offenders receive should be proportionate, fair, and cost-effective. Mandatory minimum laws should be replaced with laws expanding sentencing options available to judges. New sentencing guidelines should be drafted in accordance with the following principles:

1. Proportionate Sentences

Sentences should be proportionate to the severity of the crime and culpability of the offender. Judges must be able to sentence those convicted of the most serious drug felonies to lengthy terms of imprisonment consistent with current requirements, but they must also have the discretion to give shorter sentences as warranted by the particular circumstances.

2. Individualized Sentences

Judges should be able to tailor criminal sanctions to reflect the relevant factors in each case. These factors include the offender's role in the crime, prior criminal history, work history, family circumstances, and willingness to cooperate with the authorities. The weight of the drug should only be one factor used to assess the seriousness of the offense and the appropriate sanction.

3. Treatment For Drug Addicted Offenders

Community based drug-abuse treatment should be the presumptive sanction for drug-addicted, low level offenders, and offenders who are not charged with selling. A 1997 study by RAND's Drug Policy Research Center found that drug treatment reduces serious crime up to fifteen times more than mandatory minimum

sentences.⁷² By 1995, the graduates of Brooklyn's DTAP program had a 15% recidivism rate compared to a 46% rate for similar defendants who did not participate.⁷³ Several studies by the National Institute on Drug Abuse have shown that drug treatment programs reduce the levels of drug abuse and that the cost of outpatient care is at least seven times less costly than prison while residential treatment is little more than half the cost of incarceration on a yearly basis.⁷⁴

VI. MEANINGFUL DRUG LAW REFORM LEGISLATION

One bill introduced in the New York Assembly during the last legislative session largely incorporates reform principles.⁷⁵ It would, among other things, give courts greater discretion to impose shorter sentences, including the option of reducing the allowable minimum sentence for the most serious drug felonies from fifteen to three years, while still allowing for fifteen year minimum sentences and maximum sentences of life imprisonment; increase the amount of drugs that an offender must possess or sell to be convicted of the highest class felony; allow the court to defer sentences up to two years when an addicted offender agrees to enter drug treatment; eliminate certain plea restrictions; allow the Appellate Division, upon a finding that a sentence was unduly harsh, to reduce minimum sentences—in the case of an A-I felony, the minimum could be reduced from fifteen years to three years.⁷⁶ This bill, unlike the others, is a meaningful reform proposal that should be given serious consideration.

VII. PUBLIC SUPPORT FOR DRUG LAW REFORM

Although some politicians may still believe that supporting drug law reform is politically costly, they are wrong. In fact, significant public support for drug law reform is reflected in two recent opin-

72. JONATHAN P. CAULKINS, ET AL., RAND DRUG POLICY RESEARCH CTR., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYER'S MONEY? 68 (1997).

73. The New York State Division of Criminal Justice found that 15% of DTAP participants were later arrested for a felony or misdemeanor. REPORT OF THE STATE UNIFIED COURT SYSTEM'S COMMITTEE ON ALTERNATIVE CRIMINAL SANCTIONS, *supra* note 59, at 51. According to the State Department of Correctional Services, there is a 46.7% recidivism rate for individuals serving sentences for drug felonies in New York. *Id.* at 47.

74. CORRECTIONAL ASS'N OF N.Y., *supra* note 22.

75. A. 10051 (N.Y. 2000).

76. *Id.*

ion polls. According to a poll conducted by the Quinnipiac College Polling Institute, more than two-thirds of the respondents preferred that judges be allowed to decide sentences for drug offenders on a case-by-case basis, rather than having sentences set strictly by state law.⁷⁷ A Zogby International poll, meanwhile, found that 64% of the public does not consider a legislator who votes for drug law reform to be "soft on drugs." Indeed, 51% are more likely to vote for a legislator who supports a bill to reduce sentences while only 25% are less likely to vote for such a legislator.⁷⁸ Finally, 74% support treatment over incarceration for those convicted of drug possession, in comparison with 19% who preferred jail or prison time.⁷⁹

The public is ready for meaningful drug law reform.

CONCLUSION

The experience of the last twenty-seven years has demonstrated sufficiently that our current drug laws have failed to achieve their intended result, while being inherently unfair to those convicted of drug crimes. Prison is a sanction that should be used only when necessary to protect society from dangerous offenders such as violent criminals. When prison is employed as an option, the length of sentence must be fair and proportionate to the severity of the crime. In New York, our drug laws violate these fundamental norms of criminal justice policy. Thousands of marginal, non-violent drug offenders are sent to prison at an egregiously high fiscal and human cost to the offender and to her or his family. These laws, keyed to the weight of the drug involved and the presence of prior felony convictions, lump together people with significantly different degrees of culpability and dangerousness. The historic and proper role of judges, as neutral arbiters, to balance appropriate factors to ensure justice has been indefensibly abrogated. Judicial discretion must be restored in the interest of justice, fairness, and public safety. Meaningful drug law reform legislation is necessary and should be enacted now.

77. *Survey Finds Support for Drug Law Reform*, 221 N.Y.L.J. 1 (1999).

78. This poll was conducted April 26 through April 28, 1999 from Utica, New York. Press Release, Lindesmith Ctr.-Drug Policy Found, Results for Zogby International on Rockefeller Drug Laws (New York State), at <http://www.lindesmith.org>; see also *Politics of Drug Reform*, N.Y. TIMES, May 26, 1999, at A32.

79. *Id.*