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NOTE

ARE NEW YORK'S ROCKEFELLER DRUG LAWS KILLING THE MESSENGER FOR THE SAKE OF THE MESSAGE?

I. INTRODUCTION

In the early 1970s, New York experienced an overwhelming problem with drug addiction and drug-related crime.¹ Citizens of the state had reached the peak of their frustration with the legal system—a system they felt was no more than a “revolving-door [of] criminal justice.”² Nelson A. Rockefeller, then Governor of New York, knew that the drug problem was not getting any better.³

In the 1960s, the trend was to reserve severe sentences for higher-level drug traffickers while providing treatment for lower-level offenders.⁴ However, people began to fear for their safety from drug offenders, especially when rehabilitation programs had only limited success in treating addicts.⁵ Furthermore, drug dealers were pleading guilty to lesser charges, discouraging courts and police from enforcing the law.⁶ In order to battle what he called a “reign of fear,” Governor Rockefeller proposed legislation that would deter drug offenders from committing narcotics-related crimes.⁷ The Governor and the Legislature believed that these laws would decrease drug trafficking and drug-

1. See Annual Message from Gov. Nelson Rockefeller to the Legislature of the State of New York (Jan. 3, 1973), in 1973 N.Y. Laws 2309, 2317 [hereinafter Annual Message].

2. *Id.* at 2317-18; see, e.g., Randy Kennedy, *Drug Court Seeks End to Revolving-Door Justice*, N.Y. TIMES, May 22, 1996, at B3.

3. See Annual Message, *supra* note 1, at 2317.

4. See Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 39-40 (1995).

5. See Annual Message, *supra* note 1, at 2317-18; see also *infra* note 301.

6. See Annual Message, *supra* note 1, at 2318.

7. See *id.* at 2317-18.

related crimes in New York State.⁸ These laws were enacted in 1973 and imposed severe, mandatory penalties on all levels of drug-offenders.⁹

Part II of this Note will discuss the laws commonly known as the Rockefeller Drug Laws and the results of their enactment. It will discuss the changes in arrest rates, the number of individuals sentenced, the types of individuals arrested and sentenced, and the costs to the State. This Part will also analyze the disparate impact that the Rockefeller Drug Laws have on minorities and women.

Part III discusses why some people think the laws are beneficial and should remain intact. Part IV examines criticisms of the Rockefeller Drug Laws and alternatives to them. Also analyzed are the criticisms and problems that may be encountered with proposals for change.

Part V concludes that judicial discretion is absolutely necessary in drug sentencing. When mandatory sentencing laws are in place, discretion is essentially left in the hands of prosecutors who lack the objectivity of judges, and whose decisions are not reviewable.

II. THE LAWS

The Rockefeller Drug Laws require the mandatory imprisonment of drug offenders for all levels of offenses.¹⁰ The Rockefeller Drug Laws

8. *See id.* at 2318.

9. *See* JOINT COMM. ON N.Y. DRUG LAW EVALUATION, NAT'L INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, FINAL REPORT: THE NATION'S TOUGHEST DRUG LAW, EVALUATING THE NEW YORK EXPERIENCE 3 (1978) [hereinafter JOINT COMMITTEE REPORT].

10. *See, e.g.*, Act of May 8, 1973, ch. 276 §§ 220.21, 220.43, 1973 N.Y. Laws 371, 380-81 (codified as amended in N.Y. PENAL LAW) (explaining that criminal possession of two or more ounces of a controlled substance and criminal sale of one or more ounces of a controlled substance are Class A-I felonies). In 1979, the Legislature doubled the weight of the drug required for an A-I felony to two ounces or more for possession and four ounces or more for sale when it felt that the laws "were not conducive to efficient drug law enforcement." Spiros A. Tsimbinos, *Is it Time to Change the Rockefeller Drug Laws?*, 13 ST. JOHN'S J. LEGAL COMMENT. 613, 625 (1999) (quoting Paul Hechtman, *Practice Commentaries*, in N.Y. PENAL LAW, at 7 (McKinney 1980)); *see also* HUMAN RIGHTS WATCH, HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES: CRUEL AND UNUSUAL: DISPROPORTIONATE SENTENCES FOR NEW YORK DRUG OFFENDERS 6-7 (1997) [hereinafter HUMAN RIGHTS WATCH]. New York Penal Law Section 70.00 discusses the mandatory sentencing maximum and minimums. The pertinent part of the statute for mandatory maximum sentencing is as follows:

1. Indeterminate sentence. Except as provided in subdivisions four, five and six, a sentence of imprisonment for a felony shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.
2. Maximum term of sentence. The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:

divided New York State Class A felony charges into three categories.¹¹ Classes A-II and A-III were created to focus solely on drug crimes.¹²

A second law known as the "Second Felony Offender Law" was enacted along with the Rockefeller Drug Laws.¹³ The law requires long prison terms for individuals who commit a second felony within ten years of a prior felony conviction.¹⁴ The Legislature had two goals in

- (a) For a class A felony, the term shall be life imprisonment;
- (b) For a class B felony, the term shall be fixed by the court, and shall not exceed twenty-five years
- (c) For a class C felony, the term shall be fixed by the court, and shall not exceed fifteen years;
- (d) For a class D felony, the term shall be fixed by the court, and shall not exceed seven years, and
- (e) For a class E felony, the term shall be fixed by the court, and shall not exceed four years.

N.Y. PENAL LAW § 70.00 (McKinney Supp. 2001); *see also id.* § 70.00(3) (discussing indeterminate minimum periods of imprisonment).

11. *See* JOINT COMMITTEE REPORT, *supra* note 9, at 149.

12. *See id.* The 1979 amendments to the Rockefeller Drug Laws eliminated Class A-III classifications and reclassified them as Class B felonies. *See* HUMAN RIGHTS WATCH, *supra* note 10, at 7 n.14.

13. *See* N.Y. PENAL LAW § 70.06 (McKinney 1998); *see also* Christopher S. Wren, *Critics Say Rockefeller Drug Laws Pack the Prisons, Force Plea Deals and Hit Small-Timers the Hardest*, N.Y. TIMES, Jan. 19, 1998, at B1.

14. *See* N.Y. PENAL LAW § 70.06. The law states:

1. Definition of Second Felony Offender.

(a) A second felony offender is a person, other than a second violent felony offender as defined in section 70.04, who stands convicted of a felony defined in this chapter, other than a class A-I felony, after having previously been subjected to one or more predicate felony convictions as defined in paragraph (b) of this subdivision.

(b) For the purpose of determining whether a prior conviction is a predicate felony conviction the following criteria shall apply:

- (i) The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed;
- (ii) Sentence upon such prior conviction must have been imposed before commission of the present felony;
- (iii) Suspended sentence, suspended execution of sentence, a sentence of probation, a sentence of conditional discharge or of unconditional discharge, and a sentence of certification to the care and custody of the division of substance abuse services, shall be deemed to be a sentence;
- (iv) Except as provided in subparagraph (v) of this paragraph, sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted;
- (v) In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration;

mind when it enacted this law: (1) To deter prior felony offenders from committing additional crimes; and (2) to incarcerate those felony offenders who were not deterred by the law, thereby ensuring that they could not commit any further crimes.¹⁵ The true result, however, was to leave judges with no discretion to order treatment or any other alternative to incarceration for these predicate drug felons.¹⁶

A. Arrests, Sentencing, and Costs

The enactment of the Rockefeller Drug Laws led to several significant changes.¹⁷ As a result, drug felonies are considered the “single most significant factor underlying the remarkable growth of the prison population[]” in New York.¹⁸ Law enforcement responded aggressively to the spread of drugs, causing an enormous increase in the number of individuals arrested and the number imprisoned.¹⁹ In 1980, there were 27,407 drug arrests in New York State.²⁰ Less than 900 of these arrests were felony drug offenders sentenced to New York State prisons.²¹ By 1999, the number of arrests rose to 145,694—a 430% increase.²² In that same year, the number of felony drug offenders arrested increased by 1000% to nearly 9000 (about 46% of all those incarcerated),²³ while the number of judgeships in the state courts saw a mere 15% increase.²⁴ This flooded the courts with more drug cases than they could manage.

Imprisonments also steadily increased beginning in 1973 and continued a steeper rise through the 1980s.²⁵ Thirty-three percent of

(vi) An offense for which the defendant has been pardoned on the ground of innocence shall not be deemed a predicate felony conviction.

N.Y. PENAL LAW § 70.06(1) (McKinney 1998); *see also* Wren, *supra* note 13.

15. *See* JOINT COMMITTEE REPORT, *supra* note 9, at 10.

16. *See Rockefeller Drug Laws—20 Years Later: Hearing Before the Assem. Comm. on Codes*, 1993 Leg., 216th Sess. (N.Y. 1993) [hereinafter Coughlin] (testimony of Thomas A. Coughlin III, State Corrections Commissioner), *available at* <http://www.druglibrary.org/schaffer/misc/coughlin.htm> (last visited Mar. 11, 2002).

17. *See id.* (stating that the Rockefeller Drug Laws caused new incarcerations for drug felonies to increase from 713 in 1974 to 11,000 in 1992).

18. HUMAN RIGHTS WATCH, *supra* note 10, at 2.

19. *See id.* at 12.

20. *See* N.Y. STATE COMM’N ON DRUGS AND THE COURTS, CONFRONTING THE CYCLE OF ADDICTION AND RECIDIVISM: A REPORT TO CHIEF JUDGE JUDITH S. KAYE 10 (2000) [hereinafter REPORT TO JUDGE KAYE].

21. *See id.* at 1.

22. *See id.* at 10.

23. *See id.* at 1, 10; John R. Dunne, *Change the Drug Laws*, N.Y. L.J., Apr. 8, 1999, at 2.

24. *See* REPORT TO JUDGE KAYE, *supra* note 20, at 10; Dunne, *supra* note 23.

25. *See* HUMAN RIGHTS WATCH, *supra* note 10, at 12.

individuals convicted of drug crimes were sentenced to state prison or local jail between 1972 and 1973.²⁶ As a "direct result" of the mandatory sentencing and plea-bargaining limits of the Rockefeller Drug Laws, these convictions increased to 44% between 1974 and 1976.²⁷ The prison population changed from 9% of inmates serving sentences for drug felonies in the 1980s to 34% in the late 1990s.²⁸

The number of individuals sentenced under the Second Felony Offender Law was even higher. According to Thomas A. Coughlin, the New York State Corrections Commissioner, 68% of drug offenders imprisoned in 1993 were sentenced under the Second Felony Offender Law.²⁹ That number increased to approximately 72.8% in 1997.³⁰ Despite the increase in individuals sentenced, the law failed to lower the recidivism rates of felony offenders³¹ as Governor Rockefeller had hoped.³² The percentage of prior felony offenders rearrested before and after the implementation of the Second Felony Offender Law was 79.8% and 79.5%, respectively.³³ Therefore, the Rockefeller Drug Laws have shown a minimal deterrent effect on prior felons.

The individuals hit hardest by this law are the nonviolent offenders convicted under the lowest felony class available.³⁴ Only 3.4% of individuals sentenced after an A-I felony conviction in 1995 were repeat offenders.³⁵ In comparison, 64.6% of Class D felons³⁶ and 61.1% of

26. See JOINT COMMITTEE REPORT, *supra* note 9, at 15.

27. *Id.* Despite the fact that the chances of incarceration increased for those defendants convicted, the Joint Committee Report claims that there was an identical chance of receiving jail time prior to and subsequent to the enactment of the laws. *See id.* at 16. This discrepancy may be due to an increase in the time required to process drug cases. *See id.* at 17. The time doubled between 1973 and 1976 while it remained the same for other felony cases. *See id.* Furthermore, by 1976, cases were backlogged over one year despite the addition of thirty-one new courts. *See id.* For statutes such as these to be effective the Joint Committee felt that "efficiency, morale, and capacity of the criminal justice system" are even greater factors in determining whether the law will be effective than the statute itself. *Id.* at 25.

28. See HUMAN RIGHTS WATCH, *supra* note 10, at 12.

29. See Coughlin, *supra* note 16.

30. See HUMAN RIGHTS WATCH, *supra* note 10, at 13.

31. See JOINT COMMITTEE REPORT, *supra* note 9, at 9.

32. See *supra* text accompanying note 15.

33. See JOINT COMMITTEE REPORT, *supra* note 9, at 67.

34. See HUMAN RIGHTS WATCH, *supra* note 10, at 10.

35. See *id.* at 13.

36. See *id.* An example of a Class D felony is the sale of any amount, or possession of 500 milligrams of cocaine. See N.Y. PENAL LAW § 220.06(5) (McKinney 2000). The mandatory sentence for a nonviolent second felony offender under Class D carries a minimum of 2-3.5 years and a maximum of 4-7 years. See N.Y. PENAL LAW § 70.06(3)(d)-(4)(b) (McKinney 1998).

Class E felons³⁷ were sentenced as repeat offenders.³⁸ Only 7.6% of individuals admitted to prison for drug felonies in 1995 had prior violent felony convictions.³⁹

Along with an increase in arrests and sentencing came an increase in the number of defendants sent to state prison. In 1970, courts sentenced 470 drug offenders to state prison.⁴⁰ By 1990, that number increased to 10,785 and remained over 10,000 throughout the 1990s.⁴¹ Approximately 21,000 people were in prison for drug offenses by 1996.⁴² By the end of 1998, drug offenders made up 33% of the entire New York State prison population.⁴³

Lifetime prison sentences were rarely, if ever, imposed on drug offenders prior to the implementation of the laws.⁴⁴ But, under the Rockefeller Drug Laws, 1777 individuals received lifetime sentences between 1973 and 1976.⁴⁵ Corrections Commissioner Coughlin concluded that, at the time of his testimony, "[t]he totality of overall drug commitments ha[d] increased at an astronomical rate and . . . significantly surpass[ed] commitments for violent felonies and other coercive crimes."⁴⁶

The increase in arrests and sentencing cost the state a substantial sum of money. In 2000, approximately 22,150, or 31%, of inmates in state prison were incarcerated for drug crimes at a cost to the state of \$29,000 each.⁴⁷ By contrast, drug-free outpatient care costs about \$2700 to \$4500 per person per year; and residential drug treatment expenses are \$17,000-\$21,000 per individual per year.⁴⁸ During 2000, New York

37. Examples of Class E felonies are criminal injection of a narcotic drug, criminal use of drug paraphernalia in the second degree, and criminal possession of "precursors" of controlled substances. See N.Y. PENAL LAW §§ 220.46, 220.50, 220.60 (McKinney 2000). The mandatory sentence for a nonviolent second felony offender charged under Class E carries a 1.5-2 year minimum and a 3-4 year maximum sentence. See N.Y. PENAL LAW § 70.06(3)(e)-(4)(b) (McKinney 1998).

38. See HUMAN RIGHTS WATCH, *supra* note 10, at 13.

39. See *id.*

40. See REPORT TO JUDGE KAYE, *supra* note 20, at 12.

41. See *id.* This excludes 1999 where the number was 8521. See *id.*; see also HUMAN RIGHTS WATCH, *supra* note 10, at 13 (stating that 10,000 people annually are sent to prison for drug felonies in New York).

42. See HUMAN RIGHTS WATCH, *supra* note 10, at 13.

43. See Lindesmith Ctr.-Drug Policy Found., *Rockefeller Drug Law Fact Sheet*, at http://www.soros.org/lindesmith/cites_sources/rockefeller_fact2.html (last visited Mar. 11, 2002) [hereinafter Lindesmith].

44. See JOINT COMMITTEE REPORT, *supra* note 9, at 16.

45. See *id.*

46. Coughlin, *supra* note 16.

47. See REPORT TO JUDGE KAYE, *supra* note 20, at 12.

48. See Lindesmith, *supra* note 43.

State spent approximately \$650 million housing drug felons.⁴⁹ The state also spent a substantial amount of money on processing the drug cases in the court system. According to the Office of Court Administration, New York State's lower courts spent \$151.5 million handling misdemeanor cases during the 1999-2000 fiscal year.⁵⁰ Twenty-six percent of these cases were drug cases.⁵¹ The state's upper courts spent \$278.7 million handling indictments, 41% of which were drug cases.⁵² The total cost to the court system to adjudicate the drug cases during the 1999 calendar year reached \$115 million.⁵³ When the laws were first enacted, the State spent approximately \$32 million on implementation and enforcement.⁵⁴ The Lawyers Coalition of Criminal Justice members noted that, since 1983, the state has built approximately 29,000 prison cells, indicating a cost of around \$5 billion to maintain the laws.⁵⁵

At the time these laws were enacted, the Legislature could not have imagined the workings of the current drug system,⁵⁶ or have realized that these laws would not be effective in diminishing drug trafficking.⁵⁷ Finally, Corrections Commissioner Coughlin concluded that if the public was aware that the "8 to 25 year maximum sentencing range [was the same] for a person who commits a forcible rape as for a person who sells a dollar's worth of cocaine" the public would agree that these laws are "totally out of whack."⁵⁸

49. See REPORT TO JUDGE KAYE, *supra* note 20, at 12. The costs of housing a drug felon in New York City have increased to a substantial \$47,000 annually. See *id.* This means that because most of the state's nonviolent offenders are imprisoned there, New York City spends a significantly greater amount of money on housing drug felons than most other counties. See *id.* at 26-27.

50. See *id.* at 11.

51. See *id.*

52. See *id.*

53. See *id.*

54. See JOINT COMMITTEE REPORT, *supra* note 9, at 11.

55. See Gary Spencer, *New Defenders' Group Formed To Lobby State Legislature*, N.Y. L.J., May 29, 1992, at 1.

56. When the laws were enacted the purpose was to threaten drug lords with severe penalties in the hopes that they would be deterred from committing crime. See David C. Leven, *Our Drug Laws Have Failed—So Where is the Desperately Needed Meaningful Reform?*, 28 FORDHAM URB. L.J. 293, 293 (2000). However, today's reality is that many individuals imprisoned under these laws are low-level drug offenders who become dealers to finance their own habits. See *id.* Therefore, drug trafficking has not diminished as expected. See *id.* Furthermore, many individuals that are imprisoned were hired as mules to transport drugs by drug lords that want to stay out of prison. See *infra* text accompanying notes 59-66.

57. See Coughlin, *supra* note 16.

58. *Id.*

B. *Effects on Drug Use and Related Crime*

Despite the sizeable number of individuals arrested and imprisoned, there was an insignificant change in the use of drugs and drug-related crimes immediately after the laws' enactment.⁵⁹ The majority of individuals arrested and incarcerated under the Rockefeller Drug Laws are low-level offenders such as couriers,⁶⁰ steerers,⁶¹ or lookouts.⁶² These arrests have a minimal effect on the overall number of drug crimes because these offenders are usually hired by "drug kingpins"⁶³ to traffic the drugs.⁶⁴ Thus, after lower-level offenders are arrested, the drug crimes continue because major drug dealers simply hire new traffickers.⁶⁵ Former State Senator John R. Dunne summarized it best: "Drug kingpins will rarely if ever be foolish or reckless enough to be caught carrying narcotics, and if they are caught they have more information to trade and, thus, can cut better deals with prosecutors."⁶⁶

1. No Prior Convictions for the Majority of Those Sentenced

At least 95% of individuals charged as drug couriers had no previous criminal involvement and no criminal record.⁶⁷ In 1997, 55% of all Class A felons had no prior convictions and 41.6% had never been arrested.⁶⁸ That year, nearly 80% of all drug offenders sent to New York State prisons were never before convicted of a violent felony and nearly half had never been arrested for a violent felony.⁶⁹ Sixty percent of the drug offenders in New York State prisons were convicted of Class C, D,

59. See JOINT COMMITTEE REPORT, *supra* note 9, at 7-12.

60. A courier "[t]ransports or carries drugs with the assistance of a vehicle or other equipment." U.S. DEP'T OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES app. B (1994) [hereinafter DOJ].

61. A steerer "[a]rranges for two parties to buy/sell drugs, or directs [a] potential buyer to a potential seller." *Id.*

62. See HUMAN RIGHTS WATCH, *supra* note 10, at 15. A lookout is defined as someone who "performs [a] very limited, low-level function in the criminal activity . . . includ[ing] running errands, answering the telephone, receiving packages, packaging the drugs." DOJ, *supra* note 60, app. B.

63. Drug kingpins are also known as "high-level dealers." See HUMAN RIGHTS WATCH, *supra* note 10, at 15. A drug kingpin is one who "[p]urchases or imports drugs near the top of the drug distribution chain, and distributes drugs to other high-level or mid-level dealers; or leads, directs, or otherwise runs a significant drug organization." DOJ, *supra* note 60, app. B.

64. See Dunne, *supra* note 23.

65. See *id.*

66. *Id.*

67. See *id.*

68. See HUMAN RIGHTS WATCH, *supra* note 10, at 20.

69. See Lindesmith, *supra* note 43.

or E felonies involving minimal drug amounts.⁷⁰ Therefore, the goal of the drug laws, to deter drug traffickers from continuing in the drug trade,⁷¹ has not been achieved because major traffickers and dealers are still on the streets selling drugs while petty drug offenders are sent to prison.

2. Crime Rates Have Increased

According to statistics, the Rockefeller Drug Laws have failed in their attempt to reduce crime.⁷² Despite the prison population being at its highest, crime rates still increased 2% between 1979 and 1988 and again in 1989.⁷³ Similarly, other studies have shown these laws have little effect on crime and drug availability.⁷⁴ In New York State, serious property crimes, usually associated with heroin users, saw a dramatic increase between 1973 and 1975, the years immediately following the enactment of the Rockefeller Drug Laws.⁷⁵ This indicates that the laws did not deter drug use or drug crimes. Addicts continue to support their habits through crime without fear of punishment under the harsher drug laws.⁷⁶ The individuals incarcerated are the nonviolent, low-level offenders that are not committing drug-related crimes but habit-related crimes.⁷⁷

3. Drug Use and Drug Sales Have Remained Steady

The Rockefeller Drug Laws also had little or no effect on the use and sale of drugs. Heroin use was the same in New York State three years after enactment as it was when the laws were first implemented.⁷⁸

70. *See id.*

71. *See* HUMAN RIGHTS WATCH, *supra* note 10, at 2.

72. *See The Sentencing Project: Hearing Before the Subcomm. on Nat'l Security and the Subcomm. on Gov't Info., Justice, & Agric. of the House Gov't Operations Comm.*, 101st Cong. 347 (1990) [hereinafter Mauer] (testimony of Marc Mauer, Assistant Director, The Sentencing Project), available at <http://www.druglibrary.org/schaffer/library/testmny.htm> (last visited Mar. 11, 2002).

73. *See id.*

74. *See* Susan N. Herman, *Measuring Culpability By Measuring Drugs? Three Reasons to Reevaluate the Rockefeller Drug Laws*, 63 ALB. L. REV. 777, 782 (2000) (stating that drug availability did not decrease and crime increased); *see also* JOINT COMMITTEE REPORT, *supra* note 9, at 9.

75. *See* JOINT COMMITTEE REPORT, *supra* note 9, at 9. Felonious property crime increased 15% between these years. *See id.*

76. *See id.* at 10.

77. *See id.*

78. *See id.* at 7. Heroin sellers became more secretive in their dealings and some addicts sought out treatment for a period of about one year after the law's enactment. *See id.* at 37. However, the New York City Police Department and drug treatment centers believed that the law had very little long-term effect on heroin use and dealing. *See id.* at 37.

Furthermore, following the enactment of the Rockefeller Drug Laws, drug use remained stable in five of New York State's largest counties,⁷⁹ even though there was an increase in the number of prison and jail sentences imposed.⁸⁰

C. *Disparate Impact on Minorities*

The Rockefeller Drug Laws have not only been criticized for their failure to deter crime, but also for their disparate impact on minorities and women.⁸¹ Michael J. Gorman, a lawyer and New York City Police Lieutenant, stated that this fact is attributable to the disparate treatment of minorities by the police.⁸² He noted several factors in support of this statement. First, he explained that racial profiling⁸³ allows police to take race and ethnicity into account when stopping someone to search or question them.⁸⁴ Consequently, blacks and Hispanics account for 86% of all felony drug arrests and close to 86% of all persons indicted for drug felonies.⁸⁵ Second, police focus their drug arrests on inner-city neighborhoods as opposed to affluent communities,⁸⁶ because drug sales are more visible in low-income neighborhoods and poor individuals are less politically threatening.⁸⁷ Furthermore, the political and legal risks of making a mistake or violating an individual's civil rights are much greater in wealthy neighborhoods, as compared to low-income communities, where defendants cannot afford high-priced lawyers and are less likely to sue.⁸⁸ Finally, drug treatment is very costly and may not be available to an individual without adequate resources. As a result, treatment becomes available only for the affluent, mostly white individuals.⁸⁹ These factors, coupled with the mandatory sentencing

79. See *id.* at 19. The counties are: Erie, Monroe, Nassau, Suffolk, and Westchester. See *id.*

80. See *id.*

81. See HUMAN RIGHTS WATCH, PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS, at Fig. 1 (2000) [hereinafter HRW, PUNISHMENT AND PREJUDICE]; Johnson, *supra* note 4, at 42-45; Tracy Huling, *Women Drug Couriers: Sentencing Reform Needed for Prisoners of War*, CRIM. JUST., Winter 1995, at 14, 18-19.

82. See Michael J. Gorman, Letter to the Editor, *Racial Disparity Seen in Drug Enforcement*, N.Y. L.J., May 15, 1998, at 2.

83. Racial profiling has been defined as "the police practice of stopping, questioning, and searching potential criminal suspects in vehicles or on the street based solely on their racial appearance." HRW, PUNISHMENT AND PREJUDICE, *supra* note 81, at 22.

84. See *id.*

85. See HUMAN RIGHTS WATCH, *supra* note 10, at 14.

86. See Gorman, *supra* note 82.

87. See *id.*

88. See *id.*

89. See *id.*

requirements of the Rockefeller Drug Laws, ensure that the number of minorities in prison is substantially greater than the number of non-minorities.⁹⁰

These consequences are in fact, a reality. Minorities account for 94% of those in prison for drug offenses while whites make up only 5.3% of those incarcerated for drug crimes in New York.⁹¹ One out of every four black men and one out of ten Hispanic males between the ages of 20-29 is either in prison, in jail, on probation or on parole for drug-related crime.⁹² In comparison, only one out of sixteen white males are incarcerated, or have been incarcerated, for drug-related crimes.⁹³ From 1984 to 1988, even though blacks only account for 12% of individuals using illegal drugs, the number of blacks arrested for drug crimes increased from 30% to 38%.⁹⁴ Blacks make up 54% of the prison population but only 18% of the state's residents.⁹⁵ Forty-five percent of blacks, 59% of Hispanics, and only 16% of whites imprisoned in 1994 were sentenced for drug crimes.⁹⁶ Because they are more likely to be arrested than whites, blacks and Hispanics are adversely affected by the Rockefeller Drug Laws, even though they are less likely to use drugs.

D. Disparate Impact on Women

The laws not only target ethnic minorities but they also have a disparate impact on women. The application of the Rockefeller Drug Laws in Queens County sentenced 83% of Hispanic women charged with an A-I felony to state prison in comparison to 50% of white women and 52% of black women.⁹⁷ On December 31, 1998 there were 3504 women in New York State prisons.⁹⁸ Approximately 2000 or 56.3% were there for drug offenses.⁹⁹ Additionally, 91% of the women drug offenders are minorities—54.3% are black, 36.7% are Hispanic, and only 8.4% are white.¹⁰⁰ Out of thirty-seven states studied, New York sent

90. *See id.*

91. *See* HUMAN RIGHTS WATCH, *supra* note 10, at 5; Dunne, *supra* note 23; Gorman, *supra* note 82.

92. *See* Mauer, *supra* note 72, at 343.

93. *See id.*

94. *See id.*

95. *See* HRW, PUNISHMENT AND PREJUDICE, *supra* note 81, Fig.2.

96. *See* HUMAN RIGHTS WATCH, *supra* note 10, at 14.

97. *See* Huling, *supra* note 81, at 19.

98. *See* Lindesmith, *supra* note 43.

99. *See id.*

100. *See id.*

68%, the highest percentage, of women to state prison for drug offenses.¹⁰¹

Other studies reveal that the laws also prejudice black women.¹⁰² Black women are unemployed or working in lower paying jobs more often than whites.¹⁰³ Additionally, 44% of black households are headed by females compared to only 13% of white families in the United States.¹⁰⁴ This makes these women more likely to be impoverished.¹⁰⁵ Accordingly, low-income black women are more likely to be induced to look for income to support their families through criminal activity.¹⁰⁶ The drug laws, coupled with these facts, have helped lead to black women accounting for over 45% of the women in United States federal prisons.¹⁰⁷

The Rockefeller Drug Laws are criticized as prejudicial not only toward minority women, but also toward women generally.¹⁰⁸ Seventy percent of women sent to prison for drug crimes are compelled to become involved in drug smuggling by their boyfriends or spouses who use force to ensure that the women assist them.¹⁰⁹ If these women are caught smuggling drugs they are charged with A-I felonies and, if convicted, face a mandatory minimum prison sentence of fifteen years to life.¹¹⁰ Kidnappers, arsonists, and even murderers receive the same penalty,¹¹¹ even though women convicted of these types of drug crimes are not violent criminals.

Although men risk receiving similar sentences, the problem for women arises when “[t]he penalties [are] appl[ied] without regard to the circumstances of the offense, the offender’s character or background, or whether the person is a first-time or repeat offender.”¹¹² For example, in *People v. Thompson*,¹¹³ the defendant was a first-time offender convicted of criminal sale of a controlled substance in the first degree.¹¹⁴ The

101. See HRW, PUNISHMENT AND PREJUDICE, *supra* note 81, tbl.19.

102. See, e.g., Johnson, *supra* note 4, at 7, 10 (discussing how black women are more likely than white women to be in poverty and, therefore, more likely to turn to crime).

103. See *id.* at 32.

104. See *id.* at 43.

105. See *id.*

106. See *id.* at 32.

107. See *id.* at 42.

108. See Johnson, *supra* note 4, at 41-45; Huling, *supra* note 81, at 18-19.

109. See Dunne, *supra* note 23; Huling, *supra* note 81, at 59-60.

110. See Huling, *supra* note 81, at 15.

111. See *id.*

112. *Id.* at 17.

113. 633 N.E.2d 1074 (N.Y. 1994).

114. See *id.* at 1075.

defendant was a seventeen-year-old girl living with her uncle who the police recognized as "the principal target of their investigation and prosecution."¹¹⁵ Ms. Thompson was arrested after being employed in her uncle's drug business and making a single sale of cocaine to an undercover police officer.¹¹⁶ Ms. Thompson was offered a sentence of three years to life as a plea bargain and then four years to life immediately before trial; she rejected both offers.¹¹⁷ An appellate court sentenced her to eight years to life imprisonment but the New York Court of Appeals increased her sentence to the mandatory minimum of fifteen years to life required by the Rockefeller Drug Laws.¹¹⁸ The court reasoned that any amendments to the statutes are in the hands of the legislature, not the judiciary.¹¹⁹

Although Angela Thompson went to trial, most women plea-bargain to a reduced charge.¹²⁰ Concern for children and family drives them to accept a plea even if it is harsh as compared to the circumstances of the crime.¹²¹ In addition, although it is possible to exchange assistance to the police for a sentence of lifetime probation, most women are involved so minimally that any assistance they can provide is of little or no value, which makes this option virtually unavailable.¹²²

The prejudices these laws impose have led to a substantial increase in the number of women in prison.¹²³ In a ten-year span, from 1983 to 1993, the number of women in state prisons rose from 610 to 3553.¹²⁴ The number of women convicted in New York State as first-time offenders increased 147% between 1988 and 1991.¹²⁵ Women committed to state prisons under the Second Felony Offender Law increased 276%.¹²⁶ In Queens County alone, the statistics on females charged with A-I felonies shows that 70% of those arrested between 1986 and 1990

115. *Id.* at 1081 (Bellacosa, J., dissenting).

116. *See id.* at 1075; *see also id.* at 1081 (Bellacosa, J., dissenting).

117. *See id.* at 1082 (Bellacosa, J., dissenting).

118. *See id.* at 1075.

119. *See id.* at 1081.

120. *See Huling, supra* note 81, at 19. Women usually plead guilty to an A-II felony because it is the lowest charge available. *See id.* An A-II felony carries, at its minimum, a sentence of three years to life. *See* N.Y. PENAL LAW § 70.00(2)-(3)(a)(ii) (McKinney Supp. 2001).

121. *See Huling, supra* note 81, at 19.

122. *See id.*

123. *See id.* at 15; *see also* Johnson, *supra* note 4, at 43-44.

124. *See* Johnson, *supra* note 4, at 42. The number of women in city jails increased from 310 to 2000 in the same time period. *See id.*

125. *See id.* at 43.

126. *See id.* This statistic demonstrates that the Second Felony Offender Law has harsher effects than the laws for first-time offenders. *See id.*

were sent to state prison.¹²⁷ Sixty-five percent of women convicted of a Class A felony had no prior criminal record and 84.3% of women had no prior felony arrests, compared to 39.6% and 65.8% of men, respectively.¹²⁸ Male imprisonment increased 11.7% from 1987 to 1989 while the number of women imprisoned increased 24% during the same period.¹²⁹ From 1987 to 1989, the incarceration rate for new drug commitments increased 98.9% for women, but only 33.5% for men.¹³⁰ Just over 60% of women are in prison for drug-related crimes, while only 32.5% of men are imprisoned for similar crimes.¹³¹ Overall, the Rockefeller Drug Laws' mandatory sentencing requirements, combined with the fact that most women have low-paying jobs, have caused an increase in the number of women turning to crime and ending up in prison.¹³²

III. SUPPORT FOR THE LAWS

Although many criticisms and negative consequences have surfaced, some individuals still believe that the Rockefeller Drug Laws are more beneficial for New York State than judicial discretion in sentencing.¹³³ Supporters believe that the severe mandatory sentences deter offenders from committing crimes and keep communities safe by incarcerating those who commit crimes for a substantial period of time.¹³⁴ Additionally, prosecutors feel that the threat of a long sentence provides incentives to low- or midlevel dealers to give the police information regarding major drug dealers in exchange for lighter sentences.¹³⁵ Although information received by lower-level offenders should ideally lead to the arrest of drug lords; there has been little, if any, empirical data to prove that this occurs.¹³⁶

127. *See id.* at 44.

128. *See* HUMAN RIGHTS WATCH, *supra* note 10, at 20.

129. *See* Johnson, *supra* note 4, at 43.

130. *See id.* at 44.

131. *See* HUMAN RIGHTS WATCH, *supra* note 10, at 7.

132. *See* Johnson, *supra* note 4, at 41-45.

133. *See, e.g.*, Gary Spencer, *DAs Fire Back in Debate on Drug Laws*, N.Y. L.J., Mar. 4, 1999, at 1 (stating that prosecutors are fighting against any major reforms of the Rockefeller Drug Laws because they believe the laws to be critical in combating the drug problem).

134. *See* HUMAN RIGHTS WATCH, *supra* note 10, at 1.

135. *See* Wren, *supra* note 13. However, the disparity between mandatory sentences and plea bargains is often substantial enough that an individual will plead guilty, thereby giving up his or her right to trial, in order to ensure that he or she will not be incarcerated for a great length of time. *See* HUMAN RIGHTS WATCH, *supra* note 10, at 24.

136. Conversely, the stable price of heroin, the increase in consumption, the stable number of narcotic deaths, and the increase in admissions into drug treatment programs have the combined

Second, mandatory sentencing ensures that the same crime receives the same punishment.¹³⁷ This ideology allows for less variability in sentencing, which some say ensures that race will not play a factor in determining punishment.¹³⁸ Mandatory sentencing is also beneficial to society because it leads to less sentencing disparities and guarantees that all individuals are treated equally.¹³⁹

Third, supporters argue that there is a correlation between drug abuse and violent crime. They believe the Rockefeller Drug Laws assist in reducing violent crime by incarcerating drug offenders.¹⁴⁰ Over 60% of violent offenders had drugs in their system at the time of arrest.¹⁴¹ Since drug abuse costs the United States a substantial amount of money,¹⁴² many supporters feel this justifies mandatory sentencing laws as well.¹⁴³

A fourth argument in support of the drug laws is that seemingly harsh convictions under Class A-I felonies are used sparingly.¹⁴⁴ Between 1994 and 1999, an average of only forty-nine defendants per year were sentenced for Class A-I drug convictions.¹⁴⁵ Supporters generally find that mandatory sentencing contributes to a decrease in the amount of violent crimes and ensures that all individuals arrested are treated equally within the court system.¹⁴⁶

IV. CRITICISMS OF THE LAWS AND ALTERNATIVES

Although some see benefits stemming from the Rockefeller Drug Laws, more see the harsh consequences that result from sentencing

impact of proving that heroin supplies were as readily available a couple of years after the enactment of the drug laws as they were in 1973. See JOINT COMMITTEE REPORT, *supra* note 9, at 7.

137. See Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 123 n.4 (1993).

138. See Mauer, *supra* note 72, at 348-49. The problem with this argument is that race may not be a factor in sentencing but it is a factor in arrests which means that more minorities than whites face the judges for sentencing. See *id.*; see also *supra* text accompanying notes 81-96. Judges should then have the discretion to offset any disparities caused at the arrest and prosecution level but the Rockefeller Drug Laws have not allowed for this. See Mauer, *supra* note 72, at 349.

139. See Lowenthal, *supra* note 137, at 61-63.

140. See REPORT TO JUDGE KAYE, *supra* note 20, at 91.

141. See *id.*

142. In 1995, drug abuse cost the United States \$109.8 billion. See *id.*

143. See *id.*

144. See *id.* at 92. Class A-I felony convictions are used sparingly but Class D and E felonies are not, and those are the individuals that account for the majority of drug arrests and sentencing. See *supra* text accompanying notes 34-39.

145. See REPORT TO JUDGE KAYE, *supra* note 20, at 92.

146. See *id.* at 91.

under them.¹⁴⁷ As a result, several professionals in the field have come up with alternatives to these laws.¹⁴⁸ For example, Arizona¹⁴⁹ and Michigan¹⁵⁰ moved away from some of their harsher mandatory sentencing laws when the state governments realized that their intended goals were not being met.¹⁵¹

A. *More Sentencing Discretion for Judges*

One major criticism is that the Rockefeller Drug Laws take sentencing discretion away from the judiciary.¹⁵² In turn, the decision of what sentence to impose is left up to prosecutors who decide what charges to bring against the defendant.¹⁵³ Prosecutors' decisions are unreviewable and "the criminal justice system lacks mechanisms to hold prosecutors accountable for their choices."¹⁵⁴ In contrast, the Appellate Division, in case of any improper decisions by the trial court, may review judicial sentencing.¹⁵⁵ Many proposals try to return discretion to the judiciary to determine whether a sentence is appropriate under the circumstances surrounding the crime and the individual.¹⁵⁶

1. Arizona

Like New York, Arizona judges previously lacked judicial discretion in imposing drug sentences.¹⁵⁷ As a result of this, the state resolved to change its mandatory sentencing scheme.¹⁵⁸ A study

147. See *id.* at 89-90.

148. Some of the suggestions include: (1) repealing the laws, see Editorial, *Drug Laws that Destroy Lives*, N.Y. TIMES, May 24, 2000, at A24; (2) giving judges more discretion in sentencing, see Dunne, *supra* note 23; and (3) placing nonviolent offenders in treatment, see REPORT TO JUDGE KAYE, *supra* note 20, at 91.

149. See ARIZ. REV. STAT. ANN. § 13-3401 (West 2001).

150. See MICH. COMP. LAWS ANN. § 333.7401(2)(a)(i) (West Supp. 2001).

151. See Cami Byrd, Legislative Review, *Criminal Code Revision*, 26 ARIZ. ST. L.J. 341, 341-42 (1994); Brian M. Thomas, Recent Legislation, *Parole Eligibility—Michigan Eliminates Mandatory Drug Sentences and Allows Parole for Possession of 650 or More Grams of Cocaine or Heroin*, 76 U. DET. MERCY L. REV. 679, 679 (1999).

152. See Dunne, *supra* note 23.

153. See HUMAN RIGHTS WATCH, *supra* note 10, at 4; Robert D. Herman & Michelle Ritter Murphy, *Mandatory Minimum Drug Sentences—Can They Be Any Less Draconian?*, 16 T.M. COOLEY L. REV. 99, 111-12 (1999).

154. HUMAN RIGHTS WATCH, *supra* note 10, at 4.

155. See *id.*

156. See Dunne, *supra* note 23; see also Gary Spencer, *Effort Begun to Ease Rockefeller Drug Laws*, N.Y. L.J., May 7, 1998, at 1 [hereinafter Spencer, *Effort Begun*] (discussing the Campaign for Effective Criminal Justice and its purpose).

157. See Byrd, *supra* note 151, at 341-42.

158. See *id.* At the time the mandatory sentencing laws were enacted, the majority view was that judges were exercising too much discretion in sentencing defendants. See *id.* at 341.

committee created by the Arizona State Legislature in 1991 introduced Senate Bill 1490, which contained recommendations to change Arizona's correction system and criminal code.¹⁵⁹ Senate Bill 1490 was vetoed by then-Governor Symington and the areas of consensus were reintroduced as Senate Bill 1049, which was signed into law on April 22, 1993.¹⁶⁰

Mandatory sentencing led to many problems in Arizona including: "(a) increased severity of sentences; (b) reduction in trials; (c) prosecutorial rather than judicial control of sentencing; (d) lack of individualization of sentences; and (e) deterrence issues."¹⁶¹ Arizona's incarceration rate became the eighth highest in the nation and 139% greater than it had been ten years prior.¹⁶² The possibility of mandatory sentencing also led to an increase in plea-bargaining, and as a result, a reduction in trials.¹⁶³ Prosecutors dismissed 76% of their indictments in return for guilty pleas.¹⁶⁴ This gave prosecutors more influence in sentencing than judges.¹⁶⁵ Prosecutors had the power to decide what charge to bring against a defendant without a review of their decision.¹⁶⁶ Senate Bill 1049 was enacted in order to resolve these issues.¹⁶⁷

Prior to Senate Bill 1049, an individual could receive a mandatory sentence for possession or sale of a drug (other than marijuana) regardless of the quantity involved.¹⁶⁸ After the bill was signed, section 13-3401 of the *Arizona Revised Statutes* set threshold amounts for certain narcotics.¹⁶⁹ A mandatory sentence could not be imposed until these threshold amounts were met.¹⁷⁰

2. Michigan

Michigan was another state that realized its mandatory sentencing laws needed to be changed. When Michigan changed its laws, Michigan was infamous for its murder rate and politicians felt this was directly

159. *See id.* at 342.

160. *See id.* at 342-43.

161. Rudolph J. Gerber, *Arizona Criminal Code Revision: Twenty Years Later*, 40 ARIZ. L. REV. 143, 162 (1998).

162. *See id.* at 163.

163. *See id.*

164. *See id.* at 164-65.

165. *See id.* at 165.

166. *See id.*

167. *See Byrd, supra* note 151, at 343.

168. *See id.* at 347.

169. *See id.* at 346-47; *see also* ARIZ. REV. STAT. ANN. § 13-3401(36) (West 2001).

170. *See Byrd, supra* note 151, at 347.

related to the drug traffickers.¹⁷¹ One of Michigan's mandatory drug sentencing laws, known as the "650-lifer-law," was the state legislature's attempt to alleviate this problem.¹⁷² The law required a sentence of life without parole for anyone caught with over 650 grams of heroin or cocaine.¹⁷³ The law was enacted twenty-one years ago and (similar to the Rockefeller Drug Laws) has been the subject of much debate.¹⁷⁴ Michigan Governor William G. Milliken, who signed the bill into law, realized that he made a mistake when he endorsed the "draconian" law.¹⁷⁵ Although its intention was to imprison drug kingpins and deter drug crimes, its primary effect was capturing one-time, nonviolent drug couriers.¹⁷⁶

Like women incarcerated under New York's Rockefeller Drug Laws, JeDonna Young was sentenced under the 650-lifer-law after police found a bag of heroin in the car.¹⁷⁷ Even though her boyfriend admitted the drugs were his,¹⁷⁸ Ms. Young, a 25-year-old single mother with no criminal record, was convicted.¹⁷⁹ She is one of 173 (out of 205) prisoners with no previous criminal record serving a sentence under Michigan's 650-lifer-law.¹⁸⁰

Many arguments were set forth in favor of amending Michigan's law. First, it was difficult to say that the punishment fit the crime because the law mandated the same punishment for all offenders regardless of their circumstances.¹⁸¹ Hence, the law was incarcerating addicts who tended to be low-level couriers selling drugs solely to support their drug habit versus those individuals selling drugs as a career.¹⁸² Second, the 650-lifer-law, in comparison with other laws, seemed extremely harsh.¹⁸³ Second-degree murder, rape, and armed robbery all had the possibilities of parole while the only crime with a punishment harsher than the 650-lifer-law was first-degree murder.¹⁸⁴

171. See Thomas, *supra* note 151, at 683.

172. See *id.*

173. See MICH. COMP. LAWS ANN. § 333.7401(2)(a)(i) (West Supp. 2001).

174. See Thomas, *supra* note 151, at 679.

175. See *id.*

176. See *id.*

177. See *Young v. Miller*, 883 F.2d 1276, 1278 (6th Cir. 1989) (habeas corpus proceeding).

178. See Thomas, *supra* note 151, at 679.

179. See *Young*, 883 F.2d at 1283-84.

180. See Thomas, *supra* note 151, at 680.

181. Circumstances include past criminal record and involvement in the drug scheme. See *id.* at 684-85.

182. See *id.* at 685.

183. See *id.*

184. See *id.*

Third, the chances of acquittal were greater under Michigan's drug laws because juries were less likely to convict someone under a law with such a harsh penalty.¹⁸⁵ A fourth reason for amending the drug laws was that major drug dealers hired addicts to transport their drugs rather than taking the risk of transporting the drugs themselves.¹⁸⁶ Therefore, these laws ended up providing little, if any, assistance in combating the drug problem since those being caught were not the drug kingpins.¹⁸⁷ The high-level dealers will continue using other addicts to sell drugs. Finally, an amendment to the law was favored because a reduction in prison time would lead to reduced operating costs for the Department of Corrections, ultimately resulting in savings for the state.¹⁸⁸

Arguments have also been advanced in favor of the 650-lifer-law. The theory in its support is: If drugs are connected to violent crimes, then the elimination of the drug problem should help decrease violent crime.¹⁸⁹ However, if the people sentenced under the 650-lifer-law are addicts or first-time, nonviolent offenders, it does not seem likely that violent crimes will decrease as a result of the law. Some say that trafficking large amounts of drugs is worse than murder because murder involves one victim whereas the sale of 650 grams of cocaine or heroin involves many.¹⁹⁰ This argument may have some validity; however, it also shows the need for treatment centers to assist these addicts. Ideally, with fewer addicts, there will be less people buying drugs, and therefore less of a drug problem.

Upon the realization that the 650-lifer-law was too harsh, Michigan State Senator Mike Rogers sponsored a measure to ease the law.¹⁹¹ Governor John Engler signed the amendment into law in 1998 after it passed the legislature.¹⁹² The amendment provided judges with discretion in sentencing.¹⁹³ They now have the ability to sentence defendants to any amount of time between twenty years and life imprisonment.¹⁹⁴ The amendment also provided parole for first-time, nonviolent offenders who cooperated with police and some drug offenders became eligible for

185. *See id.* at 686.

186. *See id.*

187. *See id.*

188. *See id.* at 690.

189. *See id.* at 685.

190. *See id.*

191. *See id.* at 680.

192. *See id.*

193. *See Herman & Murphy, supra* note 153, at 109.

194. *See id.*

parole after serving fifteen years of their sentence.¹⁹⁵ In determining whether or not to grant parole, the parole board must consider the individual's criminal record, the circumstances of his or her arrest, his or her role in the drug sale and whether drugs were sold to someone under seventeen or in a drug-free school zone.¹⁹⁶ The parole board may then grant the prisoner parole with lifetime probation.¹⁹⁷ The benefit of this system is that the parole board, in addition to judges, is given discretion to ensure that kingpins remain imprisoned while couriers and addicts are released.¹⁹⁸ A final provision of the amendment provides for random drug testing and the right of the parole board to revoke parole.¹⁹⁹

3. New York's Proposed Reforms

Even New York State has recognized the need to change the outdated and ineffective laws. Former State Senator John R. Dunne organized the Campaign for Effective Criminal Justice²⁰⁰ with the goal of putting discretion back in the judges' hands.²⁰¹ Mr. Dunne was a Republican sponsor of the Rockefeller Drug Laws in 1973 and now is a leading advocate for their reform.²⁰² The organization realizes that the laws have failed and must be revised.²⁰³ Its goal is to ensure that judges have the ability to decide whether to sentence nonviolent offenders to drug treatment as opposed to long mandatory sentences.²⁰⁴ Mr. Dunne agrees that the prison systems are overcrowded with low-level drug offenders, costing the state a substantial amount of money and having only minor effects on the drug problem.²⁰⁵

The group's proposed bill would give trial judges the power to depart from the mandatory minimum sentences for all Class A felony drug crimes by taking the defendant's character into consideration, along with his or her past criminal record, if any, and the circumstances and

195. See Thomas, *supra* note 151, at 680, 687.

196. See *id.* at 687.

197. See *id.* at 688.

198. See *id.*

199. See *id.* at 689.

200. The Campaign is described as "a bi-partisan organization of leaders in law enforcement, politics, business and clergy seeking to change New York's drug sentencing laws." Dunne, *supra* note 23.

201. See *id.*

202. See Spencer, *Effort Begun*, *supra* note 156.

203. See *id.*

204. See *id.*

205. See *id.*

nature of the crime.²⁰⁶ Judicial discretion is essential to ensure that drug offenders are given a sentence that reflects their individual situations.²⁰⁷ This discretion would result in more productive and less costly punishments.²⁰⁸

Several other proposals were introduced specific to the A-I provisions of the Rockefeller Drug Laws.²⁰⁹ In 1999, Governor Pataki proposed what some consider a "weak reform."²¹⁰ The Governor's bill would allow the Appellate Division to review Class A-I drug felony sentences and, at their discretion, reduce the mandatory minimum sentence of 15-years-to-life to 10-years-to-life in cases involving first-time felons.²¹¹ This proposal was limited to those defendants convicted of drug possession, not of drug sales.²¹² The bill would also provide trial judges with the discretion to divert nonviolent offenders to drug treatment programs, but only with the consent of the district attorney.²¹³ The enactment of the Governor's bill was linked to ending parole for nonviolent felons.²¹⁴

Judith S. Kaye, Chief Judge of the State of New York, proposed a similar bill to Governor Pataki's. In her 1999 State of the Judiciary Address she offered two proposals.²¹⁵ The first would give the Appellate Division the ability to reduce the minimum period of incarceration for an A-I felony.²¹⁶ The proposal would allow a judge to decrease a convict's sentence to 5-years-to-life if the mandatory minimum would constitute a

206. See Gary Spencer, *Past Supporters Urge Drug Law Reform*, N.Y. L.J., May 13, 1999, at 1 [hereinafter Spencer, *Past Supporters*].

207. See Dunne, *supra* note 23.

208. See *id.*

209. See Pataki to Propose Rockefeller Changes, N.Y. L.J., Apr. 29, 1999, at 2 [hereinafter Pataki Proposal]; Gary Spencer, *Kaye Urges Reform of Rockefeller Drug Laws*, N.Y. L.J., Feb. 9, 1999, at 1 [hereinafter Spencer, *Kaye Urges*]; James A. Yates, Letter to the Editor, *Drug Law Proposal Described as Flawed*, N.Y. L.J., Apr. 12, 1999, at 2.

210. Editorial, *New York's Harmful Drug Laws*, N.Y. TIMES, May 12, 2000, at A34. On April 5, 2001, Governor Pataki introduced another proposal known as the "Felony Drug Law Reform Act of 2001." For the full text of the bill, see S.B. 4237, 224th Leg. Sess. (N.Y. 2001).

211. See Spencer, *Past Supporters*, *supra* note 206.

212. See *id.*

213. See *id.*; see also Jonathan Lippman, *Interaction Between Legislative, Judicial Branches Essential*, N.Y. L.J., May 3, 1999, at S1.

214. See Pataki Proposal, *supra* note 209.

215. See Hon. Judith S. Kaye, State of the Judiciary Address (Feb. 8, 1999) [hereinafter 1999 Judiciary Address] (transcript available at <http://www.courts.state.ny.us/ctapps/state99.htm> (last visited Mar. 11, 2002)); see also Alan Finder, *Top New York Judge Calls for Easing Some Drug Laws*, N.Y. TIMES, Feb. 9, 1999, at B5 (discussing Chief Judge Kaye's proposals); Spencer, *Kaye Urges*, *supra* note 209 (quoting various individuals' feelings about the proposals and the proposals themselves).

216. See 1999 Judiciary Address, *supra* note 215.

"miscarriage of justice."²¹⁷ Chief Judge Kaye's proposal would require trial judges to impose the sentence required by law and it would provide the Appellate Division with discretion to reduce the sentence, if necessary.²¹⁸

Chief Judge Kaye's second proposal is directed at nonviolent drug addicted defendants.²¹⁹ The proposal requests that trial courts, with consent of the prosecutor, have the authorization to defer prosecution of the case while the defendant completes a drug treatment program.²²⁰ While completing this program the defendant will still be under the authority of the court.²²¹ Chief Judge Kaye proposed the addition of an Article to the Criminal Procedure Law that would "codify standards for drug offender diversion programs."²²² In her 2001 State of the Judiciary Address, she mentioned her first proposal again and noted that while the proposal sparked a debate, no reform had been made.²²³ She suggested that the three branches of government work together to reform the Rockefeller Drug Laws.²²⁴

Both Chief Judge Kaye's first proposal and Governor Pataki's proposal are flawed because very few people are sentenced under the Class A felony section of the Rockefeller Drug Laws.²²⁵ The bigger problem lies with those sentenced under the Class D and E felonies,²²⁶ and these proposals do not discuss change in that area.²²⁷ James A. Yates, a New York State Supreme Court Judge in Manhattan, believes that Chief Judge Kaye's proposal "relegates the trial court to a clerical or, at best, advisory role."²²⁸ He believes that the proposal is flawed because the trial court, which is the court most familiar with the facts and circumstances of a case, has no discretion while the Appellate Division

217. *Id.* "Miscarriage of justice" was not specifically defined. *See id.* However, Chief Judge Kaye mentioned that the Appellate Division would be permitted to consider "the nature and circumstances of the offense, the history and character of the defendant and public safety concerns in determining whether an injustice has occurred." *Id.*

218. *See* Yates, *supra* note 209.

219. *See* 1999 Judiciary Address, *supra* note 215.

220. *See id.*

221. *See id.*

222. *Id.* For a more detailed discussion of drug treatment see *infra* Part IV.B.

223. *See* Hon. Judith S. Kaye, State of the Judiciary Address 9 (Jan. 8, 2001).

224. *See id.*

225. *See supra* text accompanying notes 34-39, 144-45. Chief Judge Kaye was aware that her first proposal would not affect a large number of defendants. *See* 1999 Judiciary Address, *supra* note 215.

226. *See supra* text accompanying notes 34-39.

227. *See* 1999 Judiciary Address, *supra* note 215. Chief Judge Kaye noted that her second proposal would likely affect second offenders charged with Class B felonies. *See id.*

228. Yates, *supra* note 209.

is given a role inconsistent with Article VI of the New York State Constitution.²²⁹

A bill sponsored by State Senator Lack was introduced to the Senate on March 22, 1999.²³⁰ This bill would permit the modification of Class A-I drug felony cases.²³¹ Intermediate appellate courts can modify sentences if they are unduly harsh.²³² The court can also defer prosecution of certain drug offenses if it sees that the defendant may have a problem with drug dependency.²³³ Unfortunately, this bill never made it past the Senate.²³⁴

On January 10, 2001, a bill was introduced to the Senate Committee on Codes by State Senator Montgomery.²³⁵ This bill called for judicial discretion in sentencing for certain Class A and Class B felonies.²³⁶ If the court, after reviewing the history and character of the defendant and the nature and circumstances of the crime, believes that an indeterminate sentence is too harsh, then the court may impose a lesser sentence.²³⁷ This bill had previously been sponsored by State Senator Montgomery and introduced on April 18, 2000.²³⁸ However, that bill died in the Committee.²³⁹ Senator Montgomery noted in his sponsor's memorandum the justification for the current bill:

Under the existing Rockefeller Drug Laws, judges are now bound by rigid guidelines requiring stiff prison terms for drug offenses, even for possession of relatively small amounts of drugs. The sentences escalate steeply when a person is convicted of a second felony within 10 years. The Rockefeller Drug Laws have led to an explosion in the state's prison population, which has increased fivefold since the drug laws were enacted in 1973. As a result, New York taxpayers have borne the financial burden of building over 40,000 new prison beds at a cost of over \$4 billion. Restoring judicial discretion in the sentencing

229. *See id.*

230. *See* S.B. 4009, 222d Leg. Sess. (N.Y. 1999). Senators Alesi, DeFrancisco, Hannon, Leibell, Maltese, Marchi, McGee, Meier, Padavan, Spano, and Velella were cosponsors. *See id.*

231. *See id.* §§ 3-4.

232. *See id.*

233. *See id.* § 9.

234. *See id.*

235. *See* S.B. 840, 224th Leg. Sess. (N.Y. 2001) [hereinafter Senate Bill 840], available at <http://leginfo.state.ny.us> (last visited Feb. 20, 2002). State Senators Breslin, Duane, Kruger, Lachman, Markowitz, Oppenheimer, Paterson, Sampson, Santiago, Schneiderman, M. Smith, and Stavisky were cosponsors. *See id.*

236. *See id.*

237. *See id.*

238. *See* S.B. 7611, 223d Leg. Sess. (N.Y. 2000). Senators Breslin, Duane, Kruger, Markowitz, Oppenheimer, Paterson, Sampson, Santiago, and A. Smith were cosponsors. *See id.*

239. *See* Senate Bill 840, *supra* 235.

process would allow judges to utilize less costly and more productive alternatives to incarceration.²⁴⁰

Despite the large support for this and prior bills, to date, no action has been taken.²⁴¹

In addition to the Senate, the Assembly introduced a bill.²⁴² The Assembly's plan takes a bigger step down the path toward meaningful reform. The Act is known as the "Drug Law Reform, Drug Treatment and Crime Reduction Act of 2001."²⁴³ It was introduced by Assemblyman Aubry and provides, among other things, for court ordered drug abuse treatment.²⁴⁴ Only individuals charged with a Class B, C, D, or E felony would be eligible for this treatment.²⁴⁵ While this bill was referred from the Assembly Committee on Codes, through Ways and Means to Rules, there has been no action taken since June 25, 2001.²⁴⁶

B. Court Supervised and Enforced Drug Treatment

The realization that drug addicts need treatment has led New York to take a step towards assisting these addicts.²⁴⁷ In order to come up with an effective solution to New York's drug problem, Chief Judge Kaye organized a Commission to "document the numbers and types of drug cases and their cost to the criminal justice system; evaluate the court's current response to these cases; review innovative and experimental approaches to the handling of these cases; and make recommendations for future reforms."²⁴⁸ The Commission focuses on drug treatment and Drug Treatment Courts²⁴⁹ as alternatives to incarceration because they have shown both high retention rates and low crime recidivism rates.²⁵⁰ Drug Treatment Courts monitor the defendant's progress and

240. *Id.*

241. *See id.*

242. *See* Assemb. B. 8888, 224th Leg. Sess. (N.Y. 2001).

243. *Id.*

244. *See id.* § 28.

245. *See id.*

246. *See id.*

247. *See* Press Release, New York State Unified Court System, A National First: New York to Launch Systemic Program of Drug Screening and Court-Mandated Substance Abuse Treatment Statewide 1 (June 22, 2000) [hereinafter Press Release].

248. REPORT TO JUDGE KAYE, *supra* note 20, at iii.

249. "Drug Treatment Courts are specialized court parts that give nonviolent substance-abusing offenders an opportunity to reduce or eliminate criminal justice sanctions if they are successful in completing treatment." *Id.* at 33 (footnote omitted).

250. *See generally id.* (noting the success of drug treatment courts in decreasing drug use and drug-related crime).

compliance with the conditions imposed.²⁵¹ The Commission proposed participation in drug treatment programs as an alternative to a sentence of probation or prison.²⁵² The Commission's reforms were adopted by New York in 2000, making New York the first state "to adopt a comprehensive systemic strategy to combat the overwhelming impact of substance abuse on court caseloads."²⁵³

Currently, there are 450 drug court programs in all fifty states, the District of Columbia, Guam, Puerto Rico and two federal districts.²⁵⁴ Approximately 200,000 individuals have enrolled in drug courts since the first one was established in 1989.²⁵⁵ The United States Department of Justice has a Drug Court Program Office that administered \$50 million in federal funding for drug courts for the 2000 fiscal year.²⁵⁶

Columbia University's National Center on Addiction and Substance Abuse reviewed drug court systems throughout the country and concluded that while participants are in the program, both criminal activity and drug use rates decline and rearrest rates for drug court participants are lower.²⁵⁷ Furthermore, urinalysis testing in thirteen of the courts found that only 10% of the participants tested positive for illegal drugs while on probation.²⁵⁸ Comparatively, 31% of defendants on probation in the same jurisdiction but not participating in the drug court program tested positive for illegal drugs in violation of their probation.²⁵⁹ Sixty percent of those entering drug courts are still in treatment after one year while only half of those who voluntarily enter outpatient treatment stay three months or longer.²⁶⁰

Recidivism rates are also lower as a result of drug court systems. Thirteen percent of graduates from the Jefferson County Drug Court in Kentucky were reconvicted of a felony within a year compared with 60% of nongraduates in the same county.²⁶¹ Rearrest rates are also lower in Delaware's adult Drug Court; in the Santa Clara County Drug Court

251. *See id.* at 17.

252. *See id.*

253. Press Release, *supra* note 247, at 1.

254. *See* REPORT TO JUDGE KAYE, *supra* note 20, at 17-18.

255. The first Drug Treatment Court opened in Miami because of a substantial amount of cocaine-related arrests that clogged up southern Florida's court system. *See id.* at 17.

256. *See id.* at 18.

257. *See id.* at 20-21.

258. *See id.*

259. *See id.*

260. *See id.*

261. *See id.* at 22.

in California; and in the Ventura County Drug Court also in California.²⁶² These results are far below the rearrest rate for a comparison group not participating in the drug court program.²⁶³

Similar positive results have been reported for the twenty drug treatment courts currently in operation in New York State. Courts report 60% to over 70% of individuals staying in the program.²⁶⁴ Most courts report rearrest rates of less than 15% one year after graduation compared to a 34-35% rearrest rate for those released from state prison or put on probation.²⁶⁵

The Kings County District Attorney's Drug Treatment Alternative-to-Prison ("DTAP") program²⁶⁶ was established in 1990.²⁶⁷ It has a 74% one-year retention rate and a three-year rearrest rate of 23% for graduates compared to 47% of a nonparticipating group.²⁶⁸ The Queens County District Attorney's DTAP program has a 77.7% overall retention rate and a 20% one-year rearrest rate for graduates.²⁶⁹ These statistics show the positive effects the drug courts have had on helping decrease drug use and drug-related crime.

Drug courts not only provide New York State with savings in jail and prison costs, social services costs, and other costs, but successful treatment provides additional financial benefits as well.²⁷⁰ For example, the Erie County Department of Social Services conducted a study of 176 Buffalo City Drug Court graduates.²⁷¹ The study found that 45 out of 106 open social services cases were closed upon graduation, 15 children in foster care were returned to their families, and 18 Child Protective Services cases were closed.²⁷² This amounted to savings of \$5.6 million over a five-year period.²⁷³

262. See *id.* Rearrest rates for Delaware, Santa Clara County, and Ventura County were 4%, 3%, and 12%, respectively. See *id.*

263. See *id.* The comparison group rearrest rates were 32%. See *id.*

264. See *id.* at 23.

265. See *id.*

266. This is a prosecutor-based program similar to drug treatment courts. Its development is based upon the belief that the criminal justice system can induce a defendant into a program because of its substantial leverage. See *id.* at 50.

267. See *id.* at 24-25; Steven Belenko, *The Challenges of Integrating Drug Treatment into the Criminal Justice Process*, 63 ALB. L. REV. 833, 846 (2000).

268. See REPORT TO JUDGE KAYE, *supra* note 20, at 25; Belenko, *supra* note 267, at 848.

269. See REPORT TO JUDGE KAYE, *supra* note 20, at 25.

270. See *id.* at 4, 25.

271. See *id.* at 29.

272. See *id.* at 29-30.

273. See *id.* at 30.

The number of drug cases also strains family courts.²⁷⁴ Children are removed from their homes due to abuse and neglect by drug-addicted parents, and the cost of foster care for these children adds to the expense of drug addiction on the state.²⁷⁵ Out of 1.8 million children in New York City, the Administration for Children's Services had cases open with almost half a million of them.²⁷⁶ Seventy percent of these children come from substance-abusing families.²⁷⁷ There is a direct correlation between substance abuse and neglect of children and over the past few years the number of neglect cases has increased.²⁷⁸ In New York State in 1995, 16,170 neglect cases existed and in 1999 this number was 23,186.²⁷⁹ Therefore, it is probable that the number of substance-abusing parents has increased and treatment to rid them of their drug habits is essential.

A solution to this problem is Family Treatment Court.²⁸⁰ These courts "provide improved screening and assessment of parents with substance abuse problems; quick access to appropriate treatment . . . sanctions and rewards to motivate [them] . . . and heightened accountability and judicial supervision."²⁸¹ The family treatment courts have shown some success thus far. Out of 115 individuals in the Suffolk County program, only fifteen have been terminated unsuccessfully.²⁸² As of February 2000, out of fourteen family treatment courts around the country, 60% of individuals have either remained with their children or have been reunited with them.²⁸³

1. RAND Drug Policy Research Center Study

The RAND Drug Policy Research Center conducted a study focusing on cocaine and the cost-effectiveness of the federal mandatory minimum drug sentences.²⁸⁴ The study concluded that "[m]andatory minimum sentences are not justifiable on the basis of cost-effectiveness at reducing cocaine consumption, cocaine expenditures, or drug-related crime."²⁸⁵ If one million dollars were spent on extending the mandatory

274. *See id.* at 57.

275. *See id.*

276. *See id.* at 58.

277. *See id.*

278. *See id.* at 58-59.

279. *See id.* at 59.

280. *See id.* at 61. These courts are modeled after criminal Drug Treatment Courts. *See id.*

281. *Id.*

282. *See id.* at 66.

283. *See id.*

284. *See* JONATHAN P. CAULKINS ET AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? xvi (1997).

285. *Id.* (emphasis omitted).

minimum sentences, cocaine use would be reduced by a little under thirteen kilograms.²⁸⁶ On the other hand, spending that same amount of money on treating cocaine users would decrease consumption by a substantial one hundred kilograms.²⁸⁷ The study also concluded that treatment was fifteen times more likely to reduce crime and eight times more likely to reduce drug consumption than were longer prison terms.²⁸⁸ RAND researchers agree that mandatory minimum sentences are beneficial when it comes to sentencing high-level drug dealers.²⁸⁹ However, the current mandatory minimum laws do not focus on these dealers.²⁹⁰

Overall, drug treatment and drug treatment courts have led to a decrease in drug use, lower rearrest rates, and savings for the state.²⁹¹ They have also assisted in keeping or bringing families back together. “[T]axpayers’ money would be better spent on trying to rehabilitate mules and small-time dealers rather than on paying for lengthy prison terms during which they receive no treatment for their addictions.”²⁹²

2. Criticisms of Drug Treatment and Drug Courts

Despite the fact that Chief Judge Kaye believes that “Drug Courts are one significant step toward breaking the devastating cycle of persistent nonviolent crime,”²⁹³ the system has faults. The problem with drug courts in New York City is the fact that many individuals will not feel compelled to accept treatment over a sentence.²⁹⁴ Since New York City’s criminal courts have a caseload in excess of their capacities, most cases do not go to trial thereby erasing any threat of serious jail time.²⁹⁵ Hence, New York City Drug Courts are more suitable for handling felony charges as opposed to misdemeanors.²⁹⁶ Since the Rockefeller Drug Laws provide for felony charges, Drug Treatment Courts may be beneficial to ease the harshness of the laws. However, drug courts were only enacted with the purpose of helping nonviolent drug addicted

286. *See id.* at xvii.

287. *See id.* at xviii.

288. *See* Marc Mauer, *Why are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL’Y REV. 9, 13 (1999).

289. *See* CAULKINS ET AL., *supra* note 284, at xxv.

290. *See id.*

291. *See* REPORT TO JUDGE KAYE, *supra* note 20, at 44-46.

292. Herman & Murphy, *supra* note 153, at 122.

293. Hon. Judith S. Kaye, State of the Judiciary Address (Jan. 10, 2000) (transcript available at <http://www.courts.state.ny.us/soj2000.html> (last visited Mar. 11, 2002)).

294. *See* REPORT TO JUDGE KAYE, *supra* note 20, at 41-42.

295. *See id.* at 42.

296. *See id.* at 41-43.

offenders.²⁹⁷ The Rockefeller Drug Laws have disparate impacts on a larger group of people than those covered by the drug courts.

The Commission itself describes drug treatment courts as “coerced” drug treatment.²⁹⁸ Many criminal justice and political leaders treat coerced drug treatment skeptically because they believe that “involuntary” patients are poor prospects for rehabilitation.²⁹⁹ Furthermore, the drug courts are intended for low-level, nonviolent offenders who have less of an impact on crime and costs than serious offenders.³⁰⁰ Some offenders caught in possession of large quantities of drugs have drug problems and are in need of treatment but they are not able to receive the benefits of these programs.³⁰¹

Another negative effect, specific to the DTAP program, is that it requires defendants to plead guilty to a felony prior to being accepted into the program.³⁰² Therefore, by way of the Second Felony Offender Law, a defendant is vulnerable to higher sentences if he or she violates the law again and had already plead guilty to get into the program.³⁰³ Charles D. Adler, a Manhattan criminal defense lawyer who advocates for alternative sentencing, believes that the Second Felony Offender Law will end up incarcerating more people than the first-time offender laws because defendants pleading guilty to a lesser offense on their first charge become convicted felons facing mandatory prison terms for a second offense.³⁰⁴

V. CONCLUSION

There has long been a conflict among “the criminal justice view [of drugs and crime], which emphasizes detecting and punishing drug offenders, and the public health view, which advocates treating the drug addiction that leads some individuals to commit crime.”³⁰⁵ Governor Nelson A. Rockefeller enacted the Rockefeller Drug Laws in order to

297. See *supra* note 249.

298. REPORT TO JUDGE KAYE, *supra* note 20, at 4.

299. See Belenko, *supra* note 267, at 844 n.63.

300. See *id.* at 846.

301. See *id.* People may consider these individuals a danger to society because of the large amount of drugs they possess. This is why judicial discretion is extremely important. Judges should decide whether these individuals should be sentenced to prison, sent to treatment, or a combination of the two.

302. See *id.* at 847.

303. See *supra* text accompanying notes 29-33.

304. See Wren, *supra* note 13.

305. Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of a Task Force Examining the Drugs-Violence Interrelationship*, 63 ALB. L. REV. 749, 750-51 (2000) (footnotes and emphasis omitted).

deter drug sales and drug consumption; he wanted to punish drug offenders.³⁰⁶ He believed that citizens of New York State no longer felt comfortable with the workings of the criminal justice system and he also believed that drug treatment facilities lacked the ability to assist with the drug problem.³⁰⁷ Governor Rockefeller saw his laws as an end to revolving-door justice and a solution to unsuccessful drug treatment.³⁰⁸ Unfortunately, his laws only exacerbated the problems with drugs.

The overall consensus³⁰⁹ is that the Rockefeller Drug Laws are draconian laws that, after a quarter of a century, have not served their purpose. A study done subsequent to the enactment of the laws has proven that drug use and drug sales remained the same while the number of individuals incarcerated increased.³¹⁰ The study did not come to a conclusion about the viability of the laws because it was too soon after they were enacted to make such a conclusion.³¹¹

To solve the problems of backlogged courtrooms and overcrowded prisons, it is essential that judges, especially trial court judges who are most familiar with the facts of a case, regain the discretion to impose sentences they deem appropriate. The inability of judges to tailor sentences to the defendant's situation has led to a prison system filled with low-level nonviolent offenders and drug addicted offenders. The housing of these prisoners has been at a substantial cost to New York State.

As they stand now, the laws may be appropriate for major drug traffickers and drug dealers; but the laws are adversely affecting minorities and women. The laws are also imprisoning victims of poverty and domestic violence. As one court put it: "the tiger trap had sprung

306. See Annual Message, *supra* note 1, at 2318.

307. See *id.*

308. See *id.* The Narcotics Control Act of 1966 established the New York State Civil Commitment Program, which provided treatment to drug arrestees for three to five years. See Belenko, *supra* note 267, at 840. However, the program was unsuccessful because of "the low quality of treatment facilities and staff associated with the program, the intermingling of parole supervision with treatment aftercare, high [abandonment] rates, and the prison-like atmosphere of the rehabilitation centers." *Id.*; see also Kennedy, *supra* note 2.

309. Individuals who feel the laws should be changed include, but are not limited to, Republican politicians who advocated enacting the laws, defense attorneys, judges, Governor Pataki, and Chief Judge Judith S. Kaye. See, e.g., Dunne, *supra* note 23 (arguing that the Rockefeller Drug Laws must be amended to give judges discretion); Pataki Proposal, *supra* note 209 (discussing Governor Pataki's proposal to change the Rockefeller Drug Laws); Yates, *supra* note 209 (criticizing Chief Judge Kaye's proposal and speaking of the need to give trial judges discretion in sentencing).

310. See generally JOINT COMMITTEE REPORT, *supra* note 9 (evaluating the success of the drug laws).

311. See *id.* at v.

upon a sick kitten.”³¹² Judges ought to be able to ensure that the high-level dealers the laws intended to target are the only individuals to feel the wrath of the harsh mandatory minimums. It is crucial to return discretion to the judges who have been appointed because of their ability to determine what punishment is most appropriate. Without this discretion, prosecutors will continue to retain a substantial amount of power in determining sentencing. This power is not reviewable and prosecutors are not held accountable for wrongly applying the law.

Arizona and Michigan have reformed some of their mandatory sentences by returning discretion to the judges.³¹³ Yet alternatives proposed in New York have not been enacted by the legislature. Furthermore, although the proposals are a start to easing the harsh effects of the Rockefeller Drug Laws, they do have flaws. The proposals focus solely on A-I felony convictions but the majority of the Rockefeller Drug Laws’ harsh effects hit those individuals sentenced under Class D and E felonies.³¹⁴

New York has taken a step in the right direction by accepting the reforms of New York State’s Commission on Drugs and the Courts. Drug treatment has been essential in reducing drug use, drug-related crime, and, consequently, the costs of drug violations to the state.³¹⁵ However, in addition to drug courts, judicial freedom is necessary so that the judge can decide whether to incarcerate the defendant or send the defendant into a drug-treatment program. The ability to ensure that the proper individuals receive treatment and other individuals are sent to prison must rest in the hands of the judiciary.

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312. *Young v. Miller*, 883 F.2d 1276, 1285 (6th Cir. 1989) (quoting *Terrebonne v. Butler*, 848 F.2d 500, 505 (5th Cir. 1988)).

313. *See supra* Part IV.A.1-2.

314. *See supra* Part IV.A.3.

315. *See* David I. Goldstein, Letter to the Editor, *Reform the Drug Laws*, N.Y. L.J., June 29, 1999, at 2.

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