

# The Rockefeller Drug Laws: Unjust, Irrational, Ineffective

A Call for a Public Health Approach to Drug Policy



125 Broad St.  
New York, NY 10004  
212.607.3300  
[www.nyclu.org](http://www.nyclu.org)

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# I. INTRODUCTION: NEW YORK'S JIM CROW LAWS

There has emerged over the last decade a broad consensus among policy experts, criminal justice scholars and lawmakers that the War on Drugs, with its singular emphasis on incarceration, has failed.

In 1993, on the 20<sup>th</sup> anniversary of the Rockefeller Drug Laws, New York State Corrections Commissioner Thomas Coughlin, III, said the state was “lock[ing] up the wrong people ... for the wrong reasons.”<sup>1</sup>

Former Republican state senator John Dunne was a sponsor of the state’s mandatory sentencing scheme for drug offenses. He subsequently organized a coalition that has advocated for fundamental reform of the Rockefeller Drug Laws. In 2004 he observed, in a television spot, “the Rockefeller Drug Laws have been a well-documented failure.”<sup>2</sup>

Yet, as the 36<sup>th</sup> anniversary of these laws approaches, the state continues locking up the wrong people for the wrong reasons.

This report presents and marshals the empirical evidence that demonstrates New York’s mandatory-minimum drug sentencing scheme has failed, utterly, to accomplish its stated objectives. It has not reduced the availability of drugs or deterred their use; it has not made us safer.

The overwhelming majority of those serving time for drug offenses have been convicted of low-level, nonviolent offenses. Many of those individuals have substance abuse problems, and many suffer from a range of disabilities that will not be addressed in prison.

They leave prison prepared for little else but failure and re-incarceration. These individuals are all but guaranteed a vastly diminished earning capacity, if any at all. Families come apart. And because prosecution of drug offenses targets neighborhoods that are already under great social and economic stress, the drug war destabilizes entire communities.

For this dysfunctional approach to criminal justice policy, New York taxpayers pay dearly. Based on cost estimates calculated by the New York State Commission on Sentencing Reform, taxpayers will pay about \$600 million to incarcerate drug offenders in 2009 alone.<sup>3</sup>

In his testimony before the Commission, Michael Jacobson, director of the Vera Institute of Justice, observed that “[b]y incarcerating relatively low-level users and possessor of drugs, you buy yourself almost no public safety at huge costs.”<sup>4</sup>

The costs are not only fiscal. The selective enforcement of the drug laws has done great damage to the integrity of the criminal justice system. The state’s drug sentencing laws are the legacy of a grim racial history. And the nature of the injustice worked by these laws can only be fully understood in this historical context.

From the late 19<sup>th</sup> Century into the 1960s, Jim Crow laws were enforced with the objective of denying blacks equal protection of the laws and full participation in civil society. By the late 1960s the legal infrastructure of Jim Crow had been dismantled. But over the subsequent decades a successor to was revived in statutes prohibiting drug use.<sup>5</sup> Prosecution under these statutes has led to massive, unprecedented rates of incarceration – and prisons populated almost exclusively by people of color.

The Rockefeller Drug Laws are the Jim Crow laws of the 21<sup>st</sup> Century. This report includes demographic maps of urban centers throughout the state that depict in bold relief the racial and ethnic bias that informs the state's drug-law policy.

These findings present lawmakers with a compelling argument for comprehensive reform of the Rockefeller Drug Laws. The argument is based on principles of law and public policy. But ultimately the issue is a moral one.

The report concludes by proposing a paradigm shift toward a public health approach to drug policy. In this new model, prison is a last resort, reserved for the truly violent. The public health approach seeks to reinvest dollars, otherwise spent on prisons, to promote safe and stable communities. In practice, this approach diverts individuals with substance abuse problems from prison to programs that promote and facilitate life success.

Legislators might conceive of this paradigm shift as justice reinvestment.

# I. THE ROCKEFELLER DRUG LAWS UNJUST, IRRATIONAL, INEFFECTIVE

**I**n 2007, New York State sent to prison 6,148 men and women for drug offenses.<sup>6</sup>

Of the 13,426 individuals serving sentences for drug offenses at the end of that year, most had substance abuse problems and many were mentally ill.<sup>7</sup> Nearly half had been convicted of mere possession of a controlled substance.<sup>8</sup>

A significant number had resided, prior to imprisonment, in just a handful of New York City neighborhoods – low-income communities of color. Most of the others had resided in similar neighborhoods in the state’s urban centers.<sup>9</sup>

The racial and ethnic profile of the population sent to prison for drug offenses is particularly striking. It is well established in scientific literature that the demographics of those who use or sell illicit drugs reflect the demographics of the general population.<sup>10</sup> In other words, there are greater numbers of whites – as compared with blacks and Latinos – who use and sell drugs. However, nearly 90 percent of those incarcerated for drug offenses in New York State are black or Latino.<sup>11</sup> And in this respect the year 2007 was unexceptional. Gross racial and ethnic disparities among those sent to prison for drug offenses have become statistical constants – both in New York State and nationwide.<sup>12</sup>

The enactment of the Rockefeller Drug Laws in 1973 was a bold, albeit simplistic, political response to a complex public policy problem. The politics of this initiative were driven in part by then-Governor Nelson Rockefeller’s aspiration for national office. Any such candidate must demonstrate a commitment to upholding law and order. And in the early 1970s there was concern among New Yorkers, and Americans generally, that a sharp rise in heroin use and property crime posed a growing threat to public safety. The governor responded by promoting, and ultimately signing into law, the nation’s most harsh and inflexible drug sentencing statutes.<sup>13</sup>

The Rockefeller Drug Laws mandate a prison sentence for any individual convicted of unlawful possession or sale of controlled substances. Criminal culpability is based on the weight of the drug involved; possession of even a fraction of an ounce requires a prison term. And the sentences are grossly disproportionate to the offense. The prison terms dictated for nonviolent drug offenses exceed in many cases the sentences for violent crimes.<sup>14</sup>

Consider the individual with a prior nonviolent offense on his record who is convicted of possession of a single vial of crack with “intent to sell.” He faces a sentence of three-and-a-half to 12 years.<sup>15</sup> Compare this with the two to seven-year sentence imposed on an individual convicted of assault that causes “serious physical injury to another person.”<sup>16</sup> The drug sentencing laws are inflexible; they do not permit judicial discretion and common sense. Judges are barred from exercising their constitutionally recognized responsibility for determining an appropriate sentence based upon the individual’s role in the offense, prior history and mitigating factors.<sup>17</sup> The only way a mandatory prison sentence can be avoided is with the consent of the prosecutor – the very person who fought for the conviction.

Since 1974, the State of New York has sent nearly 200,000 individuals to prison for drug offenses.<sup>18</sup> The numbers of drug offenders sent to prison increased sharply in the mid-1980s; prison admissions for drug offenses remained at high levels throughout the 1990s. In that decade there were more than 100,000 prison ad-

missions for drug offenses.<sup>19</sup> While these numbers have declined somewhat, they remain at historically high levels: There were about 45,000 new convictions under the drug laws from 2000 to 2006.<sup>20</sup>

And the population incarcerated for drug offenses has varied little: It consists almost entirely of low-level, nonviolent offenders convicted of the possession or sale of small amounts of a banned substance.<sup>21</sup>

The cost of enforcing the state's drug sentencing scheme has been exorbitant and it must be measured in human terms: diminished opportunity for life success, unemployment, broken families, destabilized communities. The fiscal burden is also great. Taxpayers will spend more than \$307 million to incarcerate for just one year (at a rate of \$50,000 per inmate) the 6,148 individuals sent to prison for drug offenses in 2007.<sup>22</sup>

## A failed policy

In 1999, federal drug czar General Barry F. McCaffrey stated, "We can't incarcerate our way out of [the drug] problem."<sup>23</sup>

Many prominent New Yorkers who were early supporters of the harsh penalties prescribed by the Rockefeller Drug Laws have renounced their support for those laws. John Dunne, the former Republican senator and sponsor of the Rockefeller Drug Laws, has said, "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 nonviolent addicted offenders who need help."<sup>24</sup>

Other critics have decried the grave collateral consequences of the state's harsh mandatory sentencing scheme – particularly for the low-income inner city communities of color that have been the primary focus of drug-law enforcement. In an article published recently in *The Boston Review*, the black scholar Glenn C. Loury, a noted social conservative, called the War on Drugs a "monstrous social machine that is grinding poor black communities to dust."<sup>25</sup>

There is a large and growing body of empirical research that documents the terrible damage caused by the state's prosecution of offenders under the Rockefeller Drug Laws – damage to the minds and bodies of the incarcerated, to their chances for life success, to their families, and to New York's most vulnerable communities, from which a disproportionate number of people are sent to prison for drug offenses.<sup>26</sup>

These harms include selective prosecution and incarceration based upon race and ethnicity; severely diminished economic opportunity for those who have been incarcerated; disintegration of families and destabilized communities; and loss of civic status and political representation as a consequence of having been convicted of a drug offense. This ongoing social catastrophe has persisted even as an emerging consensus of experts finds that government can do more to promote public safety and the stability of vulnerable communities by diverting nonviolent drug offenders from prison and into programs that treat addiction and promote rehabilitation through counseling, education and vocational training.<sup>27</sup>

Nevertheless, New York's drug sentencing scheme remains, in all essential respects, fundamentally unchanged since its adoption in 1973. New York's drug sentencing statutes are among the most harsh and inflexible in the nation. Editorial boards across the state have called for reform;<sup>28</sup> case law is replete with judicial protestations against the mandate to impose a sentence that not only subverts justice, but defies common sense.<sup>29</sup>

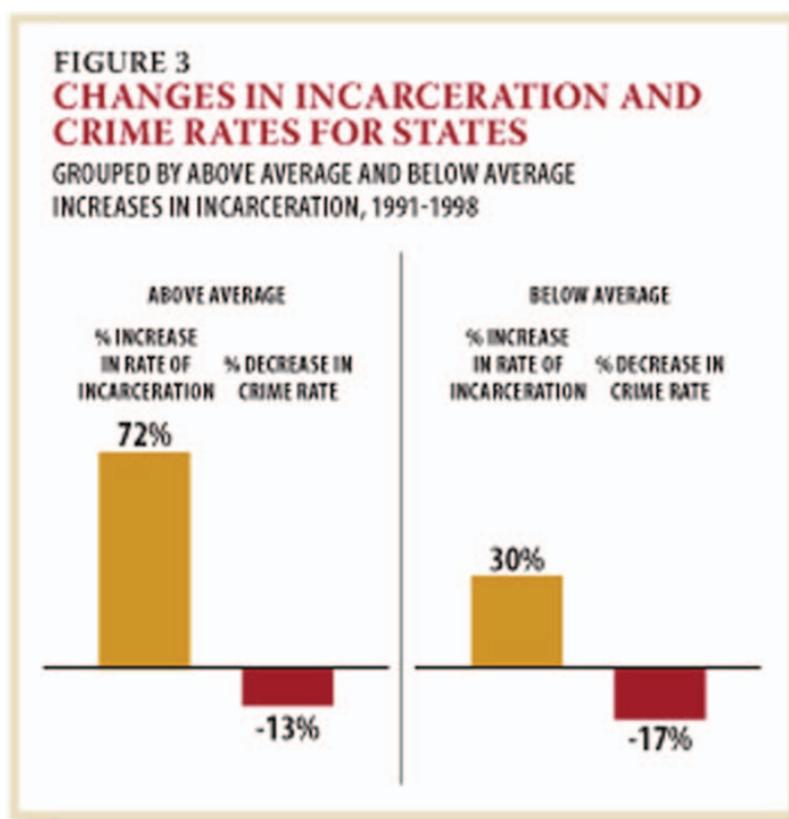
## But don't the drug laws prevent crime?

In its preliminary report, issued in October 2007, the New York State Commission on Sentencing Reform stated the following:

*The Commission heard many arguments on both sides of the debate as to whether to retain, eliminate or modify mandatory minimum sentences for certain first-time and repeat felony drug offenders. The Commission members heard forceful arguments from prosecutors that the mandatory minimum and second felony offender laws, including those for felony drug offenders, “played a vital role in providing us with the framework which has led to the tremendous and historic reduction in crime we have [seen] since about 1993.”<sup>30</sup>*

The corollary to this argument, and one that is being made by some prosecutors, is that further reform of mandatory minimum sentences will cause the crime rate to rise again to the level of “the bad old days.”<sup>31</sup> These arguments may be “forceful” – but they lack a sound empirical basis.

A study by the Sentencing Project examined prison and crime data and found that “there was no discernible pattern of states with higher rates of increase in incarceration experiencing more significant declines in crime.”<sup>32</sup> Indeed, states that reported below-average increases in incarceration rates had above-average *declines* in crime rates.<sup>33</sup> (See table below.) What’s more, the more punitive drug-sentencing schemes are correlated with more frequent drug use. States with higher incarceration rates tend to have higher rates of drug use.<sup>34</sup>



**States with above-average increases in incarceration reported below-average declines in crime rates.**

(Source: The Sentencing Project, 2005)

The Sentencing Project's findings have been corroborated by nine leading criminal justice scholars who have analyzed crime data and incarceration rates from the past 35 years. They summarize the issue this way:

*This generation-long growth of imprisonment has occurred not because of growing crime rates, but because of changes in sentencing policy that resulted in dramatic increases in the proportion of felony convictions resulting in prison sentences and in the length-of-stay in prison that those sentences required. Prison populations have been growing steadily for a generation, although the crime rate is today about what it was in 1973 when the prison boom started. It is tempting to say that crime rates fell over the past dozen years because imprisonment worked to lower them, but a look at data about crime and imprisonment will show that prison populations continued to swell long after crime rates declined and stayed low. Today, whatever is driving imprisonment policies, it is not primarily crime.<sup>35</sup>*

This study concludes by observing that a large body of scientific research contradicts the dubious claim, advanced by the proponents of prison expansion, that the massive national lock-up has made us safe. "Most scientific evidence," the scholars observe, "suggests that there is little if any relationship between fluctuations in crime rates and incarceration rates."<sup>36</sup>

Nevertheless, there are those who persist in advancing the argument that massive incarceration is a rational response to an urgent public safety problem, and that imprisoning large numbers of drug offenders has led to a reduction in crime. Professor Glen C. Loury challenges this thesis:

*Increased incarceration does appear to have reduced crime somewhat. But by how much? Estimates of the 1990s reduction in violent crime that can be attributed to the prison boom range from 5 percent to 25 percent. Whatever the number, analysts of all political stripes now agree that we have long ago entered the zone of diminishing returns. The conservative scholar John DiIulio, who coined the term 'super predator' in the early 1990s, was by the end of that decade declaring in the Wall Street Journal that "Two Million Prisoners Are Enough." But there was no political movement for getting America out of the mass-incarceration business. The throttle was stuck.<sup>37</sup>*

The flaws inherent in the Rockefeller Drug Laws were apparent long before the 1990s, however. These laws were intended to accomplish two major objectives: to "frighten drug users out of their habit and drug dealers out of their trade, and thus to reduce illegal drug use," and to "reduce crimes commonly associated with addiction, particularly robberies, burglaries, and theft."<sup>38</sup> But it was only a few years after the governor had put his pen to the enabling legislation that evidence of its failure began to emerge. In 1977, the Drug Abuse Council and a joint committee of the Association of the Bar of the City of New York issued the results of a formal evaluation of the new drug-sentencing scheme. The evaluation found that:

- Notwithstanding the expenditure of \$76 million to incarcerate drug offenders between 1973 and 1976, heroin use, availability and related crimes were as prevalent as before the laws went into effect.<sup>39</sup>
- Illegal use of cocaine and other drugs was more widespread in 1976 than 1973.<sup>40</sup>

- Serious property crime actually increased sharply after 1973.<sup>41</sup>
- The recidivist sentencing provision (mandating incarceration for individuals convicted of a second felony) did not deter prior offenders from committing new crimes.<sup>42</sup>

The Committee concluded:

*The available data indicate that despite expenditure of substantial resources[,] neither of the objectives of the 1973 drug law was achieved. Neither heroin use nor drug-related crime declined in New York State.*<sup>43</sup>

This record of failure continues. According to government sources, illicit drugs are more easily accessible than ever.<sup>44</sup> And New York continues to mandate prison for drug offenders who do not pose a meaningful risk to public safety. Few incarcerated drug offenders are “drug kingpins.” And large numbers are repeat offenders who cycle in and out of prison.<sup>45</sup>

## The reform movement

In 2009, 36 years into this failed experiment, the question must again be put to New York’s political leaders: Why is it the policy of the state to remove thousands of individuals – most of whom are addicted, mentally ill, uneducated or jobless – and send them to prison, only to be released ill-prepared for little else but a return to prison?

There is no rational answer to this question. There is, however, a clear public policy alternative: a rehabilitative public health model for addressing offenses related to drug abuse. This new paradigm, based upon a substantial body of applied research, demonstrates that alternative to incarceration programs (“ATIs”) can enhance public safety, and cost far less than incarceration. Popular opinion among the residents of New York State concurs with the scientific findings: The great majority of voters in our state agree that the best approach to preventing future drug-related crime is to provide nonviolent addicted offenders with drug treatment rather than sending them to prison.<sup>46</sup>

States across the country have adopted this rehabilitative approach to drug offenses.<sup>47</sup> These legislative reforms restore judicial discretion in sentencing; reduce or eliminate mandatory minimum sentences; and authorize the diversion of offenders from prison to treatment and rehabilitation programs. Sentencing reform is often adopted with bipartisan support. For example, one of the strongest supporters of the Michigan reforms was William G. Milliken, a Republican who served as governor from 1969 to 1982, and signed the state’s mandatory minimums into law in 1978, a decision he later came to regret.<sup>48</sup>

In June 2007, the U.S. Conference of Mayors, meeting at its annual convention in Las Vegas, added its voice to the chorus demanding an end to mandatory minimum sentences. In a resolution adopted by this body of 1,163 mayors of cities with populations of more than 300,000, the Conference condemned the “one size fits all” approach to sentencing. The mayors noted with great concern the increasing racial disparity of the prison population caused by mandatory minimum sentencing laws, and called for “the creation of fair and effective sentencing policies that permit judges to determine appropriate sentences based on the specific circumstances of the crime and the perpetrator’s individual situation.”<sup>49</sup>

The legal community has issued a similar policy recommendation. In 2004, the House of Delegates of the American Bar Association approved a resolution urging all jurisdictions to “repeal mandatory minimum sen-

tence statutes” that “shift discretion from judges to prosecutors who lack the training, incentive, and often appropriate information to properly consider a defendant’s mitigating circumstances at the charging stage of the case.”<sup>50</sup>

This reform movement is united not only in its opposition to mandatory sentencing laws, but also in its support of policy reform that will mitigate the harm such laws inflict by addressing directly the underlying causes of substance abuse.

There are certain key elements in this reform paradigm that should be included in reform legislation enacted by New York law makers:

- Restore judicial discretion, without qualification, in matters relating to sentence;
- Establish a comprehensive alternative-to-incarceration model that includes mental health services, treatment for substance abuse and addiction and education;
- Expand eligibility criteria for diversion to rehabilitation programs based upon well-designed, scientifically validated evaluation and assessment instruments;
- Provide retroactive relief to those who are serving sentences that are unduly harsh; and
- Reinvest in vulnerable communities the savings that are realized from reducing the costs related to incarceration.

Criminal justice and public health experts embraced these principles at a conference held in New York City in January of 2009. The New York Academy of Medicine, which co-sponsored the conference with the Drug Policy Alliance, issued a news release that stated:

*A public health approach emphasizes the need for a coordinated strategy involving multiple sectors. One successful strategy for engaging multiple sectors in transforming drug policies and improving public health is the Four Pillars Model (Prevention, Treatment, Public Safety and Harm Reduction). This model seeks to ensure coordination among various agencies, communities, levels of government, and stakeholders to achieve healthier, safer communities. First implemented in Switzerland and Germany in the 1990s, the Four Pillars Model is now employed in many cities and countries in Europe, North America, Australia and Asia, including Vancouver and Toronto. [This approach] has resulted in a dramatic reduction in the number of drug users consuming drugs on the street, a significant drop in overdose deaths, reduction in crime, and a reduction in the infection rates for HIV and hepatitis.<sup>51</sup>*

### III. THE HARMS

Prison populations in the U.S. have increased eightfold since 1970. Scholars have documented America's dubious distinction as the world's most aggressive warden, with more of its citizens behind bars than any other country.<sup>52</sup>

New York has participated aggressively in this race to incarcerate.

In 1980, the state sent 7,959 individuals to state prison. Nearly three times as many were sent to prison in 1990. And in no year since then has the number of people sent to prison been less than double the number reported in 1980. New York State reports close to 200,000 prison admissions for drug offenses from 1980 to 2007.<sup>53</sup>

Mass incarceration has corrosive effects on society, undermining families, compromising public health and even endangering public safety. The salient feature of this analysis is the disparate racial impact of incarceration policy:

*Prison policy has exacerbated the festering national problem of social and racial inequality. Incarceration rates for blacks and Latinos are now more than six times higher than for whites; 60 percent of America's prison population is either black or Latino. A shocking 8 percent of black men of working age are now behind bars, and 21 percent of those between the ages of 25 and 44 have served a sentence at some point in their lives. At current rates, one-third of all black males, one-sixth of Latino males, and one in 17 white males will go to prison during their lives. Incarceration rates this high are a national tragedy.<sup>54</sup>*

The Rockefeller Drug Laws have been a significant factor in sending large numbers of black and Latino men to prison. In the past decade, approximately 40 percent of prison admissions have been for drug offenses.<sup>55</sup> Since 2003, 9 in 10 of those sent to prison for drug offenses have been people of color.<sup>56</sup> And this pattern and practice of enforcing the drug laws has done enormous harm to the social fabric of the state's most vulnerable communities.

#### Selective prosecution and incarceration based on race and ethnicity

It is well documented that there are gross racial and ethnic disparities in New York State's prison population, particularly among those incarcerated for drug offenses.<sup>57</sup> There is also voluminous evidence demonstrating the causes of these disparities, including selective arrest and prosecution, inadequate legal representation, and the absence of judicial discretion in the sentencing process.

It is not possible to evaluate New York's drug-sentencing laws without analyzing the ways in which race enters into law enforcement and judicial procedures. In considering what reform of the state's drug-sentencing laws would look like, we urge that legislators and policy makers consider the following.

► **The racial disparity in New York's prison population has increased dramatically since the mid-1980s and the advent of the War on Drugs.**

There were 886 people incarcerated for drug offenses in 1980. Of these individuals, 32 percent were

white, 38 percent were black and 29 percent were Latino. In 1992, the year in which the state reported the highest number of commitments for drug offenses, 5 percent of those incarcerated were white, 50 percent were black and 44 percent were Latino.<sup>58</sup>

The demographics of the inmate population serving time for drug offenses in 2000 had changed little from the data reported in 1992. (See table below.) Of the 8,227 new commitments for drug offenses in 2000, whites were 6 percent, 53 percent were black and 40 percent were Latino.<sup>59</sup> The disparities persist. Today 9 of every 10 people incarcerated for drug offenses in New York are black or Latino.<sup>60</sup>

► **The racial and ethnic disparities among the population incarcerated for drug offenses in New York State do not reflect higher rates of offending among blacks and Latinos.**

In a relatively recent government study, a total of 1.8 million adults in New York (about 13 percent of the total adult population) reported using illegal drugs in the preceding year. Of those reported users of illicit drugs, 1.3 million – or 72 percent – were white.<sup>61</sup>

Moreover, research indicates that whites are the principal purveyors of drugs in the state. When the National Institute of Justice surveyed a sample of more than 2,000 recently arrested drug users from several large cities, including New York County (Manhattan), the researchers learned that “respondents were most likely to report using a main source who was of their own racial or ethnic background regardless of the drug considered.”<sup>62</sup>

Upon closer analysis, these findings reveal that indeed many more drug sales occur in white communities than in communities of color, but the transactions that occur in white communities tend to escape detection because they take place behind closed doors in homes and offices.<sup>63</sup>

Criminologist Alfred Blumstein, the nation’s leading expert on racial disparities in criminal sentencing practices, has concluded that with respect to drug offenses, the much higher arrest and conviction rates for blacks are not related to higher levels of criminal offending, but can only be explained by other factors, including racial bias.<sup>64</sup>

► **The over-representation of blacks and Latinos in New York’s prison population is the consequence of unequal treatment at each stage of the criminal justice process.**<sup>65</sup>

**Arrest:** It has been widely documented that the War on Drugs has been waged largely in poor, inner-city communities. Noted sociologist Michael Tonry explains: “The institutional character of urban police departments led to a tactical focus on disadvantaged minority neighborhoods. For a variety of reasons it is easier to make arrests in socially disorganized neighborhoods, as contrasted with urban blue-collar and urban or suburban white-collar neighborhoods.”<sup>66</sup>

New York City’s policing practices demonstrate the routine and widespread practice of racial profiling. According to data recently released by the NYPD, police officers conducted 531,159 stop-and-frisks in 2008. Fifty-one percent of those stop encounters involved blacks, 32 percent involved Latinos, and only 11 percent involved whites.<sup>67</sup> Those percentages bear little relation to the demographic profile of the city’s overall population. But the most salient fact is that 88 percent of the people stopped were found to have engaged in no unlawful activity. The data on police stop-and-frisk activity has varied little since the numbers were made publicly available in 2004.<sup>68</sup>

Racial bias is starkly evident in New York City's marijuana arrest statistics. Although whites use marijuana at least as often as blacks, the per capita arrest rate of blacks for marijuana offenses between 1996 and 2006 was nearly eight times that of whites. During this period there were 353,000 marijuana possession arrests in New York City. Fifty-two percent of those arrested were black and 31 percent were Latino; only 14 percent of the arrestees were white.<sup>69</sup>

**Prosecution:** The plea bargaining process is largely hidden from public scrutiny, and published research on the extent to which race enters into prosecutorial charging decisions is limited. However, a study conducted by the Federal Judicial Center and the U.S. Sentencing Commission found that black defendants are less likely than white defendants to be offered a plea below the mandatory minimum.<sup>70</sup>

But even assuming prosecutors in New York are making completely race-neutral charging and plea-bargaining decisions, there are other factors that place black and Latino defendants in legal jeopardy. Chief among them is unequal access to legal resources. Most people charged with drug crimes are poor and must rely upon the state's public defense system – which is in a state of crisis, according to a recent report by the Commission on the Future of Indigent Defense Services.

The Commission's report concludes that, "Whereas minorities comprise a disproportionate share of indigent defendants and inmates in parts of New York State, minorities disproportionately suffer the consequences of an indigent defense system in crisis, including inadequate resources, sub-standard client contact, unfair prosecutorial policies, and collateral consequences of convictions."<sup>71</sup>

**Sentencing:** By the time a drug case reaches the sentencing stage, the die has been cast. The racial inequities that operate in each phase of the criminal justice system produce a pool of defendants comprised almost exclusively of poor people of color. Ninety-eight percent of those defendants will enter a guilty plea for which the judge will be required to impose the mandatory minimum sentence.<sup>72</sup>

Over the years, many judges have expressed frustration and outrage at the mandatory minimum sentences prescribed by the Rockefeller Drug Laws. The following remarks, spoken from the bench by Judge Florence M. Kelly (Supreme Court, New York County) are not uncommon: "I sentence the defendant with a great deal of reluctance . . . and will state I think it's an inappropriate sentence and an outrageous one for what was done in this case."<sup>73</sup>

Angela J. Davis, a prominent legal scholar, has written about the coercive effect of the law upon a defendant who faces a mandatory sentence if found guilty, and upon his attorney who may recommend accepting a plea that he otherwise would have advised against.

"In cases involving mandatory minimum offenses, the stakes are often too high for a defendant to exercise his constitutional right to trial, regardless of the weakness of the prosecutor's plea offer. Even if he believes he has a good chance of being acquitted because of the weakness of the government's case or the strength of his own defense, the defendant can never be sure of what the verdict of a judge or jury will be. If the judge is permitted to exercise discretion when imposing sentence, the defendant has at least a chance of convincing the judge to show some leniency. However, if the defendant is convicted of one or more offenses, each of which requires a mandatory minimum term of incarceration, he faces a definite, long prison term."<sup>74</sup>

## Ruined lives, damaged families and communities

Over the past 25 years, hundreds of thousands of New Yorkers have been cycled in and out of the prison system for drug convictions. Drug offenders make up approximately 20 percent of New York State's prison population today.

Most of these individuals were identified, upon admission to prison, as drug abusers by the Department of Correctional Services. Close to half had previously spent time in prison.<sup>75</sup> Imprisonment is all but certain to further impair the physical and mental health of these individuals, and to create enormous odds against successful reentry into society.

What's more, the collateral damage of the state's drug laws is catastrophic in scope and effect. New York's drug sentencing scheme has so damaged the state's most vulnerable communities that policy makers' asserted commitment to fairness, justice and equality cannot be taken seriously. This damage has deeply corroded the social and economic networks that are essential to sustain communities.

### ► **Diminished opportunity for economic and life success**

Prisoners and those who have been incarcerated suffer extremely high unemployment rates. In New York, up to 60 percent of formerly incarcerated individuals are unemployed one year after release.<sup>76</sup> It is generally the case that a black man who has been incarcerated earns 10 percent less than he earned before incarceration.<sup>77</sup> And those who have been incarcerated earn between 10 and 30 percent less than similarly situated workers who have not been to prison.<sup>78</sup>

A recent study of 50 men and women who had served at least one year in a New York prison for a non-violent offense found that they had spent, on average, one-third of their lives in prison for small-scale drug offenses.<sup>79</sup> They have, in effect, become disqualified from participation in anything but an underground economy. And when large numbers of adults in a neighborhood face long-term, chronic unemployment, the neighborhood as a whole suffers from the cumulative loss of earning power. In New York State, close to 43,000 people are now on parole. Nearly 80 percent of them are black and Latino, and more than 50 percent are from New York City.<sup>80</sup> These inner-city communities have lost the workforce that is necessary to sustain viable labor market activity.

### ► **Family disintegration**

As of 2002, an estimated 11,000 people incarcerated for drug offenses, including 1,000 women, were parents of young children. Close to 25,000 children in New York State had parents in prison convicted of nonviolent drug charges.<sup>81</sup> Some 50 percent of mothers and fathers in prison for drug convictions did not receive visits from their children.<sup>82</sup> As a consequence of losing a parent to prison, these children and their extended families experience psychological trauma, financial deprivation and physical dislocation.

According to professor Glenn C. Loury, the ramifications of a black man's serving time for a drug offense are direr than these statistics suggest. "While they are locked up, these felons are stigmatized – they are regarded as fit subjects for shaming. Their links to family are disrupted; their opportunities for work are diminished[.] ... They suffer civic ex-communication. Our zeal for social discipline consigns these men to a permanent nether caste. And yet, since these men – whatever their shortcomings – have emotional and sexual and family needs, including the need to be fathers and lovers and husbands, we are creating a situation where the children of this nether caste are likely to join a new generation of untouchables. This cycle will continue so long as incarceration is viewed as the primary path to social hygiene."<sup>83</sup>

### ► Destabilized communities

In 2007, the state locked up nearly as many New Yorkers for drug offenses as were released for similar crimes.<sup>84</sup> Almost all of those released will return to the state’s most economically depressed communities.<sup>85</sup> It is estimated that about 4 in 10 will be rearrested and returned to prison within two years of release.<sup>86</sup> In prison vernacular, this is referred to as “life on the installment plan.”<sup>87</sup> The constant removal and return of people from prison makes neighborhoods less safe. Recent research shows that the “concentration of incarceration” leads to the further destabilization of our most vulnerable neighborhoods.

Columbia University sociologist Jeffrey Fagan and his colleagues have studied the “spatial effects” of high incarceration rates and found that:

[I]ncarceration begets more incarceration, and incarceration also begets more crime, which in turn invites more aggressive enforcement, which then re-supplies incarceration . . . [T]hree mechanisms . . . contribute to and reinforce incarceration in neighborhoods: the declining economic fortunes of former inmates and the effects on neighborhoods where they tend to reside, resource and relationship strains on families of prisoners that weaken the family’s ability to supervise children, and voter disfranchisement that weakens the political economy of neighborhoods.<sup>88</sup>

### ► Loss of political representation

Legislative districts are based on population. In an effort to ensure fair and equal representation in the political process, legislative districts are redrawn every 10 years following the national census. But the census counts prisoners where they are imprisoned, rather than where they lived prior to incarceration.<sup>89</sup> The overwhelming majority of the state’s prisoners come from urban centers, but every prison built since 1982 has been built in rural, upstate counties.<sup>90</sup> Indeed, the population of some upstate towns is composed mostly of prisoners.<sup>91</sup>

Thus, the political representation of mostly white rural districts has been maintained at the expense of mostly black and brown urban voters. In the last legislative redistricting, New York City lost 43,740 residents to the districts of upstate legislators. This arrangement corrupts the legislative process; it gives legislators representing districts with a large prison population enormous incentive to protect the status quo regarding the drug sentencing laws and electoral districting rules.<sup>92</sup>

This inequity is exacerbated by the state’s disfranchisement laws, which mandate that those in prison and on parole lose their right to vote in all elections. There are 43,000 parolees in New York and close to 61,000 people in state prisons.<sup>93</sup> Thus, in any given election, whether state, federal or local, more than 100,000 voters from the state’s poorest neighborhoods are barred from voting.<sup>94</sup>

## Exorbitant waste of tax dollars

Lawmakers must pass sentencing reform – if not in the interest of justice and fairness, then certainly in the interest of fiscal responsibility. A conservative estimate puts New York’s annual expenditures for incarcerating drug offenders at much more than half a billion dollars. Most of these offenders pose no risk to public safety.

The savings that can be realized by diverting drug offenders from prison are significant. The cost of one year's residential treatment is \$30,700; out-patient treatment for a year costs \$13,900.<sup>95</sup> Imprisonment for one year, by comparison, costs \$50,000. The adoption of state policy that promotes treatment and rehabilitation can save taxpayers between 39 and 72 percent of the cost of incarceration.

A report by the Legal Action Center estimates the state would save approximately \$267 million annually if just 60 percent of people charged with a second nonviolent, non-sexual felony offense were diverted from prison to community-based treatment.<sup>96</sup> (The report assumes that closure of some prisons or prison wings would be required to realize the full amount of the projected savings.)

States that have adopted even modest sentencing reform legislation have reported significant, immediate cost savings.

- A recent, comprehensive analysis of reforms adopted pursuant to Proposition 36 showed that California taxpayers saved nearly \$2.50 for every dollar invested in providing nonviolent drug offenders with treatment for substance abuse under the reform law.<sup>9</sup>
- An evaluation of Washington State drug courts showed that for every \$4,300 spent on drug courts, there was an estimated \$9,100 in cost savings.<sup>9</sup>
- By sentencing drug offenders to a nine-month rehabilitation program instead of mandatory prison time, Arkansas realized significant savings – including a \$6 million reduction in jail costs alone.<sup>99</sup>

Research on this issue finds that sentencing reform does not compromise public safety. However these studies also indicate that the nature and scope of the treatment intervention will determine its impact on the outcome both for program participants and public safety.<sup>100</sup>

Beyond savings directly attributable to reduced incarceration costs, there are additional savings related to health care, welfare, foster care, and to increased tax contributions when those charged with drug offenses are diverted to ATI programs. The Legal Action Center's report cites an analysis conducted by the Brooklyn Drug Treatment Alternative Program (DTAP) that estimates the "collateral" savings realized for each individual who successfully completed the program at approximately \$38,085; of that total more than \$5,500 is attributable to savings related to health care and welfare, and to increases in taxes paid.<sup>101</sup>

These findings make clear that the New York State Legislature must adopt a strategy of justice reinvestment. The Council of State Governments has established the Justice Center, which works with a limited number of states to design and implement more effective ways of managing corrections systems and improving the accountability and integration of resources allocated to particular communities. The stated objective is to "reinvest the savings generated from these efforts to make communities receiving the majority of people released from prison safer, stronger and healthier."<sup>102</sup> The model would seem to encompass diverting people from prison in the first instance.

## IV. MAPPING OF INJUSTICE: Buffalo, Rochester, Syracuse, Albany, New York City

Who goes to prison  
Where they lived before imprisonment  
What it costs to lock them up

There are stark racial disparities in the population prosecuted and sentenced for drug offenses in New York State. More than nine of every 10 people imprisoned for a drug offense are black or Latino, but far greater numbers of whites use and sell drugs.

A recent study by the Justice Policy Institute examined the race and ethnicity of people incarcerated for drug offenses in 198 counties with large populations located throughout the United States.<sup>103</sup> The data reveal extreme racial disparities in the population sent to prison in every New York county analyzed. In Erie County, the ratio of admissions for blacks and whites was 30 to one. In Westchester County, the ratio was 37 to one. In Albany, it was 58 to one. In Onondaga County, researchers found the second most severe racial disparity among all counties studied: In Syracuse, 99 blacks are incarcerated for every one white when the predicate offense involves illegal drugs.<sup>104</sup>

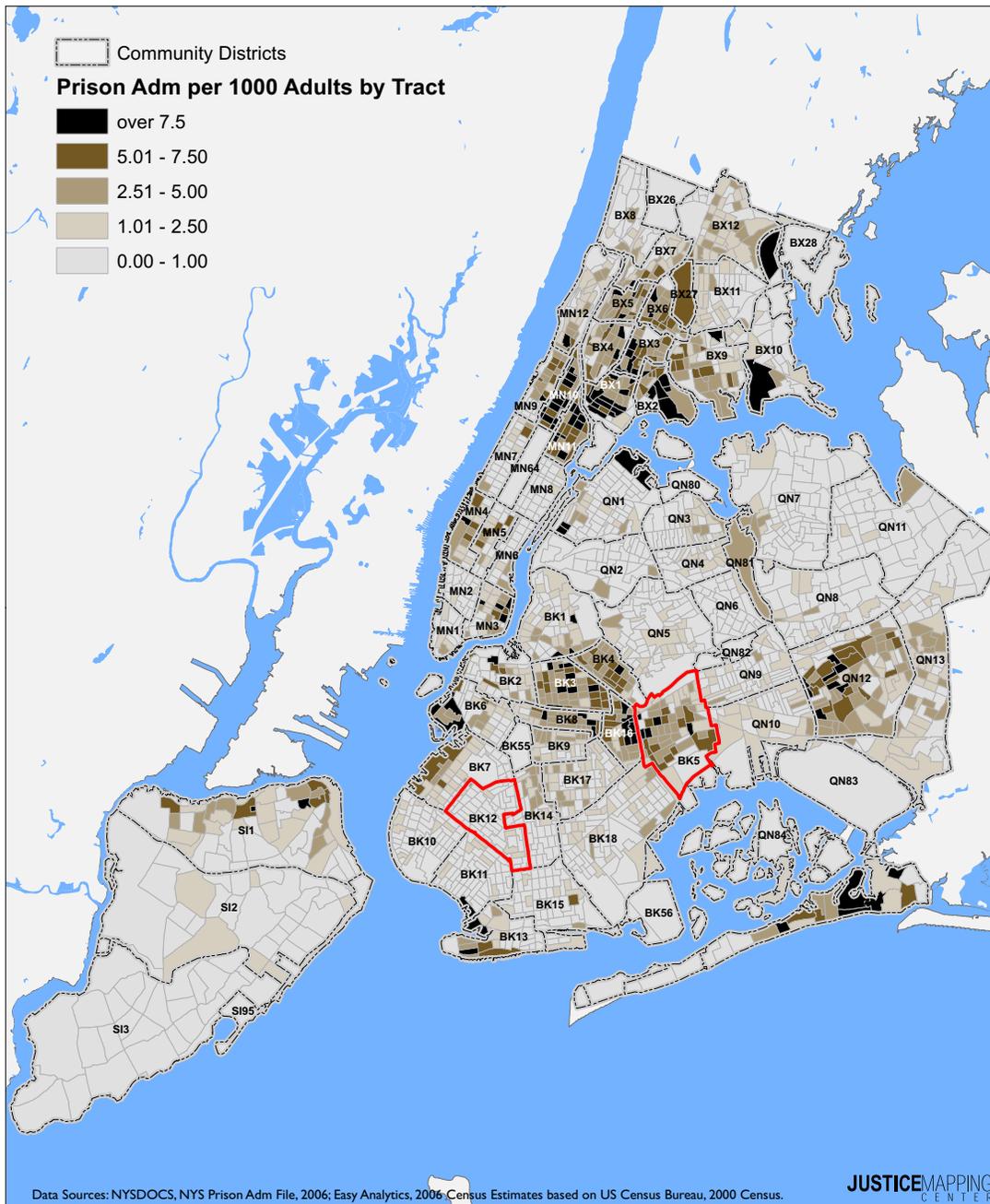
Seventy percent of those who lived in New York City prior to being incarcerated for drug offenses had addresses in seven of the city's poorest black and Latino neighborhoods: the Lower East Side, the South Bronx, Harlem, Brownsville, Bedford-Stuyvesant, East New York and South Jamaica.<sup>105</sup> This phenomenon is not exclusive to New York City. The same pattern, for example, has characterized incarceration patterns in Syracuse, although on a smaller scale. Like New York City, Syracuse has a high level of residential segregation.<sup>106</sup> According to the 2000 census, the city's population was 26.9 percent black. However, 68 percent of drug arrestees that year were black,<sup>107</sup> and most were made in three low-income, overwhelmingly black neighborhoods.

The following maps illustrate those neighborhoods in urban centers around the state from which people are most likely to be sent to prison for a drug offense. The maps also illustrate the exorbitant costs associated with locking those people up.





# Prison Admissions per 1000 Adults New York City, 2006



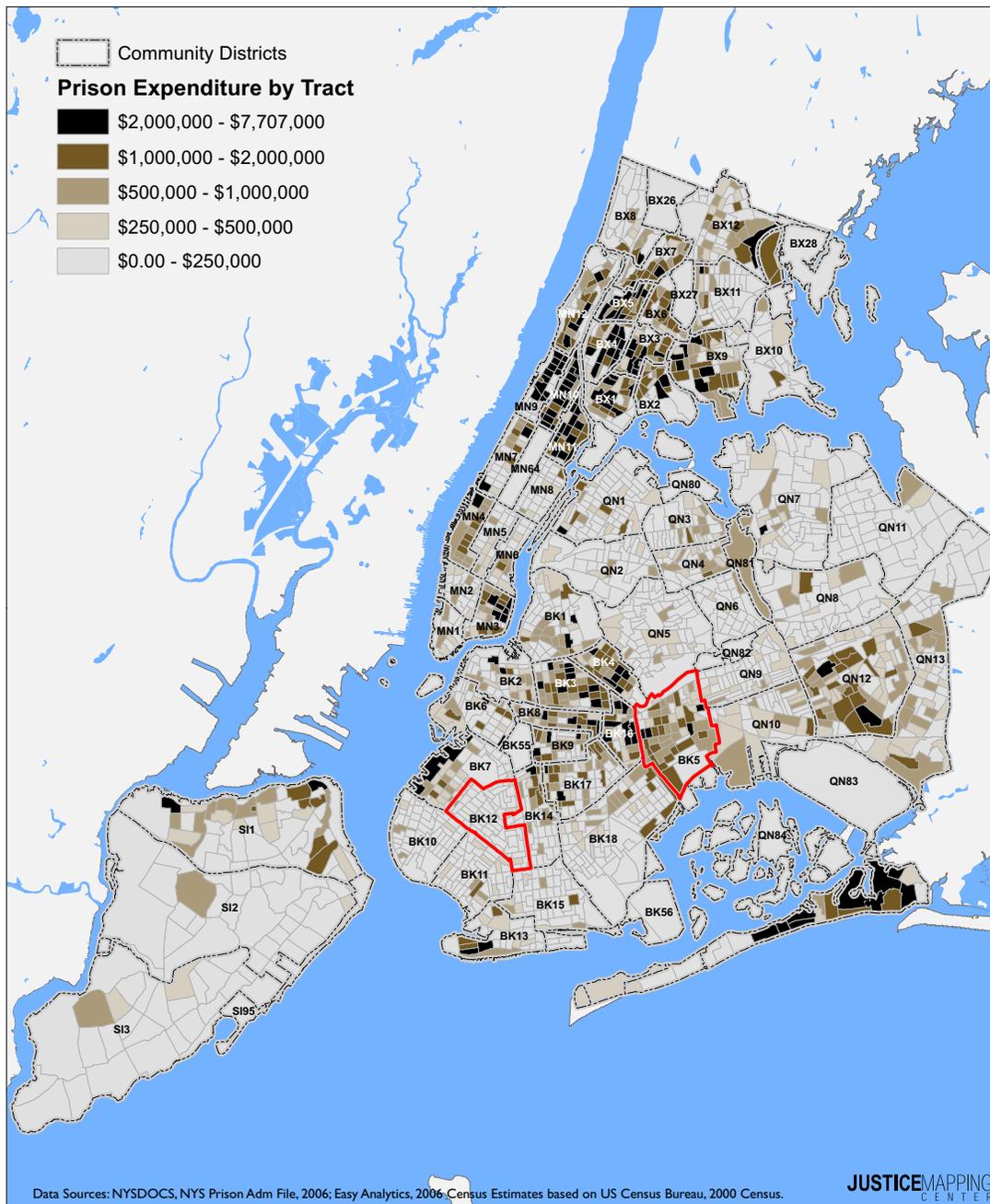
## Who goes to prison for drug offenses in New York City?

Twenty-five percent of NYC adults sent to prison in 2006 came from neighborhoods with just 4 percent of the adult population. More than half were admitted for drug offenses, and 97 percent were black or Latino – even though whites use and sell drugs in far greater numbers than blacks or Latinos (See section III, herein, “The Harms”).

**Community District 5, which includes East New York**, is populated largely by people of color. Just 5 percent of residents are non-Latino white. In 2006, at least 400 residents of the district were incarcerated; 40 percent of those individuals were sent to prison for drug offenses.

**Community District 12, which includes the neighborhoods of Kensington and Borough Park**, is 63 percent non-Latino white. In 2006, just 39 people living in the district were sent to prison. Approximately 25 percent of those individuals – about 10 – were sent to prison for drug offenses.

## Prison Expenditure New York City, 2006

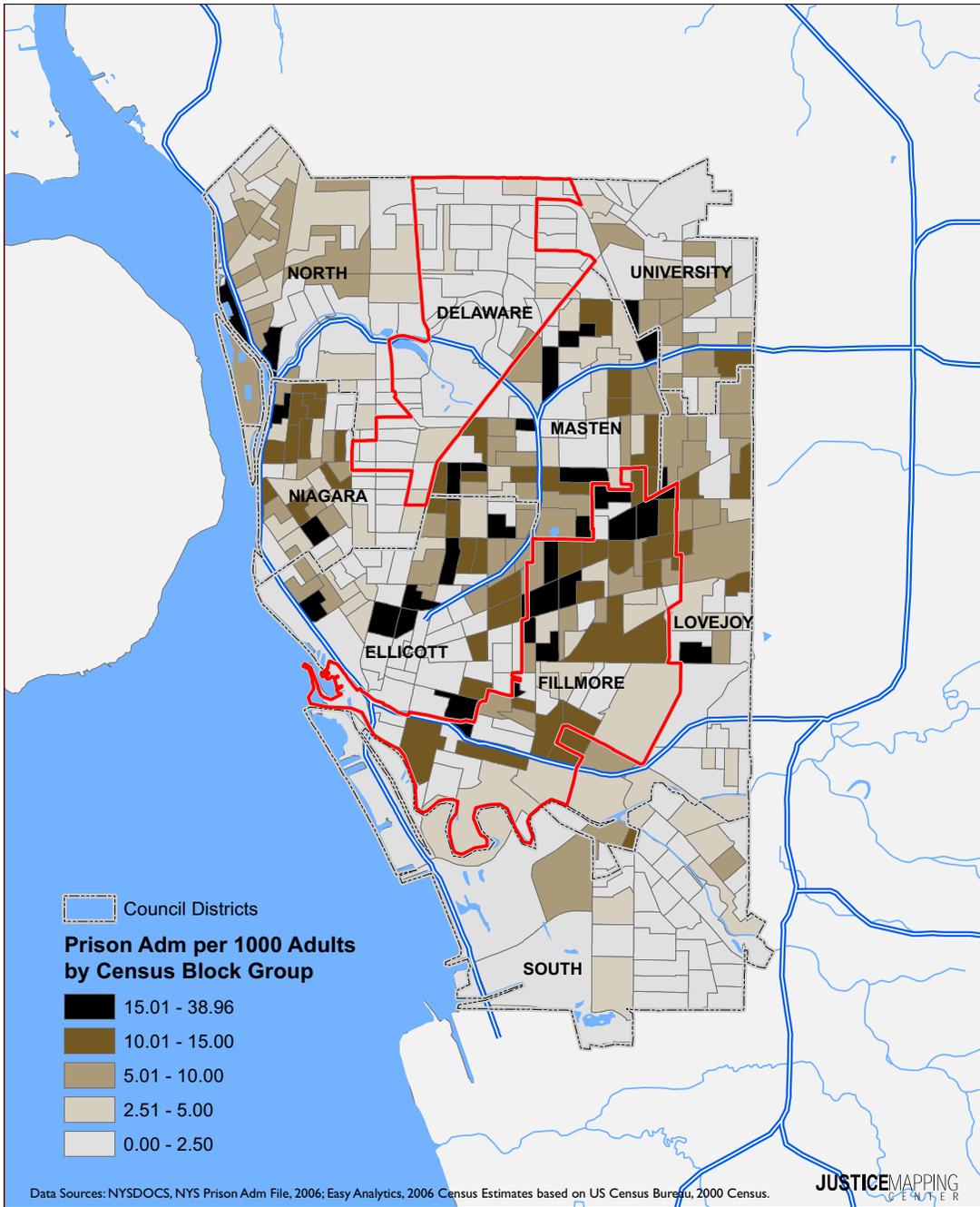


### What it costs to keep them in prison

Taxpayers spent more than \$440 million to incarcerate New York City residents sent to prison in 2006 for drug offenses (based on the minimum sentence served). This expenditure represents more than 35 percent of the cost to incarcerate all city residents sent to prison that year.

It cost approximately \$14 million to incarcerate (for the minimum sentence) persons sent to prison for drug offenses from Community District 5. The cost of incarcerating those sent to prison for drug offenses from Community District 12 was \$600,000.

## Prison Admissions per 1000 Adults Buffalo, 2006



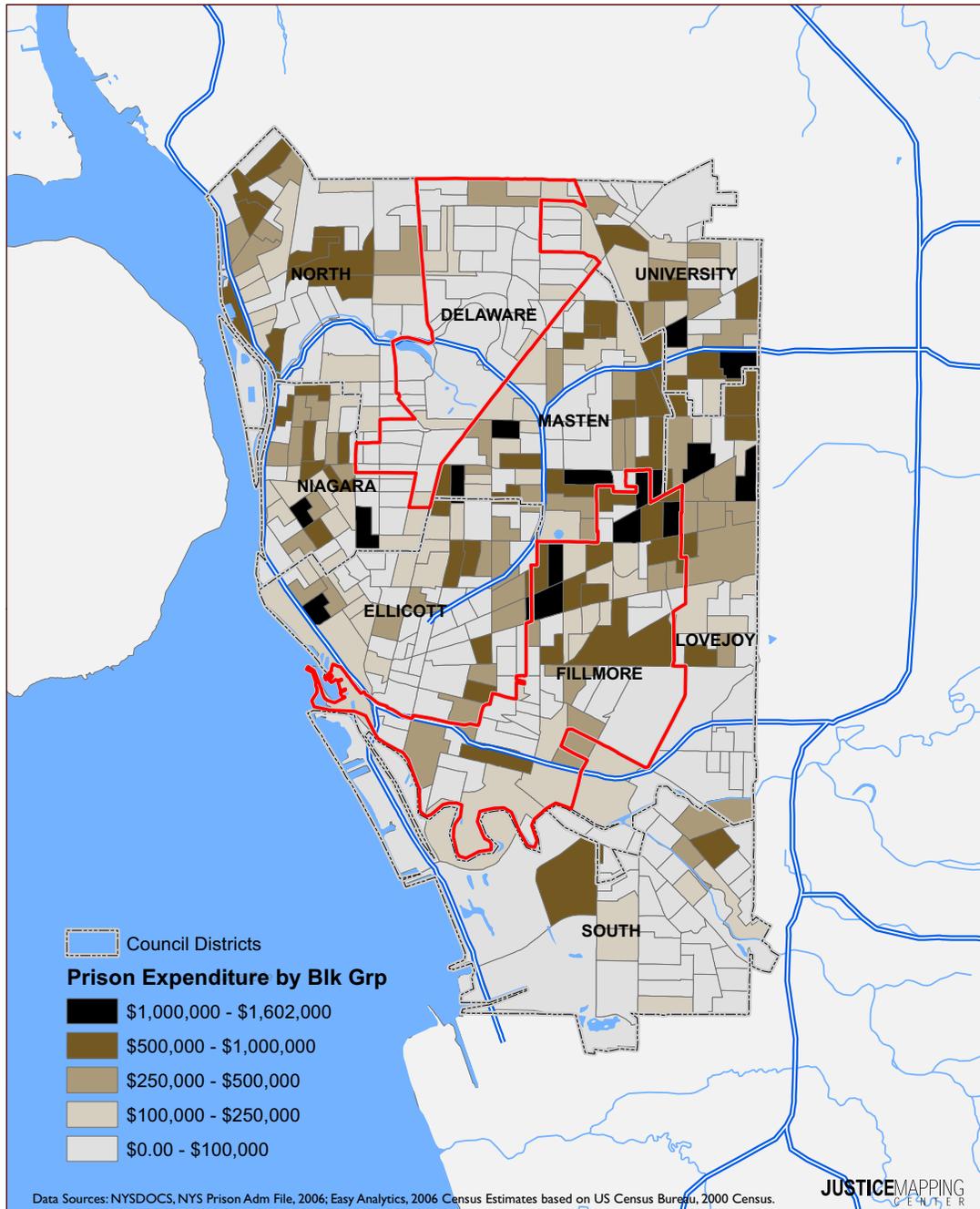
### Who goes to prison for drug offenses in Buffalo?

Twenty-five percent of adults sent to prison from Buffalo come from areas with just 6 percent of the city’s adult population. One in four is admitted for drug offenses and 91 percent are black or Latino (See section III, herein, “The Harms”).

**The Fillmore District** is populated largely by people of color. Only 36 percent of residents are non-Latino white. In 2006, 127 Fillmore residents were incarcerated; 27 percent of those individuals were sent to prison for drug offenses.

**The Delaware District** is 76 percent non-Latino white. In 2006, just 16 Delaware residents were sent to prison. Approximately 31 percent of those individuals – about 5 persons – were sent to prison for drug offenses.

# Prison Expenditure Buffalo, 2006

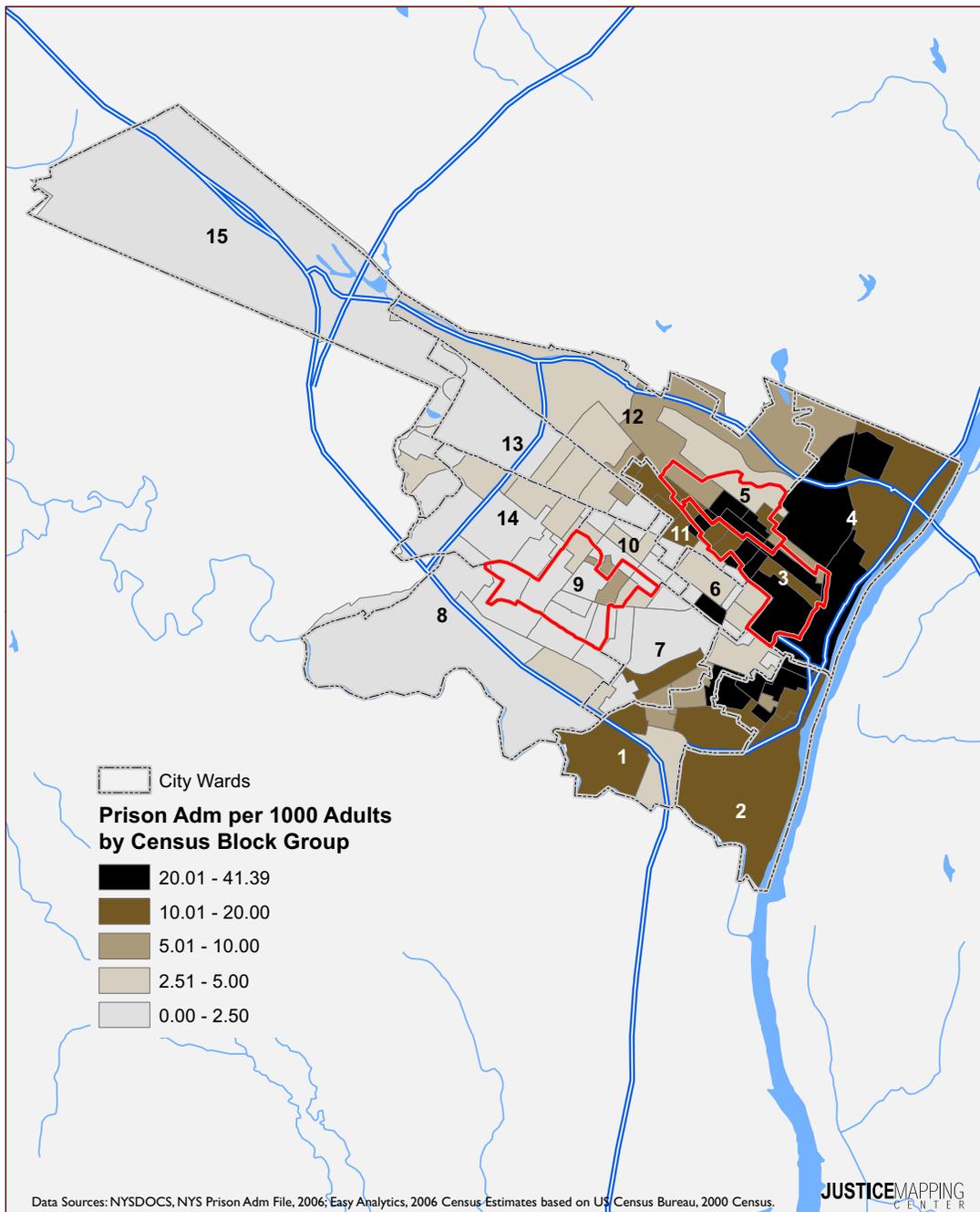


## What it costs to keep them in prison

Taxpayers spent more than \$16 million to imprison Buffalo residents convicted of drug offenses in 2006 (based on the minimum sentence served) – accounting for more than 17 percent of incarceration costs for all Buffalo residents sent to prison that year.

It cost approximately \$3.2 million to incarcerate (for the minimum sentence) people sent to prison for drug offenses from Fillmore. The cost of incarcerating those sent to prison for drug offenses from Delaware was \$880,000.

## Prison Admissions per 1000 Adults Albany, 2006



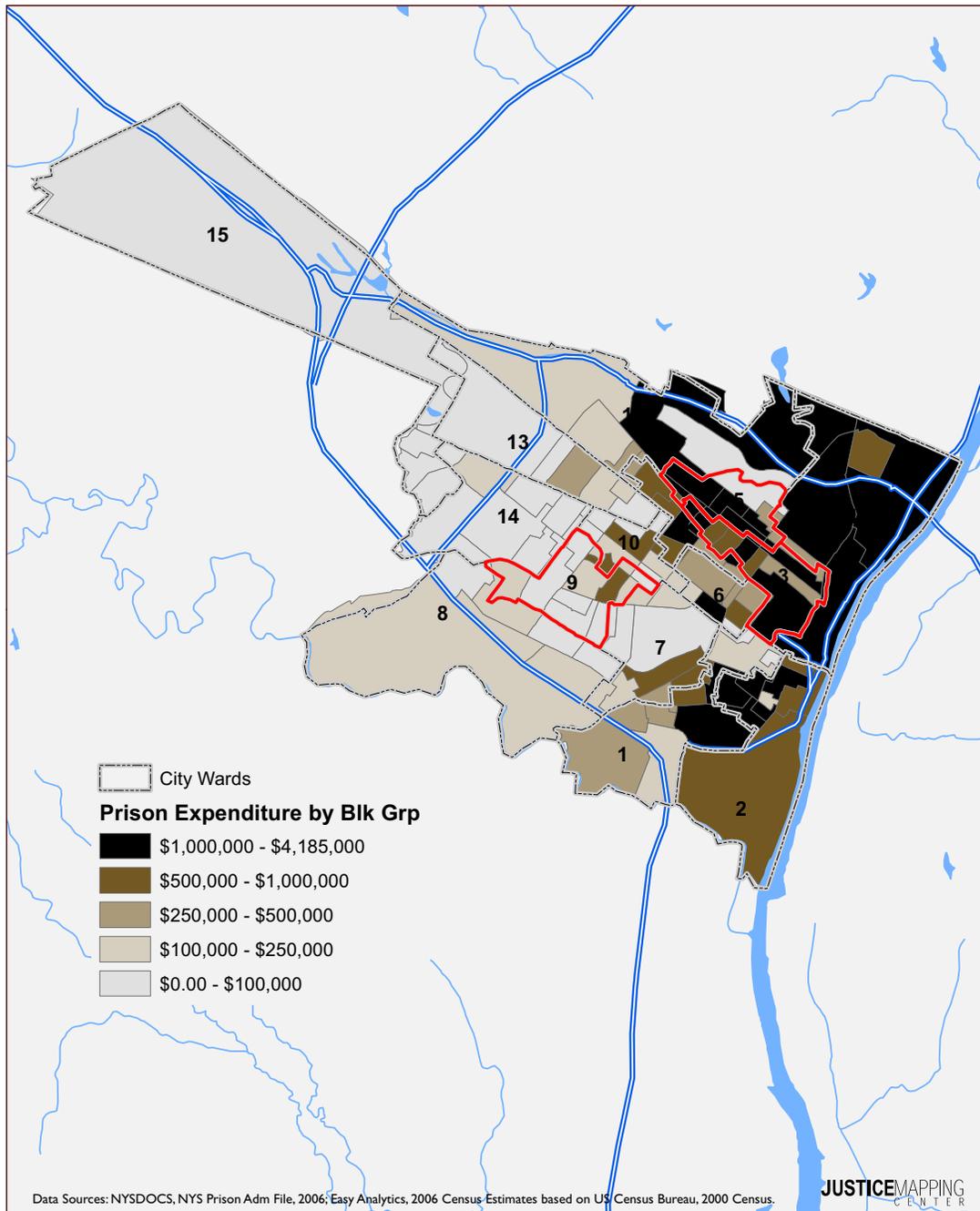
### Who goes to prison for drug offenses in Albany?

Twenty-five percent of adults sent to prison from Albany come from areas with just 6 percent of the city’s adult population. Almost half are admitted for drug offenses and 93 percent are black or Latino (See section III, herein, “The Harms”).

**Wards 3 and 5, which include the neighborhoods of Arbor Hill and West Hill,** are populated largely by people of color. Only 19 percent of residents are non-Latino white. In 2006, 135 residents of these two wards were incarcerated; 52 percent of those individuals were sent to prison for drug offenses.

**Ward 9, which includes the neighborhoods of New Scotland and Pine Hills,** is 79 percent non-Latino white. In 2006, just 8 people living in the ward were sent to prison. Exactly 25 percent of those individuals – just 2 people – were sent to prison for drug offenses.

## Prison Expenditure Albany, 2006

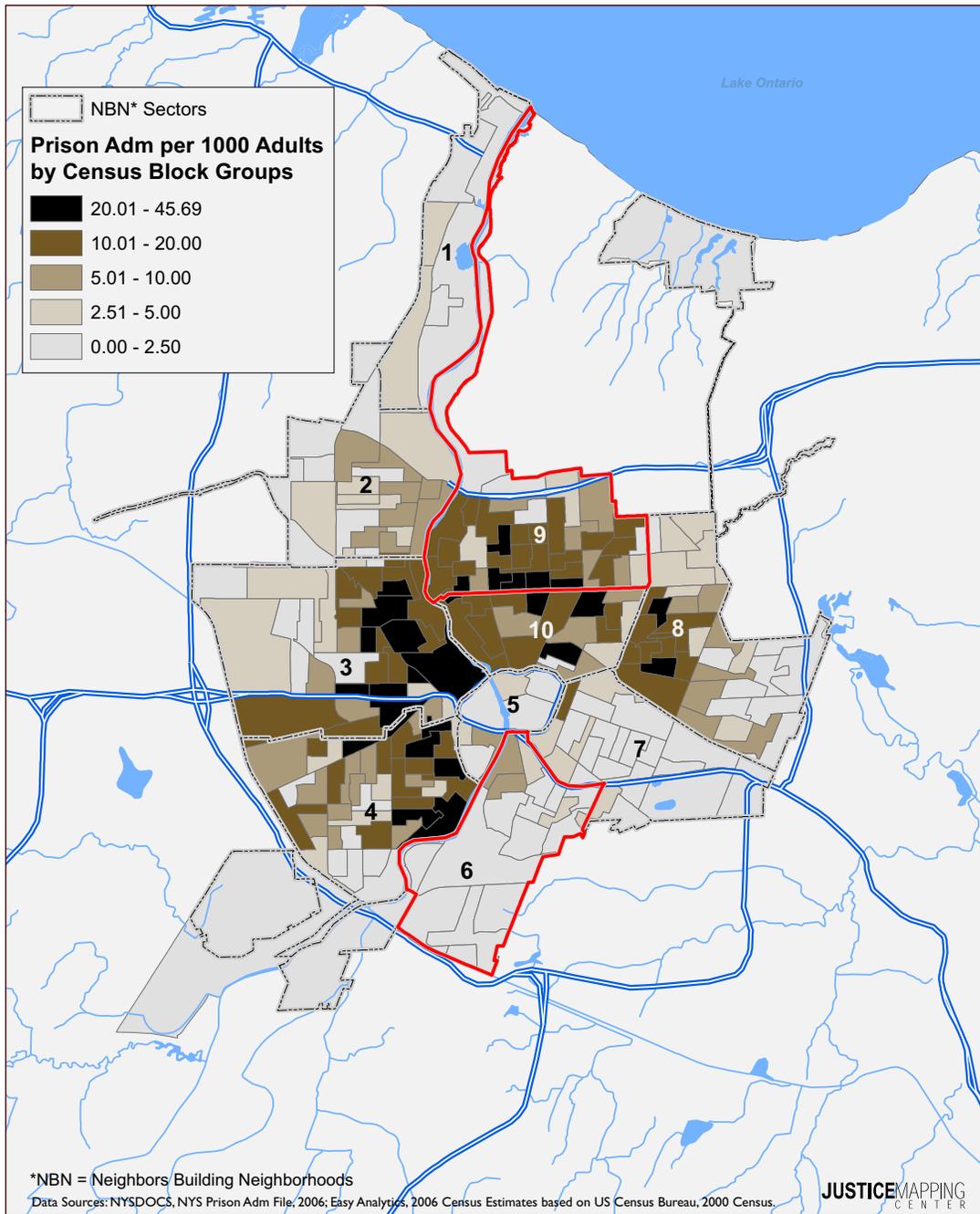


### What it costs to keep them in prison

Taxpayers spent more than \$21 million to imprison Albany residents convicted of drug offenses in 2006 (based on the minimum sentence served) – accounting for 40 percent of incarceration costs for all Albany residents sent to prison that year.

It cost approximately \$6.3 million to incarcerate (for the minimum sentence) people sent to prison for drug offenses from Wards 3 and 5. The cost of incarcerating those sent to prison for drug offenses from Ward 9 was \$160,000.

## Prison Admissions per 1000 Adults Rochester, 2006



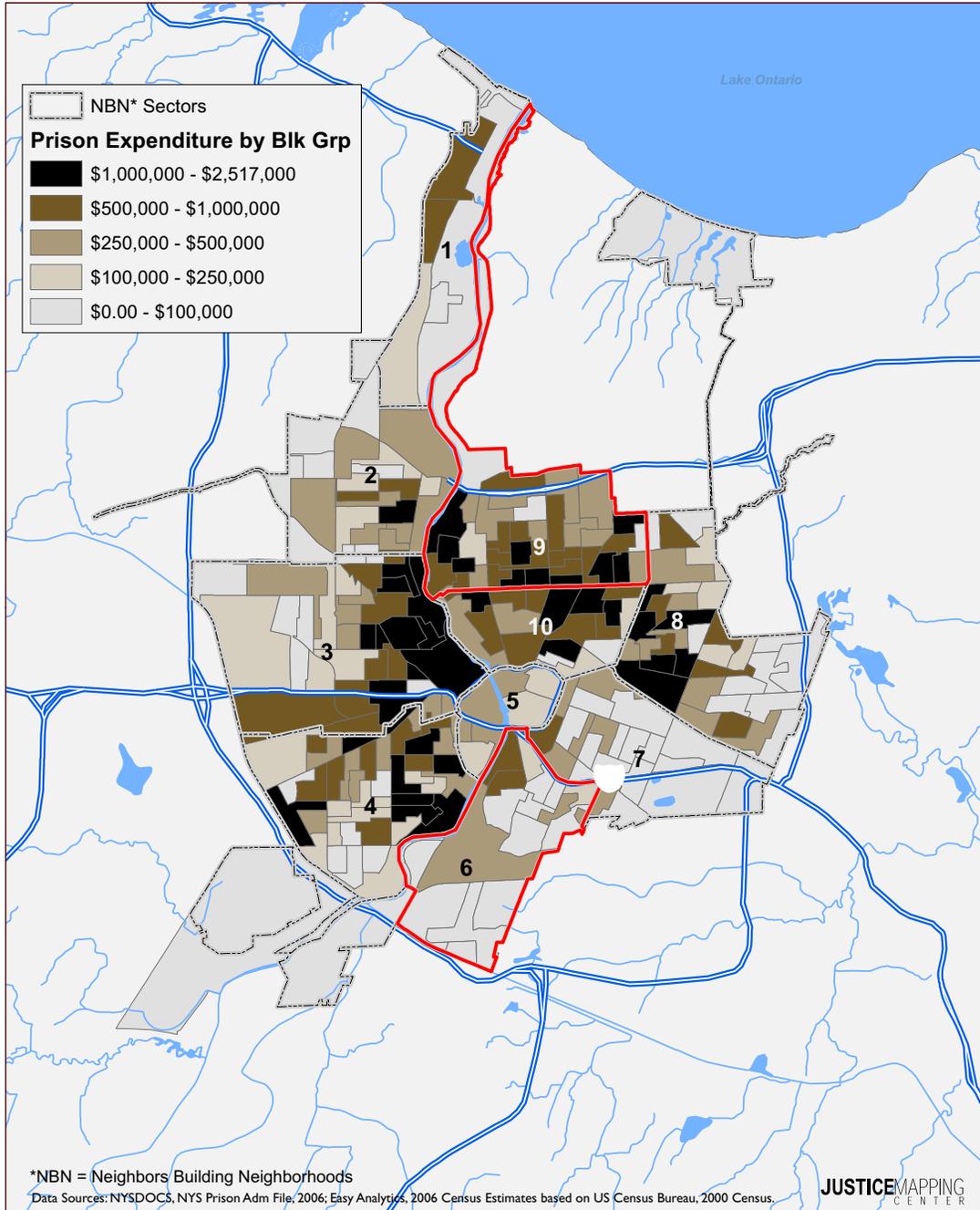
### Who goes to prison for drug offenses in Rochester?

Twenty-five percent of adults sent to prison from Rochester come from areas with just 7 percent of the city’s adult population. Almost one in three is admitted for drug offenses and 92 percent are black or Latino (See section III, herein, “The Harms”).

**NBN Sector 9, which includes the Northeast section of the city,** is populated largely by people of color. Only 24 percent of residents are non-Latino white. In 2006, 204 sector residents were incarcerated; 30 percent of those individuals were sent to prison for drug offenses.

**NBN Sector 6, which includes the neighborhoods of Highland and South Wedge,** is 65 percent non-Latino white. In 2006, just 19 people living in the sector were sent to prison. Approximately 16 percent of those individuals – just 3 people – were sent to prison for drug offenses.

## Prison Expenditure Rochester, 2006

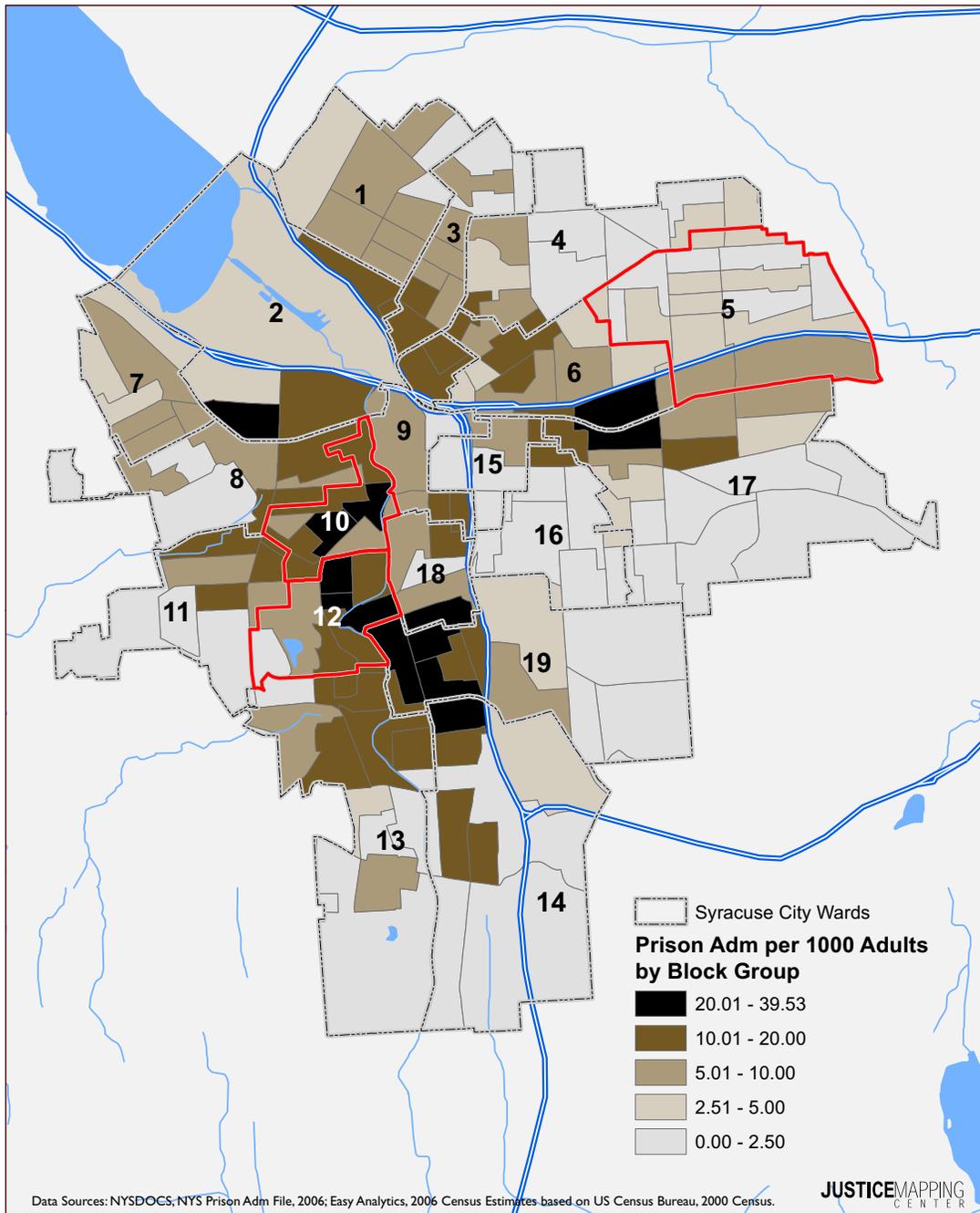


### What it costs to keep them in prison

Taxpayers spent more than \$27.5 million to imprison Rochester residents convicted of drug offenses in 2006 (based on the minimum sentence served) – accounting for over 22 percent of incarceration costs for all Rochester residents sent to prison that year.

It cost approximately \$6.5 million to incarcerate (for the minimum sentence) people sent to prison for drug offenses from NBN Sector 9. The cost of incarcerating those sent to prison for drug offenses from NBN Sector 6 was \$400,000.

## Prison Admissions per 1000 Adults Syracuse, 2006



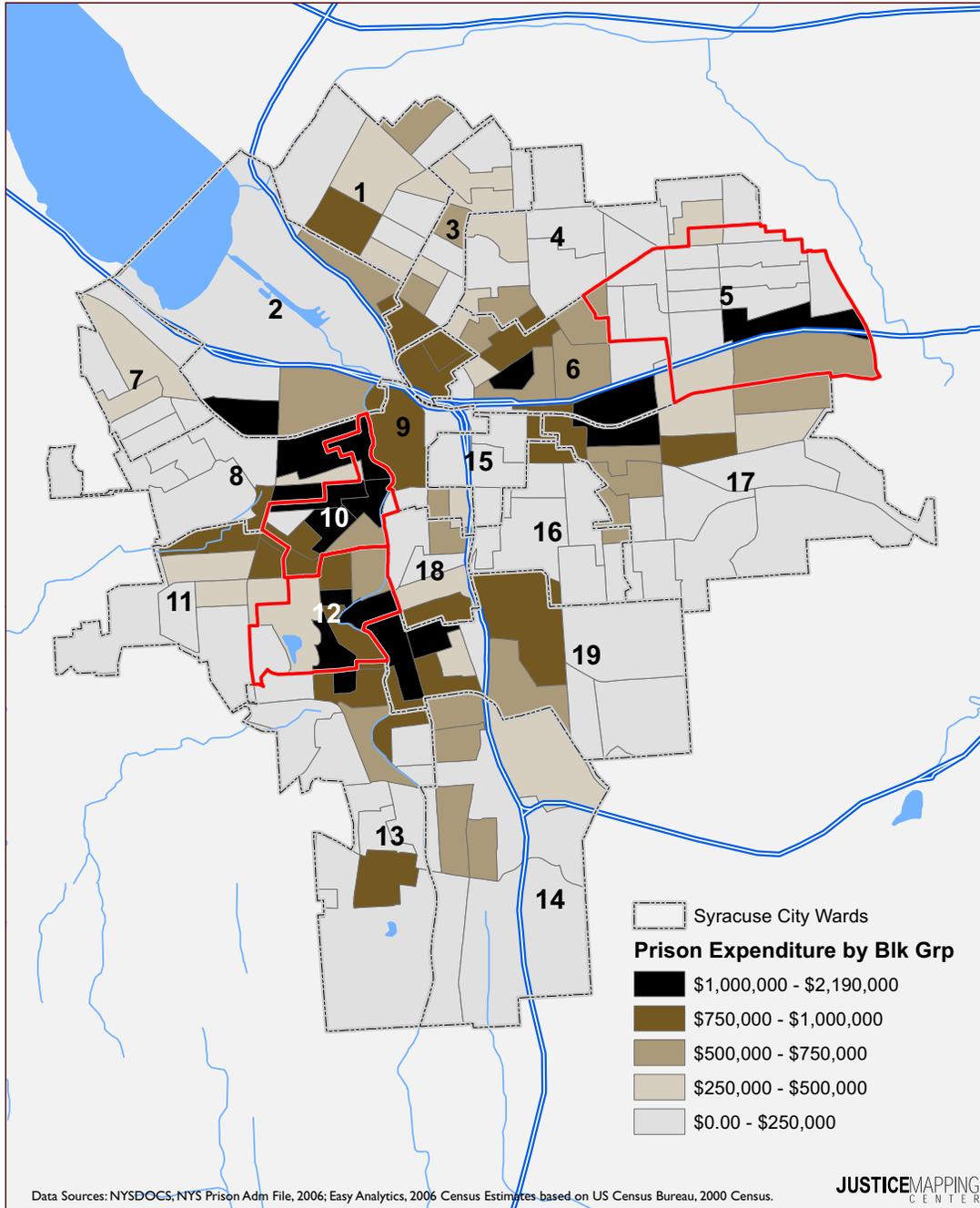
### Who goes to prison for drug offenses in Syracuse?

Twenty-five percent of adults sent to prison from Syracuse come from areas with just 6 percent of the city’s adult population. One in three is admitted for drug offenses and 93 percent are black or Latino (See section III, herein, “The Harms”).

**Wards 10 and 12, the Westside neighborhood,** are populated largely by people of color. Only 35 percent of residents are non-Latino white. In 2006, 99 residents of both wards were incarcerated; 31 percent of those individuals were sent to prison for drug offenses.

**Ward 5, the Eastwood neighborhood,** is 82 percent non-Latino white. In 2006, just 20 people living in the ward were sent to prison. Approximately 15 percent of those individuals – just 3 people – were sent to prison for drug offenses.

## Prison Expenditure Syracuse, 2006



### What it costs to keep them in prison

Taxpayers spent nearly \$16 million to imprison Syracuse residents convicted of drug offenses in 2006 (based on the minimum sentence served) – accounting for over 25 percent of incarceration costs for all Syracuse residents sent to prison that year.

It cost approximately \$3.14 million to incarcerate (for the minimum sentence) people sent to prison for drug offenses from Wards 10 and 12. The cost of incarcerating those sent to prison for drug offenses from Ward 5 was \$250,000.

## V. PARADIGM SHIFT

The Rockefeller Drug Laws have failed by every measure – cost to the state, impact on recidivism, successful rehabilitation of offenders, public safety, racial justice and basic fairness – a fact that is now acknowledged by those in the highest levels of state government.<sup>108</sup>

Today, nearly 40 years into the War on Drugs, it is beyond dispute that the imposition of punitive criminal sanctions is the wrong paradigm for dealing with the problems related to illicit drug use.

A new and more effective model is required, one that is already in an advanced stage of development and implementation in Canada. It is based upon a broadly conceived understanding of what society can do to promote public health and public safety. This public health model:

*focuses on health promotion, prevention of disease or injury, and reducing disability and premature mortality. It also incorporates individual and societal health protection measures through protecting and promoting physical environments and social policy frameworks that maximize health and minimize individual and community harms. [This approach is also ] attentive to the unintended effect of control policies, to ensure that other harms are not created out of proportion to those harms from the substance use itself.<sup>109</sup>*

The principles on which this model is based inform the design of the most effective ATI models used throughout the United States. The benefits of this paradigm shift can be seen in measures of public safety and cost savings.

■ One of the first major reforms in the nation was adopted by **California** voters in a statewide ballot initiative in 2000, commonly referred to as Proposition 36.<sup>110</sup> Adults convicted of nonviolent, drug-related offenses and otherwise eligible for diversion are now required to be sentenced to probation with drug treatment instead of either probation without treatment or incarceration. Those on probation or parole who commit nonviolent, drug-related offenses or who violate drug-related conditions of their release are also eligible to receive treatment under the law.<sup>111</sup>

A recent, comprehensive analysis of Proposition 36 reforms showed that California taxpayers saved nearly \$2.50 for every dollar invested in providing nonviolent drug offenders with treatment for substance abuse under the reform law. The reinvestment resulted in savings of more than \$170 million – nearly \$4 for every dollar expended – over a two-and-a-half-year period.<sup>112</sup>

■ In 2002, **Washington** legislators voted to amend their state’s sentencing guidelines to give judges more discretion to divert nonviolent drug offenders from prison to treatment, and to reduce prison sentences for drug trafficking. When he signed the reforms into law, the state’s governor explained that it would support existing drug rehabilitation efforts by reducing prison time for first-time heroin and cocaine offenders and transfer the savings realized by the state on incarceration costs to treatment.<sup>113</sup> An evaluation of Washington State drug courts showed that for every \$4,300 spent on drug court, there was a corresponding 8 percent reduction in crime and an estimated \$9,100 in cost savings.<sup>114</sup>

■ Reform in **North Carolina** was prompted by the state’s budget crisis. Officials in that state noted

both prison overcrowding and a “revolving door” phenomenon with drug offenders who, once released, were almost immediately being rearrested for drug crimes. The legislature set up a new sentencing grid that reduced maximum sentences for drug offenders; notwithstanding the financial crisis, the legislature funded counties to support or establish community-based programs for offenders.

The new law produced measurable enhancements to public safety: Recidivism rates decreased by 10 percent for those who were given intermediate probation, and an additional 10 percent for those given probation.<sup>115</sup> Non-trafficking drug offenses in North Carolina are now the offenses least likely to result in incarceration.<sup>11</sup>

■ In **Arkansas**, the state turned to modified therapeutic communities as an alternative to incarceration, and saw recidivism rates drop by 10 percent. By sentencing people to a nine-month rehabilitation program instead of mandatory prison time, the state realized significant savings – including a \$6 million reduction in jail costs.

The investment needed to jump-start reform was substantial, but so were the dividends: The state invested \$9 million to create one center, recognizing that an expenditure of \$46 million would have been required to incarcerate those offenders referred to the treatment program.<sup>117</sup>

## Accelerate the paradigm shift in New York

New York law mandates prison time for drug offenses. However, in counties across the state, defendants facing drug charges are diverted to treatment and rehabilitation programs – at the discretion of the prosecutor.

The state’s mandatory sentencing scheme, however, inhibits officials from introducing more progressive and effective strategies for responding to problems related to substance abuse. Chafing under this constraint, Syracuse City Auditor Minchin Lewis issued a report in 2005 recommending that the police de-emphasize drug-related arrests and focus on “harm reduction and prevention efforts rather than absolute prohibition.”<sup>118</sup> His report found that 22 percent of all arrests were for drug-related incidents, including 2,000 people charged with possession or sale of marijuana. These arrests were concentrated in six poor, primarily black neighborhoods.<sup>119</sup>

And even if state law were not sufficient to stall reform, there is still the district attorney. The prosecutor alone determines a defendant’s eligibility for diversion. In this matter, the prosecutor’s judgment is the rule of law.

As a consequence, there is neither uniformity nor consistency as to the criteria for determining eligibility for diversion from prison. There are no best-practice standards regarding the design or operation of ATI programs, and no rigorous, independent procedures for assessing quality control or analyzing outcomes. Perhaps most important, there is no appeal when the prosecutor determines a defendant is ineligible for treatment or rehabilitation.

The state’s ad hoc approach to prison alternatives has been limited both in design and scope. In most areas of the state outside New York City, the more comprehensive, community-based treatment and rehabilitation programs are not available. What’s more, many who could benefit from diversion are deemed ineligible for any type of treatment or rehabilitation program. Others may be found ineligible for diversion because they do not have a substance abuse problem; and still others may be precluded from treatment as an alternative to incarceration precisely because of their history of addiction.<sup>120</sup>

And there are other barriers that deter individuals from entering a rehabilitation program, even if eligible and motivated. These individuals have learned they could face imprisonment for a relatively minor violation of program rules, and the sentence imposed as a result of the violation is likely to be longer than the sentence that could have been negotiated through a plea agreement.<sup>121</sup>

Nevertheless, New York's existing ATI model provides the infrastructure upon which a more robust and better-designed reform program can be built. Lawmakers can improve drug law reform legislation by analyzing the strengths and weaknesses of the three most widely used ATI models.

**Drug courts:** New York introduced special courts for the adjudication of low-level drug offenses in 1995, and today there are drug courts in many counties.<sup>122</sup> The administration of these courts varies greatly, but typically an arrestee is assigned to residential or out-patient treatment once a clinical assessment is made.<sup>123</sup> Progress is monitored by a "drug court team" composed of the judge, the defense and prosecuting attorneys, and program staff. Graduation is contingent upon a participant's completing drug treatment, remaining drug free and demonstrating self-sufficiency through education, job training or employment.

In most counties criminal charges are dismissed once a participant has graduated from drug court. In some counties the charges are reduced to a misdemeanor. The penalty for failure is incarceration. In 2003, the Center for Court Innovation (CCI) released a 350-page evaluation of New York State's drug courts. Based on an analysis of 11 of the state's oldest and largest programs, CCI found that graduates were 32 percent less likely to be re-arrested in the year following completion than those who did not participate in the program.<sup>124</sup> Those who successfully completed treatment were also significantly more likely to be employed or in school when graduating from the program than they were when starting it. It is estimated that from 1995 through November 2003, drug courts saved the state in excess of \$254 million.<sup>125</sup>

Some facing drug charges have benefited from drug courts. But significant numbers of people who need treatment are ineligible for drug court because they present complex problems and criminal histories. This practice of cherry-picking participants skews the success rate and inhibits a critical analysis of "failure," which is needed to develop a more effective treatment protocol. Moreover, a participant who is unable to handle the rigors of the program – perhaps because it fails to meet the participant's needs – is likely to face a harsher sentence than he would have had he not participated at all. Failure compels a sentence based on his original guilty plea, a condition for participation in drug court. That individual may well have spent less time in prison had he opted out of drug court.<sup>126</sup>

It is argued that carefully screening people for participation in drug court is appropriate; but there is little question this approach *disqualifies* the very individuals who could benefit most from treatment and rehabilitation.

**Prosecutor-run programs:** In 1990, District Attorney Charles Hynes created the Kings County Drug Treatment Alternative-to-Prison (DTAP) program.<sup>127</sup> The DTAP model requires a prosecutor to make the initial determination that a person is eligible for diversion. After initial screening, a professional assessment is completed to determine treatment needs and to match defendants with appropriate treatment facilities.

Upon acceptance into DTAP, a defendant is required to plead guilty to a felony charge, but the criminal sentence is deferred<sup>128</sup> while the participant undergoes 15-24 months of residential drug treatment fol-

lowed by after-care, such as GED preparation or vocational training. Those who graduate return to court to withdraw their guilty plea; the charges are then dismissed. In Brooklyn, nearly 7,000 people charged with nonviolent felonies have been screened for eligibility for DTAP. However, only 15 percent of those offenders (1,066) were able to complete treatment and realize the benefit of deferred sentencing.<sup>129</sup>

As of 2003, 16 district attorney's offices outside New York City operate a diversion program modeled on DTAP known as STEPS – Structured Treatment to Enhance Public Safety. The state has allocated \$4.5 million to operate these programs.<sup>130</sup>

The DTAP program has been roundly criticized; like drug courts, participation is highly selective. And those for whom the therapeutic community model is not appropriate face harsher sentences than they would have had they either gone to trial or pleaded to a lesser sentence. Nonetheless, studies have shown that diverting people to treatment through DTAP (1) does not compromise public safety;<sup>131</sup> (2) reduces re-offense among its participants;<sup>132</sup> (3) increases employment rates;<sup>133</sup> and (4) results in significant cost savings. Based only on its 1,066 graduates over the past 17 years, the Brooklyn district attorney's office estimates its DTAP program has saved nearly \$42.5 million – the expenditure that would have been required to incarcerate its graduates during this period.<sup>134</sup>

**Community-based Alternative to Incarceration programs:** New York has the oldest and largest network of community-based ATI programs in the country.<sup>135</sup> The vast majority of these programs are concentrated in New York City, which created the nation's first pre-trial diversion project in 1967.<sup>136</sup> New York State's Classification/Alternatives to Incarceration Act of 1984 established the first dedicated funding stream for this experiment. The level of funding has not increased to scale over the years, but this funding authorization continues to support the state's ATI system to this day.

Some community-based programs – such as the Fortune Society, the Center for Community Alternatives and the Center for Alternative Sentencing and Employment Services – have been an adjunct to the state's criminal justice system for decades. The Women's Prison Association is more than a century old. These “community corrections” programs divert and supervise people who would otherwise be sentenced to state prison. They not only provide drug treatment to participants, but also offer mental health services, education, and employment training and placement. These programs allow people to remain with their families, participate in the workforce, further their education and remain active in their communities.

ATI programs in New York City serve more than 3,000 people<sup>137</sup> each year at a cost of \$12.5 million<sup>138</sup> – a fraction of the more than \$75 million it would have cost to incarcerate just those who were charged with felony offenses (1,500 people at \$50,000/year).<sup>139</sup>

In 2002, the Vera Institute of Justice completed a comprehensive four-year evaluation of New York City's ATI programs – 78 percent of whose participants are charged with drug offenses – and concluded that they do not compromise public safety, and that they have the potential to reduce the incidence of recidivism. The report concluded that the city's ATI system “represents a valuable sentencing option[.]”<sup>140</sup>

The criticisms advanced in the foregoing discussion of New York's ATI programs are consistent with a broader critique that finds government-operated treatment programs, notwithstanding the cost savings, have *no impact* on recidivism.<sup>141</sup> The authors of this critique also argue that treatment and rehabilitation programs “tend to be most effective when they are disassociated from government coercion.”<sup>142</sup>

Even this analysis, however, acknowledges that the quality of a treatment program – as indicated, for example, by scope of services and staff competence – can affect the rate of successful outcomes. And it is these qualitative factors, regarding both program design and eligibility for participation, that need far greater attention by New York policy makers. One noted expert has observed that we must “treat the treatment system” before massive investment in new programs.<sup>143</sup> In other words, to achieve the optimum outcomes for the people who enter a rehabilitation program, it is necessary to develop evidence-based models.<sup>144</sup>

The director of the National Institute on Drug Abuse suggests what a best-practice model might look like. In an op-ed published in 2006, she wrote that innovative treatment models for a “criminal justice” population require “customized strategies that include cognitive behavioral therapy, medication, and consideration of other mental and physical illnesses. Continuity of care after reentry into the community is also essential.”<sup>145</sup>

There is no question that New York must change course from its failed policy of massive incarceration to a policy that diverts individuals into programs that promote and facilitate life success. Implementation of this policy, however, will require 1) less frequent use of imprisonment as a sanction and 2) the investment of the dollars that would have been spent on prisons into institutions and services that promote safe and stable communities.

*[W]e have squandered lean government budgets on corrections (responding to the symptom) instead of funding programs that shepherd dislocated young people onto conventional paths (responding to the cause). While we build prisons, we do not increase funding for academic and technical education, job training, health-care, affordable housing, or other social services that assist people in getting a foot in the door to a better life. . . .*

*What makes a place safe are social and economic factors that deliver a high quality of life as measured by good education, strong families, informal social controls, viable networks, and opportunities for stable, meaningful and well-paid work.<sup>146</sup>*

## Prison as a last resort

Imprisonment for drug-related crimes should be the last resort. Joan Petersilia, the highly regarded director of the Criminal Justice Program at RAND, has argued:

*[P]olicymakers need to understand that it is not one or the other: build prisons or support community corrections. We need strong systems of each. We need to create enough prison space to house the truly violent and those with no desire to change their criminal behavior and, at the same time, we need to invest heavily in helping offenders who are not yet steeped in criminal behavior and wish to chart a different path. Sending someone to prison should be a last resort – it is expensive, it is stigmatizing, and it can increase risk of future criminal behavior. Moreover, it impacts not only the person incarcerated but also his or her family and children. Investing in quality community corrections programs is, in my view, just good public policy.<sup>147</sup>*

Public policy in New York State is hostile to this principle. While it is true that the state's incarcerated population has diminished in recent years, there are still far too many people serving drug sentences, and far too many of those released return to their communities damaged by incarceration rather than empowered with new skills and tools to help them lead lives free of crime.

Experts in criminal justice and public health acknowledge that the state's drug policy remains tethered to a discredited and failed incarceration model, which is based upon a misapprehension of the causes of illicit drug use and the related social and public safety problems.

But Governor Paterson has articulated the need for a new model. He has made it a public policy priority. Now is the moment for New York's legislature to join its governor in adopting a public health model to address the problems related to substance abuse. Doing so will not only save taxpayers money, it will move the state toward more fair and effective strategies for promoting justice and public safety.

## VI. MOVING TOWARDS A PUBLIC HEALTH MODEL: RECOMMENDATIONS

In implementing a public health approach, New York policy makers must recognize that, as we endorse treatment as an alternative to incarceration, traditional substance abuse programs alone will not be sufficient to meet the needs of many people who are appropriate for diversion.

Those whose drug-related crimes are borne of poverty, mental illness, lack of education and other disabilities will need alternatives that may require services other than substance abuse treatment. There is no shortage of rehabilitation models, but reform legislation must allow judges to make decisions about the appropriateness of diversion for those who are not addicted.

The following recommendations are based upon best practices developed by experts in law and policy, and in treatment and rehabilitation. The NYCLU urges legislators and policy makers to consider these recommendations as they develop a new public health model for responding to substance abuse.

### ► Reduce sentences for drug offenses

As with the prohibition of alcohol, the prohibition of drugs “has led to violence as dealers have sought to eliminate rivals in the lucrative market. [And] [l]ike Prohibition, it has resulted in the distribution of adulterated drugs that have injured and killed users. The high profits of drug dealing are largely the consequence of legislation that eliminates competition from anyone unwilling to risk draconian penalties.”<sup>148</sup>

A rational and common-sense response to the social ills related to substance abuse requires far greater attention to medical and public health issues. Reduction in harsh, punitive criminal sanctions is consistent with this approach to public policy. We urge the legislature to adjust downward the sentences for drug offenses, and to expand the class of probation-eligible offenses. In 2004, then-Senate Minority Leader David Paterson issued a report that proposed a new sentencing grid that proposed significantly reduced determinate sentences. We recommend this model to the legislature.<sup>149</sup>

### ► Restore judicial discretion

Judges should have the authority to divert a defendant charged with a drug offense into an ATI program. Mandatory sentences should be eliminated and judicial discretion in sentencing drug defendants restored.

With the enactment of the Rockefeller Drug Laws, the state of New York elected to subvert judicial fairness – and to subvert the constitutional right to a fair trial, to a zealous defense and, if found guilty, to a sentence that is commensurate to the wrong committed.

This subversion of the judicial process is a consequence of the harsh mandatory sentencing scheme that relegates the judge to the role of bystander in the courtroom. The charge predetermines the sentencing outcome, forcing defendants to accept guilty pleas in order to avoid being sentenced to lengthy prison terms. In this arrangement, the prosecutor follows no guidelines or standards. She has no obligation to consider mitigating factors. She is not required to justify her decisions, nor are those decisions reviewable on appeal. This is an inherently unfair arrangement.

► **Establish a legal presumption that eligible defendants may be diverted to an ATI program**

There should be a legal presumption that those charged with drug offenses are eligible for ATI diversion if the following criteria are met: (a) justice would be served; (b) public safety would not be compromised; and (c) such diversion would be effective. In determining whether or not an individual defendant meets these criteria, a judge should be authorized to order a risk-and-needs assessment from a qualified professional at any point in the adjudication of a case after the defendant has obtained counsel. The principle of prison as a last resort is a fundamental tenet of justice; it should be a matter of state policy.

► **Develop and invest in a comprehensive, statewide ATI model**

The NYCLU recommends to the legislature the following as a working definition of the design and purpose of alternative to incarceration programs:

Alternative to Incarceration (ATI) programs divert individuals facing incarceration and provide supervised treatment, education and employment training in the community. Individuals who are identified, screened and admitted to ATI programs engage in family, youth development, education, employment, mental health, housing, substance abuse and counseling services. These services enable people to achieve meaningful accomplishments such as GED certification, stable employment, reunification with family, sustained sobriety and permanent housing – all as part of developing the skills and resources to avoid future criminal involvement. ATI program staff work closely with the courts to assess an individual’s appropriateness for ATI participation, and all programs regularly submit written reports to judges.

This definition reflects a client-centered approach utilized by programs with demonstrated success as measured by client outcomes. Individuals who are charged with drug-related offenses generally face a range of risk factors that brought them into contact with the criminal justice system, and all of them need to be addressed. Drug addiction is seldom an isolated issue; the substance abuser may be mentally ill or homeless. Those who do not have substance abuse disorders but are nonetheless accused of drug-related offenses often lack education and employment opportunities. The proposed definition will guide policy makers in identifying the important risk factors that may lead to substance abuse and crime.

Under the new sentencing regime contemplated by these recommendations, many more people will be diverted from prison into community-based ATI programs. Existing ATI programs will have to be expanded, and new programs will have to be created throughout the state. This may require an initial investment to develop and expand ATI programs,<sup>150</sup> but that investment will be recouped many times over as corrections costs are reduced and additional cost savings are realized from reduced demand for public assistance services. According to the Department of Correctional Services, the very modest changes in the Rockefeller Drug Laws enacted in 2004 and 2005 had, by the end of 2007, saved the state more than \$42 million in corrections costs.<sup>151</sup>

► **Utilize rigorous, evidence-based assessment instruments for determining an individual’s eligibility for an ATI program**

The state must develop rigorous, fair, evidence-based instruments for determining eligibility for diver-

sion to an ATI program. It is now the case that prosecutors conduct initial screenings of those charged with drug offenses to assess eligibility for ATIs.<sup>152</sup> There is no uniform or transparent screening procedure or standard for assessing eligibility. As a consequence, the quality of assessments is often poor; determinations are often arbitrary and inconsistent. Someone deemed eligible for diversion in Brooklyn may be found ineligible in Schenectady.

Judges must be able to rely on thorough and reliable evaluations of defendants. And the courts should have access to the expertise of treatment experts who can conduct such evaluations and give guidance to the court regarding a defendant's eligibility for a diversion program and the appropriateness of various treatment and rehabilitation approaches.

In its evaluation of the New York City's ATI programs, the Vera Institute of Justice acknowledged the important role played by court representatives who evaluate and identify appropriate programs for defendants. It was the court representatives who ensured the success of a diversion model that exists "[i]n the absence of legislation, guidelines, or even much conversation among judges or prosecutors about who should be sent to these programs."<sup>153</sup> The report noted that prosecutors and judges relied on court representatives' assessments as among "the most important factors guiding their decisions."<sup>154</sup>

### ► Train criminal justice professionals to utilize appropriate ATIs

Judges, prosecutors, defense attorneys and others who will be making decisions about eligibility for, and placement in, ATI programs must develop expertise in substance abuse and dependency issues, ATI best practices, and the range of options available to a defendant in order to ensure that an appropriate program referral is made. Education and training curriculums should be developed and taught subject to approval by the New York State Office of Alcoholism and Substance Abuse Services.

### ► Establish protections of fairness and due process

Determinations as to eligibility for an ATI program must provide guarantees of fairness and due process. Assessment instruments and evaluation procedures must be scientifically sound; such procedures should be well documented, and subject to review. These procedural safeguards should include the opportunity for defense counsel to provide clients with a vigorous defense. And legal procedures should not compromise a defendant's right to trial by disqualifying him from eligibility to enter a rehabilitation program should he receive a guilty verdict.

Due process safeguards must also be enforced when an individual is out of compliance with the requirements of an ATI program. Graduated, non-custodial sanctions should be used in such circumstances. These sanctions may include increased monitoring, attendance at additional court sessions, placement in an earlier phase of treatment or the use of more intensive treatment, and short jail stays (as opposed to incarceration).<sup>155</sup> Non-compliance with ATI protocols should not lead to a longer sentence than would otherwise have been imposed.

In no case should the sanction of imprisonment be levied if a person relapses or tests positive for illegal substances while participating in an ATI program, without a determination of whether the treatment program that they are participating in is appropriate. Too often, a person's non-compliance with a program's requirements is seen as a "failure," when in fact, the program itself may be failing the client.

## ► Provide retroactive sentencing relief

Those serving time under the current sentencing scheme should be eligible to apply for re-sentencing based on relaxed sentencing provisions approved by the legislature. The legislature must ensure procedures for determining eligibility for re-sentencing are fair, and that individuals have a meaningful opportunity to seek sentencing relief.

## ► Enlist independent experts who can advise and consult regarding the design, operation and evaluation of ATI programs

State policy makers and administrators must avail themselves of the experience and expertise developed by those direct service providers who have developed the state's community-based treatment programs. The ATI Coalition, for example, is comprised of eight organizations that have professional staffs with extensive experience; these organizations also have a longstanding presence in the communities they serve.<sup>156</sup> It is recommended that the legislature formally constitute a task force of government officials, treatment providers and administrators of ATI programs. Failure to enlist this expertise will seriously compromise the state's efforts to develop high-quality ATI programs.

One expert who carefully studied the experience of five individuals who entered drug treatment programs in California has offered the following cautionary recommendation:

*There is a burgeoning movement in states across our nation to shuffle drug offenders from prison to treatment, and liberal bastions like San Francisco are staking millions of dollars on voluntary rehab programs. But my eye-opening experience in the world of drug programs has shown that, before we shift hundreds of thousands of additional addicts into rehab, we must first treat the treatment system. While our policy makers are pushing drug treatment as if it were the panacea of the new millennium, few have actually peeked inside the programs to see what rehab is all about.*<sup>157</sup>

It is also essential that the state monitor and evaluate ATI programs on an ongoing basis. The Office of Alcoholism and Substance Abuse Services will continue to review individual programs. The state should also contract with an independent agency, such as the Vera Institute of Justice, to help government officials determine whether the new regime is meeting its goals: (1) to enhance public safety; (2) to restore fairness in drug sentencing; (3) to further reduce the state's prison population; (4) to provide more drug law defendants with a path to recovery and rehabilitation; and (5) to greatly lower correctional costs.

# ENDNOTES

<sup>1</sup> Thomas A. Coughlin, III, New York State corrections commissioner, “Rockefeller Drug Laws—20 Years Later,” testimony, Assembly Committee on Codes, Albany, 8 June 1993.

<sup>2</sup> Michelle Goldberg, “Noelle Bush gets rehab, the poor and black get a hard time,” *Salon.com* 5 Aug. 2002. Available at [http://archive.salon.com/news/feature/2002/08/05/drug\\_reform/index.html](http://archive.salon.com/news/feature/2002/08/05/drug_reform/index.html).

<sup>3</sup> See Section III herein “Exorbitant Waste of Dollars.”

<sup>4</sup> Michael Jacobson, director of the Vera Institute of Justice, testimony, the New York State Commission on Sentencing, 27 June 2007: transcript, 29.

<sup>5</sup> Ira Glasser, “Drug Busts = Jim Crow,” *The Nation* 10 July 2006.

<sup>6</sup> New York State Department of Correctional Services data, as reported to the Correctional Association of New York. Available at: [http://drophtherock.ipower.com/wp-content/uploads/2008/09/dtr\\_trends\\_feb08.pdf](http://drophtherock.ipower.com/wp-content/uploads/2008/09/dtr_trends_feb08.pdf).

<sup>7</sup> New York State Department of Correctional Services, HUB System: Profile of Inmate Population Under Custody on January 1, 2008: 28, 54 “82.6 percent of inmates abuse drugs, alcohol, or both as measured from available data from tests and self-reporting.”; see also “Ill-Equipped: U.S. Prisons and Offenders with Mental Illness,” *Human Rights Watch* 2003.

<sup>8</sup> NYS Department of Correctional Services, HUB System: Profile of Inmate Population Under Custody on Jan. 1, 2008: 31

<sup>9</sup> See Section III herein, “Mapping of Injustice.”

<sup>10</sup> See results from Substance Abuse and Mental Health Services Administration, the *2007 National Survey of Drug Use and Health* (Washington: U.S. Department of Health and Human Services, 2008). Available at <http://www.oas.samhsa.gov/NSDUH/2k7NSDUH/tabs/Sect1peTabs1to46.htm#Tab1.19B>.

<sup>11</sup> New York State Commission on Sentencing Reform, *The Future of Sentencing in New York State: Recommendations for Reform*, (Albany: 30 Jan. 2009) 76-77.

<sup>12</sup> Phillip Beatty, Amanda Petteruti and Jason Ziedenberg, “The Vortex: The Concentrated Racial Impact of Drug Imprisonment and the Characteristics of Punitive Counties,” Justice Policy Institute, December 2007: 2.

<sup>13</sup> Association of the Bar of the City of New York and the Drug Abuse Council, “The Nation’s Toughest Drug Law: Evaluating the New York Experience, Final Report of the Joint Committee on New York Drug Law Evaluation” 1977: 3.

<sup>14</sup> The second felony offender law, also enacted in 1973, exacerbates the harshness of the Rockefeller Drug Laws by mandating enhanced penalties for a second (or subsequent) felony offense, regardless of the nature of the offense, the intent of the offender, or mitigating circumstances.

<sup>15</sup> NY Penal Law, Sections 220.16; 70.70 (3) (b).

<sup>16</sup> NY Penal Law, Sections 70.02; 120.05.

<sup>17</sup> William Gibney, “One Year Later: New York’s Experience with Drug Law Reform,” Legal Aid Society, 2005: 12-13.

<sup>18</sup> New York State Department of Correctional Services, data as reported to the Correctional Association of New York. Available at: [http://drophtherock.ipower.com/wp-content/uploads/2008/09/dtr\\_trends\\_feb08.pdf](http://drophtherock.ipower.com/wp-content/uploads/2008/09/dtr_trends_feb08.pdf).

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> New York State Department of Correctional Services, *Statistical Overview: Year 2007 Court Commitments*, 14. See Table 7.1 and Table 7.2. From 2003 to 2007 at least 90 percent of felony drug commitments were for a B felony or lesser offense.

<sup>22</sup> See New York State Commission on Sentencing Reform, *Recommendations for Reform*, 158. The \$50,000 figure reflects “costs related to fringe benefits and capital construction.”

<sup>23</sup> Timothy Egan, “The War on Crack Retreats,” *The New York Times*, 28 Feb. 1999.

<sup>24</sup> Correctional Association of New York, “Mandatory Injustice: Case Histories of Women Convicted under New York’s Rockefeller Drug Laws,” Women in Prison Project, April 1999: 23. Available at <http://www.correctionalassociation.com/publications/download/wipp/reports/Mandatory%20Injustice.pdf>.

<sup>25</sup> Glenn C. Loury, “Why Are So Many Americans in Prison? Race and the transformation of criminal justice,” *The Boston Review*, July-August 2007.

<sup>26</sup> See Section III herein, “Ruined lives, damaged families and communities.”

<sup>27</sup> See Section III herein, “The Harms.”

<sup>28</sup> See, e.g., “Just say yes to drug law reform,” *Albany Times Union* 3 March 2009; “Drug law reform: Gives judges more sentencing authority,” *Watertown Daily Times* 3 March 2009; “Rocky Horror: Legislature should move quickly to reform drug laws,” *Syracuse Post-Standard* 14 Jan. 2009; “Rockefeller drug laws need reform,” *Poughkeepsie Journal* 13 Jan. 2009; “Rockefeller Laws: An End in Sight,” *The New York Times* 9 Feb. 2009.

<sup>29</sup> The Correctional Association of New York, “Stupid and Irrational and Barbarous”: New York Judges Speak against the Rockefeller Drug Laws,” December 2001. Available at <http://www.correctionalassociation.com/publications/download/ppp/judgesreport.pdf>.

<sup>30</sup> New York State Commission on Sentencing Reform, *The Future of Sentencing in New York State: A Preliminary Proposal for Reform*, (Albany: 15 Oct. 2007) 23.

<sup>31</sup> Michael Bongiorno, testimony, New York State Commission on Sentencing Reform, 18 July 2007: transcript, 148.

- <sup>32</sup> Marc Mauer, “Incarceration and Crime: A Complex Relationship,” *The Sentencing Project*, 2005: 3.
- <sup>33</sup> *Ibid.*
- <sup>34</sup> Beatty, et al., “The Vortex,” 2.
- <sup>35</sup> James Austin, et al., “Unlocking America, Why and How to Reduce America’s Prison Population” JFA Institute, November 2007: 1.
- <sup>36</sup> *Ibid.*, 8.
- <sup>37</sup> Loury.
- <sup>38</sup> NYC Bar Association and the Drug Abuse Council, “The Nation’s Toughest Drug Law,” 3.
- <sup>39</sup> *Ibid.*, 7, 11.
- <sup>40</sup> *Ibid.*, 8.
- <sup>41</sup> *Ibid.*, 9.
- <sup>42</sup> *Ibid.*
- <sup>43</sup> *Ibid.*, 7.
- <sup>44</sup> See Substance Abuse and Mental Health Services Administration, Office of Applied Studies, *2008 National Survey on Drug Use and Health* (Washington: U.S. Department of Health and Human Services, 2009).
- <sup>45</sup> See State of New York Correctional Services, *Three Year Post Release Follow-up 19* (Albany: 2001). “Thirty-eight percent of the drug offenders [discharged] were returned to the Department within three years...Over three-quarters of the drug offenders returned to prison for a new crime were convicted of new drug offenses.” See also, New York State Commission on Drugs and the Courts, *Confronting the Cycle of Addiction & Recidivism: A Report to Chief Judge Judith S. Kaye* (Albany: June 2000) Section I, 77. “All of the available surveys and data support the proposition that the state’s drug-offending population is comprised, in significant part, of addicted recidivists.” Available at <http://www.courts.state.ny.us/reports/addictionrecidivism.shtml>.
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- <sup>48</sup> William J. Milliken, “Michigan Must Reform Harsh Drug Sentences,” *Detroit News*, 20 Sept. 2002: A11. Available at 2002 WL 25291631
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- <sup>51</sup> New York Academy of Medicine, Drug Policy Alliance, “New Directions for New York: A Public Health and Safety Approach to Drug Policy: What is a Public Health Approach to Drug Policy?” news release, 23 Jan. 2009.
- <sup>52</sup> Austin, et al., 1.
- <sup>53</sup> New York State Department of Correctional Services data, as reported to the Correctional Association of New York. Available at [http://droptherock.ipower.com/wp-content/uploads/2008/09/dtr\\_trends\\_feb08.pdf](http://droptherock.ipower.com/wp-content/uploads/2008/09/dtr_trends_feb08.pdf).
- <sup>54</sup> Austin, et al., 1.
- <sup>55</sup> New York State Department of Correctional Services data, as reported to the Correctional Association of New York. Available at [http://droptherock.ipower.com/wp-content/uploads/2008/09/dtr\\_trends\\_feb08.pdf](http://droptherock.ipower.com/wp-content/uploads/2008/09/dtr_trends_feb08.pdf).
- <sup>56</sup> New York State Commission on Sentencing Reform, *Recommendations for Reform*, 76-77.
- <sup>57</sup> New York State’s population overall is 74 percent white, but the current drug offender population is 91 percent black and brown. Of every 100,000 whites in New York State, 174 are in prison or jail. The comparable figures for blacks and Hispanics, respectively, are 1,627 out of every 100,000, and 778 out of every 100,000. See U.S. Census Bureau: State and County QuickFacts [sic]. Available at <http://quickfacts.census.gov/qfd/states/36000.html>; See also New York State Department of Correctional Services data, as reported to the Correctional Association of New York. Available at [http://www.correctionalassociation.org/publications/download/ppp/factsheets/DTR\\_Fact\\_Sheet\\_2009.pdf](http://www.correctionalassociation.org/publications/download/ppp/factsheets/DTR_Fact_Sheet_2009.pdf); See also Marc Mauer and Ryan S. King, “Uneven Justice: State Rates of Incarceration by Race and Ethnicity,” *The Sentencing Project*, July 2007: 6. Available at [http://www.sentencingproject.org/Admin/Documents/publications/rd\\_stateratesofinbyraceandethnicity.pdf](http://www.sentencingproject.org/Admin/Documents/publications/rd_stateratesofinbyraceandethnicity.pdf)
- <sup>58</sup> Rachel Porter, “Unjust and Counterproductive: New York’s Rockefeller Drug Laws,” *Physicians for Human Rights and The Fortune Society*, 2004: 23.
- <sup>59</sup> New York State Department of Correctional Services data, as reported to the Lindesmith Center and to Physicians for Human Rights.

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- <sup>62</sup> K. Jack Riley, “Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities,” (Washington: National Institute of Justice and the Office of National Drug Control Policy, December 1997) 1.
- <sup>63</sup> *Ibid.* The Riley study found that powder cocaine users, who tend to be more affluent than heroin or crack users, “reported that the typically made indoor purchases in places of business more frequently than did other users.”
- <sup>64</sup> Alfred Blumstein, “Racial Disproportionality of U.S. Prison Populations Revisited,” *University of Colorado Law Review*, Vol. 64, No. 3 (1993) 11.
- <sup>65</sup> The Sentencing Project, “Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers,” October 2000. The Project Advisory Committee included Charles Austin, chief of police, Columbia, SC; I Matthew Campbell, Jr., assistant state’s attorney, Howard County, Md.; Hon. Renee Cardwell-Hughes, First Judicial District, Court of Common Pleas, Philadelphia, Pa.; Jerome McElroy, executive director, New York City Criminal Justice Agency; Leonard Noiset, director, Neighborhood Defender Service, New York, NY; Stuart O. Simms, secretary, Maryland Department of Public Safety; Ashbel Wall, director, Rhode Island Department of Corrections; and Hubert Williams, president, The Police Foundation.
- <sup>66</sup> Michael Tonry, *Malign Neglect: Race, Crime and Punishment in America* (New York: Oxford Univ. Press, 1995) 105.
- <sup>67</sup> Al Baker and Emily Vasquez, “Police Report Far More Stops and Searches,” *The New York Times* 3 Feb. 2007: A1.
- <sup>68</sup> New York Police Department data, as provided to the New York Civil Liberties Union.
- <sup>69</sup> Harry G. Levine and Deborah Peterson Small, “Marijuana Arrest Crusade, Racial Bias and Police Policy in New York City, 1997-2007,” April 2008.
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- <sup>71</sup> The Spangenberg Group, “Status of Indigent Defense in New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services,” 16 June 2006: 158.
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- <sup>73</sup> Correctional Association of New York, “Stupid and Irrational and Barbarous,” 6.
- <sup>74</sup> Angela J. Davis, *The Power of the American Prosecutor* (New York: Oxford Univ. Press 2007) 57.
- <sup>75</sup> NYS Department of Correctional Services, HUB System: Profile of Inmate Population Under Custody on January 1, 2008: 32, 54.
- <sup>76</sup> Center for Employment Opportunities, “CEO Breaks Down Barriers to Employment,” fact sheet. Available at [http://www.ceo-works.org/images/CEO\\_Breaks\\_down\\_barriers\\_to\\_employment\\_rebranded.pdf](http://www.ceo-works.org/images/CEO_Breaks_down_barriers_to_employment_rebranded.pdf).
- <sup>77</sup> Loury, 5.
- <sup>78</sup> Bruce Western, Becky Pettit and Joshua Guetzkow, “Black Economic Progress in the Era of Mass Imprisonment,” *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (Eds. Marc Mauer and Meda Chesney-Lind, New York: The New Press, 2002) 176.
- <sup>79</sup> Porter, 3.
- <sup>80</sup> Division of Criminal Justice Services, *New York State Criminal Justice: 2007 Crimestat Report* (Albany: NYS Department of Correctional Services, March 2008) 40; *See also* New York State Division of Parole, Parolee Facts. Available at <https://parole.state.ny.us/PROGRAMstatistics.asp>.
- <sup>81</sup> “Collateral Casualties: Children of Incarcerated Drug Offenders in New York,” *Human Rights Watch*, (June 2002) 2.
- <sup>82</sup> *Ibid.*
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- <sup>85</sup> *See* Section III herein, “Mapping of Injustice.”
- <sup>86</sup> State of New York Department of Correctional Services, *Three Year Post Release Follow-up* (Albany: 2001) 19. “Thirty-eight percent of the drug offenders [discharged] were returned to the Department within three years...Over three-quarters of the drug offenders returned to prison for a new crime were convicted of new drug offenses.”
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- <sup>88</sup> Jeffrey Fagan, Valerie West and Jan Holland, “Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods,” *Fordham Urban Law Journal* 30 (July 2003) 1551, 1554.
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<sup>92</sup> See Peter Wagner, "Diluting Democracy: Census Quirk Fuels Prison expansion," Prison Policy Initiative, April 2004. Available at <http://www.prisonpolicy.org/articles/dilutingdemocracy.pdf>. The author observes that leading defenders of the Rockefeller Drug Laws are Senators Dale Volker and Michael Nozzolio. Volker and Nozzolio were, respectively, long time chairpersons of the Committee on Codes and the Committee on Crime. (Democrats won a majority of Senate seats in the 2008 election.) The prisons in their two districts account for more than 17 percent of the state's total prison population.

<sup>93</sup> *New York State Criminal Justice: 2007 Crimestat Report, Division of Criminal Justice Services*, (Albany: NYS Department of Correctional Services, March 2008) 40. New York State Department of Correctional Services web site, available at <http://www.docs.state.ny.us/>

<sup>94</sup> A lawsuit challenging New York's felon disenfranchisement law, brought by the NAACP Legal Defense and Education Fund, was not successful. See *Hayden v. Pataki*, No. 00 Civ. 8586 (LMM), 2004 WL 1335921 (S.D.N.Y. 14 June 2004).

<sup>95</sup> New York State Commission on Sentencing Reform, *Recommendations for Reform*, 110.

<sup>96</sup> Legal Action Center, "Drug Law Reform 2009 – Dramatic Costs Savings for New York State," 2008: 2.

<sup>97</sup> Dan Page, "Proposition 36 Saves Taxpayers' Money: UCLA Study Finds Nearly \$2.50 in Savings for Each \$1 Spent on Drug Offenders Eligible for Treatment," press release, 5 April 2006. Full report available at [http://www.uclaisap.org/prop36/documents/SACPA\\_COSTANALYSIS.pdf](http://www.uclaisap.org/prop36/documents/SACPA_COSTANALYSIS.pdf).

<sup>98</sup> Steve Aos, associate director, Washington State Institute for Public Policy, "Alternative Sentencing: Rehabilitative and Punitive Models and Evidence-Based Policy, Symposium on Alternatives to Incarceration," U.S. Sentencing Commission, 14 July 2008: transcript, 41. Available at [http://www.uscc.gov/SYMPO2008/Material/03\\_FINAL\\_AlternativesSentencingRehabilitative.pdf](http://www.uscc.gov/SYMPO2008/Material/03_FINAL_AlternativesSentencingRehabilitative.pdf).

<sup>99</sup> David Guntharp, director, Arkansas Department of Community Corrections, "States Implementation of Alternatives to Incarceration, Symposium on Alternatives to Incarceration," U.S. Sentencing Commission, 15 July 2008, transcript, 216-17. Available at [http://www.uscc.gov/SYMPO2008/Material/11\\_FINAL\\_StatesImplementation.pdf](http://www.uscc.gov/SYMPO2008/Material/11_FINAL_StatesImplementation.pdf).

<sup>100</sup> See Section IV herein, "Accelerate the paradigm shift in New York."

<sup>101</sup> Legal Action Center, *Drug Law Reform 2009 – Dramatic Costs Savings for New York State*, 2008: 8. The study relied on data collected by the Columbia University Center for Addiction and Substance Abuse.

<sup>102</sup> The Council of State Governments Justice Center, "Work in the States." Available at <http://www.justicereinvestment.org/states/>.

<sup>103</sup> Beatty, et al., "The Vortex," 23-26.

<sup>104</sup> *Ibid*, 23. The study found that the county with the most extreme racial disparity among those imprisoned for drug offenses was Forsyth County, N.C., with a ratio of African-American to white that was 164:1.

<sup>105</sup> Fagan, et al, "Reciprocal Effects of Crime," 6.

<sup>106</sup> See "Metropolitan Racial and Ethnic Change – Census 2000," Lewis Mumford Center, University at Albany -- SUNY (select Syracuse). Available at <http://mumford.albany.edu/census/WholePop/WPsegdata.htm>.

<sup>107</sup> Alan Rosenthal, "A Report to the NAACP/Syracuse/Onondaga Chapter on Racial Disparities in the Local Criminal Justice System," January 2001. Available at [http://www.communityalternatives.org/articles/racial\\_disparities.html](http://www.communityalternatives.org/articles/racial_disparities.html).

<sup>108</sup> See, Governor David Paterson, State of the State Address, "Our Time to Lead," New York State Capitol, 7 Jan. 2009: 16. "Few public safety initiatives have failed as badly and for as long as the Rockefeller Drug Laws." See also, New York State Assembly Speaker Sheldon Silver, remarks at a conference sponsored by the New York Academy of Medicine and the Drug Policy Alliance, "New Directions for New York: A Public Health and Safety Approach to Drug Policy," 22 Jan 2009.

<sup>109</sup> Health Officers Council of British Columbia, "A Public Health Approach to Drug Control in Canada," October 2005: 14.

<sup>110</sup> Substance Abuse and Crime Prevention Act of 2000 (California). See also, California Department of Alcohol and Drug Programs, fact sheet. Available at <http://www.adp.cahwnet.gov/SACPA/prop36.shtml>.

<sup>111</sup> More recently voters rejected Prop 5, a measure to expand the reforms begun by Prop 36. Some blame the defeat of Prop 5, also called the Nonviolent Offenders Rehabilitation Act ("NORA") (described here: <http://www.jointogether.org/news/features/2008/new-calif-ballot-initiative.html>), on the pending economic crisis, others on the lack of sign-on from the treatment community. Bob Curley, "Calif.'s Prop 5 Battle Exposes Fault Lines Between Treatment Groups, Drug Courts," Join Together, 5 Dec. 2008. Available at <http://www.jointogether.org/news/features/2008/califs-prop-5-battle.html>.

<sup>112</sup> Page. Full report available at [http://www.uclaisap.org/prop36/documents/SACPA\\_COSTANALYSIS.pdf](http://www.uclaisap.org/prop36/documents/SACPA_COSTANALYSIS.pdf).

<sup>113</sup> Matthew Preusch, "National Briefing: Northwest: Washington: Reducing Terms For Drug Offenders," *The New York Times* 3 April 2002. Available at <http://query.nytimes.com/gst/fullpage.html?res=9506EEDA103AF930A35757C0A9649C8B63>.

<sup>114</sup> Aos, symposium transcript, 41.

<sup>115</sup> Dr. Susan Katzenelson, executive director, North Carolina Sentencing and Policy Advisory Commission, "States Implementation of Alternatives to Incarceration, Symposium on Alternatives to Incarceration," U.S. Sentencing Commission, 15 Jul 2008: transcript,

210. Available at [http://www.ussc.gov/SYMPO2008/Material/11\\_FINAL\\_StatesImplementation.pdf](http://www.ussc.gov/SYMPO2008/Material/11_FINAL_StatesImplementation.pdf).

<sup>116</sup> Vicky Etheridge, Tamara Flinchum and Ginny Hevener, *Structured Sentencing Statistical Report for Felonies and Misdemeanors, Fiscal Year 2006-07* (Raleigh, N.C.: North Carolina Sentencing & Policy Advisory Commission, February 2008) 15. Available at <http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/06-07statisticalreport.pdf>. Options for intermediate punishment include intensive supervision probation (close supervision and assistance in helping the offender to remain in the community); special probation; house arrest with electronic monitoring; day reporting centers; residential treatment facilities; and drug treatment courts. Options for community punishment include supervised probation, unsupervised probation, restitution, fines, community services.

<sup>117</sup> David Guntharp, symposium transcript, 216-17.

<sup>118</sup> See Neal Pierce, "Can One City Reduce U.S. Drug Law Madness," St. Paul Pioneer Press 3 Jan. 2005. Available at <http://www.commondreams.org/views05/0103-29.htm>.

<sup>119</sup> Ibid.

<sup>120</sup> See Lonnie Shavelson, *Hooked, Five Addicts Challenge our Misguided Drug Rehab System* (New York: The New Press, 2001) 7. "The U.S. Department of Justice has concluded that only a small percentage of the nation's drug abusers create 'an extraordinary proportion of crime.' Yet those most destructive addicts are the least likely to enter or be helped by rehab. This ... push toward treatment, then, may do no more than get the 'better' addicts off drugs, leaving the hard-core troublemakers still disastrously addicted."

<sup>121</sup> See Rachel Porter, Sophia Lee, and Mary Lutz, "Balancing Punishment and Treatment: Alternatives to Incarceration in New York City," Vera Institute of Justice, May 2002: 15 It is often the case that prosecutors and judges require those offered diversion "plead guilty to charges that carry lengthier sentences than the charges they would offer without the ATIs. They believe the harsher sentence provides the 'stick' needed to encourage defendants to remain law-abiding while attending the ATI program."

<sup>122</sup> Drug courts are a nationwide phenomenon. The Miami Drug Court, opened in 1989, was the first. By 1995, 86 drug courts had opened nationwide, and by 2003, there were 1,078. Michael Rempel, et al., "The New York State Adult Drug Court Evaluation, Policies, Participants and Impacts," Center for Court Innovation, October 2003: 3. Available at <http://courts.state.ny.us/reports/NYSAdultDrugCourtEvaluation.pdf>.

<sup>123</sup> New York State Commission on Sentencing Reform, final report, 80. Some drug courts were designed according to an Expedited Drug Case Management model (EDCM) in order to more efficiently process the tremendous number of defendants cycling through the system, while others were designed as drug treatment courts. See Peggy Fulton Hora et al., "Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America," *Notre Dame Law Review* 74(2) (January 1999) 101. Available at <http://www.ndci.org/admin/docs/notredame.doc>.

<sup>124</sup> Rempel, et al., 3. The counties studied included Bronx, Brooklyn, Manhattan, Queens, Suffolk, Syracuse, Rochester, Buffalo, Tonawanda, Lackawanna, and Ithaca.

<sup>125</sup> New York State Unified Court System, "First Comprehensive Study on New York Drug Courts Shows Significant Reductions in Recidivism: Vast Implications on Drug Courts Nationwide," press release, 10 Nov 2003. Available at: [http://www.courts.state.ny.us/press/pr2003\\_16.shtml](http://www.courts.state.ny.us/press/pr2003_16.shtml). "With over 18,000 individuals in New York having participated in drug court programs since its inception, the court system estimates that taxpayer savings have totaled an excess of \$254 million. These projects are based on savings in incarceration costs alone, which amount to an average of \$14,053 per drug court participant, not even including other cost-savings associated with an addict becoming sober, such as reductions from foster care, welfare and other social services."

<sup>126</sup> Richard C. Boldt, "The Adversary System and Attorney Role in the Drug Treatment Court Movement," *Drug Courts: In Theory and in Practice* (ed. James Nolan Jr., New York: Aldine DeGruyter, 2000) 121.

<sup>127</sup> Anne J. Swern, first assistant district attorney, *DTAP Drug Treatment Alternative-to-Prison, Seventeenth Annual Report* (New York: Kings County District Attorney's Office, May 2008). Available at: [http://www.brooklynnda.org/dtap/DTAP\\_Seventeenth\\_Annual\\_Report.pdf](http://www.brooklynnda.org/dtap/DTAP_Seventeenth_Annual_Report.pdf).

<sup>128</sup> Ibid., 20.

<sup>129</sup> Ibid., 6. Of 6,926 nonviolent felony offenders screened for DTAP eligibility, 63 percent (4,387) were either rejected from the program or refused to participate; 14 percent (345) were still in treatment at the time the report was released, 43 percent (1,087) "dropped out" of treatment prior to completion, and 2 percent (41) were referred to a program called TADD (Treatment Alternatives for Dually Diagnosed Defendants), a diversion program for those with co-occurring substance abuse and mental health disorders.

<sup>130</sup> Ibid., 21-22. The DTAP model was incorporated into federal legislation known as the Second Chance Act of 2007, which authorizes the U.S. attorney general to provide grant money to state and local prosecutors to "develop, implement, or expand drug treatment alternative-to-incarceration programs based on the DTAP model."

<sup>131</sup> Paul Dynia and Hung-En Sung, "The Safety and Effectiveness of Diverting Felony Drug Offenders into Residential Treatment as Measured by Recidivism," *Criminal Justice Policy Review*, 11(4) (2000) 299-311. See also National Center on Addiction and Substance Abuse at Columbia University ("CASA"), "Crossing the Bridge: An Evaluation of the Drug Treatment Alternative-to-Prison (DTAP) Program, A CASA White Paper," March 2003: 6. Available at <http://www.casacolumbia.org/absolutenm/articlefiles/379-Crossing%20the%20Bridge%20DTAP%20Evaluation.pdf>.

<sup>132</sup> Swern, 30 (describing comparison group study that showed that 30 percent of DTAP participants were re-arrested in a five-year period following program completion, compared to 56 percent of non-participants); see also 2003 CASA Evaluation, *supra* note 105, at 6 (DTAP participants have re-arrest rates that are 26 percent lower and reconviction rates that are 36 percent lower two years after leav-

ing the program than a matched comparison group two years after leaving prison).

<sup>133</sup> Ibid., 33. Of those who completed the DTAP program and were interviewed for DTAP's 17th annual report, 92 percent of 60 respondents were employed, compared to 33 percent who were employed at the time of their arrest. *See also* CASA 2003 evaluation. DTAP graduates are three and one-half times likelier to be employed than they were before arrest.

<sup>134</sup> Ibid., 34 (estimating corrections savings at over \$33 million, health care savings of over \$1 million; public assistance savings of over \$4 million; recidivism savings of over \$3 million; and increased income tax contribution of over \$1 million).

<sup>135</sup> Coalition for Criminal Justice Reform, "Blueprint for Criminal Justice Reform—Bringing Justice to Scale," February 2007: 2.

<sup>136</sup> Porter et al., "Balancing Punishment," 5.

<sup>137</sup> Ibid., 3. Half of those were charged with misdemeanor offenses, the other half with felony offenses.

<sup>138</sup> Ibid., 3.

<sup>139</sup> New York State Commission on Sentencing Reform, *Recommendations for Reform*, 158.

<sup>140</sup> Porter, et al., "Balancing Punishment," 66.

<sup>141</sup> Austin, et al, "Unlocking America," 16. The authors cite a meta-analysis of 291 evaluations of offender treatment programs, both in-prison and in-community; citing Steve Aos, Marna Miller and Elizabeth Drake, "Evidence-Based Adult Corrections Programs: What Works and What Does Not," Washington State Institute for Public Policy, 2006.

<sup>142</sup> Ibid., 16; citing Ojmarrh Mitchell, David B. Wilson and Doris L. MacKenzie, "The Effectiveness of Incarceration-Based Drug Treatment on Criminal Behavior," September 2006.

<sup>143</sup> Shavelson, *Hooked*, 7.

<sup>144</sup> Steve Aos, Marna Miller, and Elizabeth Drake, "Evidence-Based Adult Corrections Programs: What Works and What Does Not," (Olympia, Wash.: Washington State Institute for Public Policy, 2006) 1. Available at <http://www.wsipp.wa.gov/rptfiles/06-01-1201.pdf>.

<sup>145</sup> Nora D. Volkow, "Treat the Addict, Cut the Crime Rate," *The Washington Post* 19 Aug. 2006: A17. *See also*, Justice Policy Institute, "Substance Abuse Treatment and Public Safety," January 2008. Available at [http://www.justicepolicy.org/images/upload/08\\_01\\_REP\\_DrugTx\\_AC-PS.pdf](http://www.justicepolicy.org/images/upload/08_01_REP_DrugTx_AC-PS.pdf).

<sup>146</sup> Austin, et al, "Unlocking America," 18-19; citing Arnold S. Linky and Murray A. Straus, *Social Stress in the United States: Links to Regional Patterns in Crime and Illness*, (Dover, Mass.: Auburn House, 1986).

<sup>147</sup> The Pew Center on the States, "What Works in Community Corrections, An Interview with Dr. Joan Petersilia," Expert Q&A, Public Safety Performance Project No. 2. (November 2007) 3.

<sup>148</sup> Austin, et al, "Unlocking America," 24.

<sup>149</sup> New York State Senate Democratic Conference, David A. Paterson, leader, "Sentencing Reform & Offender Re-Entry" (March 2004) Section C. These recommendations reflect only slight modification of Governor Paterson's 2004 recommendations based on the changes that were made by reform laws that went into effect shortly after Paterson's report was issued. Current sentencing requirements were obtained from the Center for Community Alternatives, New Sentencing Chart for Drug Offenses Under Rockefeller Drug Law Reform. Available at:

<http://www.communityalternatives.org/pdfs/New%20Sentencing%20Chart%20for%20Drug%20Offenses.pdf>.

<sup>150</sup> Coalition for Criminal Justice Reform, "Blueprint for Criminal Justice Reform," 12-13. The blueprint recommended an initial investment of \$25 million, but predicted a long-term cost-savings of \$60,000 per each individual diverted from prison to treatment.

<sup>151</sup> Judith Greene, testimony, New York State Commission on Sentencing, 13 Nov. 2007: transcript, 365.

<sup>152</sup> Defense attorneys, court personnel and court representatives from community-based ATIs can also recommend those charged with drug offenses to prosecutors, but ultimate authority to approve diversion rests with the prosecutor. *See* Porter, et al., "Balancing Punishment," 13-17.

<sup>153</sup> Ibid., 24.

<sup>154</sup> Ibid.

<sup>155</sup> Coalition for Criminal Justice Reform, "Blueprint," 14.

<sup>156</sup> *See* ATI Coalition brochure. Available at <http://www.ati-ny.org/files/ATI%20Coalition%20Atlas%20v3.pdf> (last accessed April 2, 2008). The coalition is composed of the following organizations: Center for Alternative Sentencing and Employment Services (CASES); Center for Community Alternatives (CCA); Center for Employment Opportunities (CEO); Fortune Society; La Bodega de la Familia/Family Justice; Legal Action Center, Osborne Association; Women's Prison Association (WPA).

<sup>157</sup> Shavelson, *Hooked*, 8.

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125 Broad St.  
New York, NY 10004  
212.607.3300  
[www.nyclu.org](http://www.nyclu.org)

**Donna Lieberman, executive director**