

COMMENTS

RESENTENCING AFTER THE “FALL” OF ROCKEFELLER: THE FAILURE OF THE DRUG LAW REFORM ACTS OF 2004 AND 2005 TO REMEDY THE INJUSTICES OF NEW YORK’S ROCKEFELLER DRUG LAWS AND THE COMPROMISE OF 2009¹

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Insanity is doing the same thing, over and over again, but expecting different results.

– Rita Mae Brown²

I. INTRODUCTION

“Vice” is defined as “an evil, degrading, or immoral practice or habit.”³ With the proper treatment, however, habits may be broken. For thirty-six years New York’s drug legislation attempted to break the habits of its constituents through the process of incarceration. This ideology resulted in thousands of disproportionate sentences for non-violent crimes. It all began in 1973 when Governor Nelson A. Rockefeller signed into law a large-scale drug reform.⁴ The reform drastically changed the prior drug laws by systematically classifying illicit drugs into categories of varying offenses and

¹ This article was originally written in the winter of 2008—well before the DLRA of 2009 was adopted—and was entitled *Resentencing After the “Fall” of Rockefeller: Has the Drug Law Reform Acts of 2004 and 2005 Actually Remedied the Injustices of New York’s Rockefeller Drug Laws?* The title and contents were subsequently modified to reflect this recent reform.

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² RITA MAE BROWN, *SUDDEN DEATH* 68 (1983).

³ *AMERICAN HERITAGE DICTIONARY* 1916 (4th ed. 2000).

⁴ 1973 N.Y. Laws 1040–65.

punishment.⁵ The signature of this reform was the mandatory maximum of life imprisonment required by the commission of a class A felony.⁶ These draconian reforms became known around the nation as The Rockefeller Drug Laws.⁷ Over the next three decades the prison population in New York State grew exponentially from ten thousand to seventy thousand inmates, with almost a third of those inmates incarcerated for drug offenses.⁸ Although the penalties were steep, they did little to deter drug use and drug crimes.⁹

By the early 2000s, it was clear that this method was unsuccessful and that reform was needed.¹⁰ In 2004, Governor Pataki signed into legislation the Drug Law Reform Act (“DLRA”) of 2004, which increased the quantity of drugs necessary to classify as a class A felony and decreased the prison terms for these crimes.¹¹ Most notably, no longer were life sentences available for any drug offense.¹² Recognizing the injustices produced by the Rockefeller Drug Laws, the 2004 DLRA provided for special retroactive relief that allowed inmates serving life sentences under the old laws for committing A-I felonies to petition the courts to be resentenced.¹³ Soon thereafter, the 2005 DLRA was signed into legislation to extend resentencing to A-II felony offenders.¹⁴

Although at first blush the DLRA appeared to be ameliorative legislation that would rectify the injustices of the Rockefeller Drug Laws, the story was not so simple. Weaved into the language of the DLRA were limitations, obstacles, and restrictions that made resentencing impossible to some inmates and burdensome to the rest. Moreover, the resentencing provision was the extent of the legislative “reform” to New York’s harsh drug laws. Although the sentencing structure was revised, the reform of 2004 and 2005 did not attempt to change the philosophy used to battle the drug problem. Instead of finding solutions to prevent drug-related violence, the legislature continued to mask the problem behind bars

⁵ See N.Y. PENAL LAW § 220.00 (McKinney 2008).

⁶ N.Y. PENAL LAW § 70.00 (McKinney 2009).

⁷ ALBERT M. ROSENBLATT, *NEW YORK’S NEW DRUG LAWS AND SENTENCING STATUTES*, at v (1973).

⁸ Edward J. Maggio, *New York’s Rockefeller Drug Laws, Then and Now*, N.Y. ST. B.A. J., Sept. 2006, at 30, 32.

⁹ *Id.* at 31.

¹⁰ *Id.* at 33.

¹¹ 2004 N.Y. Laws 3917–18.

¹² *Id.*

¹³ 2004 N.Y. Laws 3918–19.

¹⁴ 2005 N.Y. Laws 3435–36.

and bricks. It was not until 2009 that a solution was finally proposed. The success of this solution, however, remains to be seen.

Part II of this note provides an overview of the history and reforms of the New York State drug laws. Part III dissects the reforms of the DLRA of 2004 and 2005 and shows why they failed to result in any meaningful change. Part IV explains the movement for further reform—from multiple vantage points—as well as the various proposals for a workable solution. Finally, Part V describes the legislative compromise that resulted in the DLRA of 2009 and assesses the likely effects of the recent revisions.

I. THE ROCKEFELLER DRUG LAWS

A. *The Governor’s New Project*

Prior to 1965, the drug laws in New York State were confusing and unsystematic.¹⁵ The sanctions for different drug offenses were found in completely different statutes of the former penal law, and separate crimes were attached to each drug classification.¹⁶ In 1965, New York revised the drug laws by classifying all drugs under the term “controlled substances,” and creating two basic offenses: criminal possession and criminal sale.¹⁷ The new system defined each drug according to the public health law schedule¹⁸ and punished the offense under the appropriate correction law provision.¹⁹ The advantage to this system is that it allows flexibility with respect to subsequent legislation.²⁰ Instead of having to enact a new statute when a new substance is declared illegal, the definitions under the public health law can simply be expanded to encompass the new substance.²¹

In 1973, Governor Rockefeller further revised this system in response to widespread concerns about problems of drug abuse; the system imposed tougher, more restrictive sentences upon conviction.²² It appeared from the governor’s rhetoric that the

¹⁵ Arnold D. Hechtman, *Practice Commentaries*, in N.Y. PENAL LAW § 220 (McKinney 1980) [hereinafter Hechtman, *Commentaries*].

¹⁶ *Id.*

¹⁷ See N.Y. PENAL LAW § 220.00 (McKinney 2008).

¹⁸ See N.Y. PUB. HEALTH LAW § 3306 (McKinney 2001) (containing the current equivalent of the schedules).

¹⁹ See N.Y. CORRECT. LAW § 70 (McKinney 2003) (containing the current equivalent of the statute).

²⁰ Hechtman, *Commentaries*, *supra* note 15.

²¹ Hechtman, *Commentaries*, *supra* note 15.

²² See 1973 N.Y. Laws 1040–65; Hechtman, *Commentaries*, *supra* note 15.

reform was not only a reaction to public concerns, but actually reflected his personal attitudes towards drugs.²³ In 1972, the governor urged all the nation's governors to "back an all-out effort to end drug abuse" and make a "national commitment" to resolve the drug problem.²⁴ By this time the governor had invested \$750 million into drug control; he opined that drugs were going to destroy the nation, and suggested that the nation treat the war on drugs like the Manhattan Project of World War II.²⁵ Clearly the governor was not making idle threats, for the revisions to the penal law turned out to be some of the harshest sentencing schemes in our nation's history.

The most notable change to the sentencing scheme was the expansion of the list of felonies that held indeterminate sentences of life imprisonment. Under the old system, felonies were classified as A, B, C, D and E; but under the new regime, A felonies were further broken down into three subcategories: A-I, A-II, and A-III.²⁶ Each class A felony held mandatory maximums of life imprisonment as well as mandatory minimums.²⁷ Due to the expansion of the A felony class, crimes that were previously punished relatively gently now came within the ambit of mandatory life sentences.

Using narcotics²⁸ as an example, any sale²⁹ of the smallest amount is classified as an A-III felony.³⁰ Previously, this activity was classified as a C felony,³¹ holding a determinate sentence of five to fifteen years with the possibility of probation.³² Given the broad definition of "sale," almost any activity, including passing drugs around for communal use, could be classified in this category. Furthermore, possession of two ounces of narcotics or sale of one, became classified as an A-I felony; the most serious offense known

²³ It is often suggested that the governor had a "personal crusade" against drugs since he witnessed a close friend's family tear itself apart due to heroin addictions. Maggio, *supra* note 8, at 30.

²⁴ Nelson A. Rockefeller, Governor Urges All-Out Effort of Nation's Governors to End Drug Abuse, *in* PUBLIC PAPERS OF NELSON A. ROCKEFELLER 791, 791-92 (1972).

²⁵ *Id.*

²⁶ N.Y. PENAL LAW § 55.05 (McKinney 2009); 1973 N.Y. Laws 1040.

²⁷ N.Y. PENAL LAW § 70.00 (McKinney 2009). The mandatory minimum for an A-I offense is 15-25 years, for an A-II offense is 6-8 1/3 years, and for an A-III offense is 1-8 1/3 years. *Id.*

²⁸ Under the New York Public Health Law schedule, narcotics is defined to include heroin, methadone, opium, and cocaine. N.Y. PUB. HEALTH LAW § 3306 (McKinney 2001).

²⁹ To sell, broadly defined by N.Y. PENAL LAW § 220.00(1) (McKinney 2008), means to "exchange, give or dispose of to another, or to offer or agree to do the same."

³⁰ N.Y. PENAL LAW § 220.39(1) (McKinney 2008).

³¹ § 220.35.

³² N.Y. PENAL LAW §§ 60.05, 65.00(1), 70.00 (McKinney 2009).

under New York State law.³³ To put this drastic alteration in perspective, prior to the law change, only a sale of one pound or more of narcotics was classified as an A felony.³⁴ Narcotics were not the only drugs within the ambit of A felonies holding life sentences; the sale of minor amounts of hallucinogens, stimulants, LSD, and methamphetamines were now classified as A-III felonies.³⁵ The most remarkable alteration was that the possession of a small quantity of certain drugs, which formerly constituted a misdemeanor, was now classified as an A-III felony.³⁶ The ramifications of the revisions to the drug and sentencing laws were obvious and enormous. Low-level street dealers, addicts, and experimenters were now subject to potential life sentences if convicted.

B. Judicial Review

Although many contested that the harsh regime established under the Rockefeller Drug Laws constituted cruel and unusual punishment, the laws were upheld by both the New York Court of Appeals and the Second Circuit.³⁷ In *People v. Broadie*,³⁸ eight defendants who were sentenced to life terms for low-level drug offenses, challenged the sentencing scheme as so disproportionate as to constitute cruel and unusual punishment in violation of the New York Constitution.³⁹ The New York Court of Appeals articulated the standards by which to evaluate the disproportionately of punishment under the state constitution;⁴⁰ however the court failed actually to apply these standards, choosing instead to defer to the legislature.⁴¹ Furthermore, if applied objectively, it is hard to believe that the court would have found the punishment to be proportional to the crime. For example, when discussing the third factor to be considered—comparison of the punishment for drug

³³ §§ 220.21, 220.43.

³⁴ § 220.44.

³⁵ The smallest amount that classified as an A-III felony was one milligram of LSD and one gram of a stimulant. § 220.39.

³⁶ For example, possession of five milligrams of LSD, formerly an A misdemeanor became an A-III felony. § 220.16(9).

³⁷ *People v. Broadie*, 332 N.E.2d 338 (N.Y. 1975); *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978).

³⁸ 332 N.E.2d 338 (N.Y. 1975).

³⁹ *Id.* at 341.

⁴⁰ The court cited a three prong evaluation: (1) the gravity of the offense and harm to society; (2) the threat the offender poses to society; and (3) comparison of punishment to other crimes and similar crimes in other states. *Id.* at 342–45.

⁴¹ *See id.*

offenses to punishment for other crimes—the court recognized the severity of the laws by acknowledging that sale of one-eighth of an ounce of cocaine carried greater punishment than manslaughter, kidnapping, rape, robbery, or arson.⁴² Nevertheless, the court deferred to the legislature and rationalized their decision based on what the legislature *may* have believed to be the reasons for enacting such strict sentences.⁴³

In *Carmona v. Ward*,⁴⁴ the Second Circuit reversed a decision by the Southern District of New York⁴⁵ which had granted habeas corpus relief to two women sentenced to life in prison for narcotics offenses.⁴⁶ In lockstep fashion, the court followed the reasoning of the New York Court of Appeals in *Broadie*, and deferred to the legislature's evaluation of the severity of drug offenses.⁴⁷ In a spirited dissent, however, Judge Oakes pointed to the disparity between drug offenses and violent crimes punished equally or less severely.⁴⁸ He exclaimed,

[i]t is difficult to believe that the possession of an ounce of cocaine or a \$20 'street sale' is a more dangerous or serious offense than the rape of a ten-year-old, the burning down of a building occupied by people, or the killing of another human being while intending to cause him serious injury.⁴⁹

There were some doubts as to whether the Rockefeller Drug Laws would pass the Supreme Court's rational basis review, but these doubts cast aside when the Supreme Court denied certiorari to review *Carmona*.⁵⁰

⁴² *Id.* at 345 (explaining that the cited crimes are "B felonies carrying a discretionary sentence of up to 25 years and no minimum sentence").

⁴³ *Id.* For example, when comparing the punishment for drug crimes with violent felonies requiring merely B classification, the court found that the legislature may have determined that "drug related crime[] [is] . . . much more prevalent, that is, [it has] a higher and rising incidence, than other crimes comparably punished or equally grave crimes not as severely punished, requiring greater isolation and deterrence." *Id.*

⁴⁴ 576 F.2d 405 (2d Cir. 1978).

⁴⁵ *Carmona v. Ward*, 436 F. Supp. 1153 (S.D.N.Y. 1977).

⁴⁶ *Carmona*, 576 F.2d at 418.

⁴⁷ *Id.* at 414–15.

⁴⁸ *Id.* at 423 ("[The defendants] received the same maximum sentence as [those] . . . convicted of first degree murder, first degree arson, and kidnapping . . . [and] punished more severely than [those] . . . convicted of second degree arson, first degree rape, first degree manslaughter . . . and second degree kidnapping." (citation omitted)).

⁴⁹ *Id.*

⁵⁰ 439 U.S. 1091 (1979).

II. THE PUSH FOR REFORM AND THE DRUG LAW REFORM ACTS

A. *Criticism and Scrutiny*

The academic criticism of the Rockefeller Drug Laws echoed Judge Oakes’ dissent. Many critics condemned the laws as missing the key component of rational criminal legislation: that the punishment fit the crime.⁵¹ Others have condemned the laws for lacking judicial discretion since the laws preordain a mandatory minimum and maximum “regardless of the prior history, character, and circumstances of the individual, his or her role in the offense, or the threat posed to society.”⁵² Even the New York City Mayor John Lindsay urged the governor to reconsider his changes to the sentencing law: “mandatory minimum penalties have never worked . . . the criminal justice system will not be able to process fairly, expeditiously, and effectively the resultant stream of A-felony cases that will flood an already overloaded felony case processing system in the State Supreme Court.”⁵³

This criticism was vindicated by the apparent ineffectiveness of the laws. Empirical studies conducted several years after the laws were enacted found that neither of Governor Rockefeller’s objectives had been achieved: drug availability had not been reduced, and crime increased rather than decreased.⁵⁴ For example, “[i]n 1977 the Association of the Bar of the City of New York and The Drug Abuse Council formed the Committee of New York Drug Law Evaluations.”⁵⁵ The committee found the laws to be ineffective because despite the state’s \$76 million expenditure on enforcing the drug laws, heroin use and crimes related to heroin did not decrease.⁵⁶ Further, there was a growing concern about the rising prison populations that were a direct result of the mandatory sentencing laws, especially in the 1980s when the spread of crack-cocaine caused the New York State prison population to triple.⁵⁷ In 1973 the state’s prison population was approximately ten thousand; by 2002, there were approximately seventy thousand state inmates,

⁵¹ See Susan N. Herman, *Measuring Culpability by Measuring Drugs? Three Reasons to Reevaluate the Rockefeller Drug Laws*, 63 ALB. L. REV. 777, 779 (2000).

⁵² Maggio, *supra* note 8, at 31.

⁵³ *Id.* at 30 (citation omitted).

⁵⁴ Herman, *supra* note 51, at 782.

⁵⁵ Maggio, *supra* note 8, at 31.

⁵⁶ *Id.*

⁵⁷ *Id.* at 32.

and 19,164 were incarcerated for drug offenses.⁵⁸

The ineffectiveness of the Rockefeller laws in deterring criminal activity, the disproportionateness of the sentences, and the rising prison population, made it clear that reform was essential. Based on a host of reasons, including the ones previously mentioned, Governor Pataki signed into law the first of two Drug Law Reform Acts in 2004.⁵⁹

B. *The 2004 Drug Law Reform Act*

The 2004 DLRA's modifications to the Rockefeller Drug Laws were prospectively significant.⁶⁰ First, the quantity of narcotics classified as A-I and A-II offenses was increased from four ounces to eight ounces, and two ounces to four ounces, respectively.⁶¹ Also, the A-III felony classification was eliminated and individuals charged with A-I and A-II felonies were no longer required to plead guilty to at least an A-III offense.⁶² Most importantly, indeterminate sentences with mandatory minimums and mandatory maximum life sentences were replaced with less harsh determinate sentences for A-I and A-II felons.⁶³

Additionally, the 2004 DLRA provided for special retroactive relief in the form of resentencing for those sentenced under the old regime.⁶⁴ Namely, the Act allowed any individual convicted of an A-I offense and sentenced to at least fifteen years to apply to the court for resentencing under the new law.⁶⁵ As to the relevant proof, the individual and/or district attorney could submit to the court facts and circumstances relevant to the imposition of a new sentence; upon review of the submissions of both parties, the court was given the authority to resentence the individual, unless substantial justice⁶⁶ dictated that the application should be denied.⁶⁷ The individual was granted the right to appeal the court's decision if the

⁵⁸ *Id.*

⁵⁹ 2004 N.Y. Laws 3907.

⁶⁰ 2004 N.Y. Laws 3926–27.

⁶¹ N.Y. PENAL LAW § 220.21 (McKinney 2008).

⁶² William C. Donnino, *Practice Commentary*, in N.Y. PENAL LAW §60.00 (McKinney 2009).

⁶³ § 60.04. Under the 2004 DLRA, those convicted of A-I felonies were subject to determinate sentences ranging between eight to twenty years and those convicted of A-II felonies were subject to determinate sentences ranging between three to ten years. Further, A-II felons could receive lifetime probation if they cooperated. *Id.*

⁶⁴ 2004 N.Y. Laws 3918–19.

⁶⁵ *Id.* at 3918.

⁶⁶ As we shall see, *infra* Part III, “substantial justice” is a vague and amorphous term that can operate to bar resentencing.

⁶⁷ 2004 N.Y. Laws 3919.

application was denied, or if the new sentence was either too harsh or unauthorized as a matter of law.⁶⁸ Finally, the law provided that the court must “specify[] and inform[]” the individual of the determinate sentence to be imposed so that he may make the decision to either accept or reject the newly imposed sentence.⁶⁹

Although the response to the 2004 DLRA was predominantly positive, many were concerned about the exclusion of A-II felons from the resentencing reform.⁷⁰ Under the 2004 DLRA, merit time allowances were available to A-II felons, but resentencing eligibility was not.⁷¹ The injustice of refusing the extension of resentencing to A-II felons is obvious; an individual convicted of selling the most minute amount of narcotics and sentenced to eight years to life in 1990 may still be incarcerated in 2004, whereas after the DLRA had been enacted the maximum sentence that could be imposed was ten years. Persuaded by public, legislative and administrative support,⁷² Governor Pataki signed the 2005 Drug Law Reform Act into law, extending resentencing to A-II felons.⁷³

C. *The 2005 Drug Law Reform Act*

The 2005 DLRA extended the availability of resentencing to A-II felons, but imposed certain requirements that were not necessary for A-I offenders.⁷⁴ First, in order for an A-II offender to qualify to apply to be resentenced, the inmate must be at least twelve months from being an eligible inmate as defined by section 851(2) of the New York Corrections Law.⁷⁵ An inmate is defined as “eligible” if he or she is either eligible for parole or will become eligible for parole within two years.⁷⁶ In other words, an inmate is not entitled to apply for resentencing if he is less than three years away from *potentially* being paroled.

Second, A-II offenders must be eligible for merit time allowance

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See generally S.B. 5880, 228th Leg., Reg. Sess. (N.Y. 2005).

⁷¹ 2004 N.Y. Laws 3918–19. Merit time allowances are reductions to the minimum period of the indeterminate sentence provided that the inmate has not committed a violent felony and successfully participates in certain programs while incarcerated. N.Y. CORRECT. LAW § 803 (McKinney 2003).

⁷² Extension of resentencing was supported by the N.Y.S. Senate, Assembly, Department of Corrections, Division of Parole and Counsel to the Governor. See S.B. 5880, 228th Leg., Reg. Sess. (N.Y. 2005) (B. Jacket).

⁷³ 2005 N.Y. Laws 3435–36.

⁷⁴ *Id.* at 3435.

⁷⁵ *Id.*

⁷⁶ N.Y. CORRECT. LAW § 851(2) (McKinney 2003).

under section 803(d) of the corrections law.⁷⁷ To be eligible for a merit time allowance, an inmate cannot have committed an A-I felony, a violent felony (A-II, B, C, D, or E), or any specifically enumerated crimes.⁷⁸ Furthermore, to earn merit time, an inmate must have participated in certain programs while incarcerated, and must not have committed any serious disciplinary infractions or filed a frivolous civil action against a state agency, officer, or employee.⁷⁹

The DLRA appeared to bring an end to an era of injustice and inequity. No longer would petty street dealers and addicts be subject to life imprisonment. Also, judges would be given the necessary discretion, via determinate sentences, to take into consideration the circumstances and events that surrounded the conviction of a drug offender. But what about those inmates whose sentences were already finalized before the DLRA? And what about those confined to imprisonment for crimes that the legislature has subsequently deemed to be not as serious as once before? Resentencing, on its face, appears to be the simple answer; however, a closer look at the limitations, requirements, and judicial interpretation of resentencing legislation suggests that it has not adequately remedied the past injustices of the Rockefeller Drug Laws, and that far more legislative action is necessary to produce meaningful reform.

III. RESENTENCING AS REFORM?

A. *The Failures of A-I Resentencing*

The essential problem with the 2004 DLRA resentencing scheme for A-I offenders is the provision that allows a judicial determination that “substantial justice” dictates a denial of resentencing.⁸⁰ Substantial justice, which is left undefined by the DLRA, was intended to give the presiding judge the option to decline resentencing in the event that it is imprudent. This is

⁷⁷ 2005 N.Y. Laws 3435. The interpretation given to the word “eligible” by courts has placed another obstacle in the way of resentencing. See *infra* Part III.

⁷⁸ N.Y. CORRECT. LAW § 803(1)(d)(ii) (McKinney 2003). The specifically enumerated crimes include manslaughter in the second degree, vehicular manslaughter in the first and second, criminally negligent homicide, incest, aggravated harassment of an employee by an inmate, sexual offenses, or child pornography offenses. *Id.*

⁷⁹ § 803(1)(d)(iv). Required programs were completion of alcohol and substance abuse treatment and GED or vocational training. *Id.*

⁸⁰ 2004 N.Y. Laws 3919.

evident from language of the DLRA, which states that “the court *shall*, unless substantial justice dictates that the application should be denied . . . enter an order to [resentence].”⁸¹ From a fair reading of this language it appears that a court must resentence unless there is a compelling reason not to, such as where the convict a history of violence while incarcerated, demonstrating an inability to re-enter society.⁸² After all, the purpose of the resentencing provision was to give those sentenced under the old laws a new sentence that society now believes to fit the crime. The substantial justice clause, however, allows prosecutors not only to base their resentencing recommendations on acts committed while incarcerated, but also on acts committed prior to conviction and sentencing.⁸³

An interview conducted with former prosecutor Barry Aaron⁸⁴ revealed that among the factors considered by a district attorney when deciding on a resentencing recommendation were the criminal history of the inmate, whether the inmate had previously pled guilty to the underlying offense, and the nature of the inmate’s involvement in the crime for which he or she was convicted.⁸⁵ So, in essence, the dictates of substantial justice lie in the hands of the prosecutor, and based on a defendant’s exercise of his or her constitutional right to go to trial by not pleading guilty, resentencing may be denied.

It is evident from the case law that courts give significant weight to the nature of the offense committed when evaluating substantial justice.⁸⁶ For example, in *People v. Morales*, an application for resentencing was denied because of the large amounts of narcotics involved in the underlying conviction.⁸⁷ The Appellate Division, Fourth Department, held that the “DLRA[] is intended to afford relief to low level offenders and, based upon the large amount of

⁸¹ 2004 N.Y. Laws 3919 (emphasis added).

⁸² *See, e.g.*, *People v. Rivers*, 842 N.Y.S.2d 611, 612 (App. Div. 2007) (denying resentencing because of a significant number of disciplinary violations while incarcerated and a fairly lengthy criminal record).

⁸³ *See e.g.*, *People v. Rodriguez*, 864 N.Y.S.2d 406, 407 (App. Div. 2008) (denying resentencing because of the large amounts of drugs involved in the case, and the defendant’s extensive history in large-scale trafficking of narcotics and firearms).

⁸⁴ Barry Aaron was an Assistant District Attorney in Kings County (Brooklyn) for thirty-three years. He handled all of the resentencing applications for the D.A. after the DLRA of 2004.

⁸⁵ E-mail from Barry Aaron, Retired Assistant District Attorney, Kings County District Attorney’s Office, to author (Nov. 17, 2008) (on file with author).

⁸⁶ *See, e.g.*, *People v. Morales*, 848 N.Y.S.2d 486, 487 (App. Div. 2007).

⁸⁷ *Id.*

cocaine involved in the subject transaction, it is evident that defendant is not such an offender.”⁸⁸ Although street dealers and addicts should be evaluated differently than large scale importers, this discrepancy should manifest itself in the length of the resentence rather than in a complete denial of resentencing. After all, the point of the DLRA and resentencing was to adjust the penalties for drug offenses to levels that society deems fit. Society has determined that anyone convicted of an A-I drug offense should spend no more than twenty years in prison.⁸⁹ Therefore, it is a miscarriage of justice to allow Mr. Morales, who has been incarcerated for seventeen years,⁹⁰ to continue to serve an indeterminate sentence of life imprisonment when he would not spend a day over twenty years in prison if he had committed the same crime today. The more culpable the defendant, the longer the resentence should be; it is illogical to refuse resentencing based on the quantity of drugs involved in a crime when no amount of drugs carries a life sentence under the current law.

The DLRA was intended to recalibrate the scales of justice by acknowledging the fact that *no* nonviolent drug offense should be punished by lifetime incarceration.⁹¹ Nevertheless, the broad and vague articulation of “substantial justice” has given prosecutors and the judiciary carte blanche to deny resentencing and perpetuate life sentences for drug offenses. This has led to the denial of resentencing to almost 50 percent of A-I felons; and out of those resentenced, only 50 percent have been released.⁹² This telling statistic could not have been what the legislature intended when they sought to “reform” the Rockefeller Drug Laws.

B. The Failures of A-II Resentencing

The differences between the resentencing requirements for A-II offenders and A-I offenders are notable.⁹³ Under the 2005 DLRA, there are two strong limitations on the resentencing of A-II offenders.⁹⁴ First, an inmate must be at least twelve months from

⁸⁸ *Id.*

⁸⁹ N.Y. PENAL LAW § 60.04 (McKinney 2009).

⁹⁰ *Morales*, 848 N.Y.S.2d at 487.

⁹¹ *See* § 60.04.

⁹² As of December 2005, out of 473 A-I felons eligible at the time the DLRA became effective, 270 have been resentenced. Of those 270, 142 were released. LEGAL AID SOCIETY, ONE YEAR LATER: NEW YORK'S EXPERIENCE WITH DRUG LAW REFORM 7 (2005), http://www.drugpolicy.org/docUploads/DLRA_2005_Report.pdf.

⁹³ *See supra* Part II.C.

⁹⁴ 2005 N.Y. Laws 3435–36.

being an “eligible inmate” as defined by section 851 of New York’s Corrections Law.⁹⁵ Second, an inmate must be eligible to earn merit time as per section 803 of the corrections law.⁹⁶ These two limitations, as well as judicial discretion, make resentencing impossible for many A-II offenders and unlikely for the rest.

As explained above,⁹⁷ the requirement that an inmate be at least twelve months from being an “eligible inmate” as defined by section 851 of the corrections law, translates to resentencing being limited to inmates at least three years from qualifying for parole.⁹⁸ The current definition of “eligible inmate,” however, may not have been the intent of the legislature⁹⁹ because the limitation was not developed until the Appellate Division, First Department, interpreted the legislation as such in *People v. Bautista*.¹⁰⁰

In *Bautista*, the court determined that the language of the 2005 DLRA—that in order for a defendant to qualify for resentencing he or she must be more than twelve months from being an “eligible inmate,” as that term is defined in corrections law section 851(2)¹⁰¹—amounted to a limitation on resentencing, available only to those three years from parole eligibility.¹⁰² While acknowledging that this statutory equation is not a “model of clarity” and that this interpretation may disparately impact two similarly situated individuals,¹⁰³ the First Department found the statute constitutional “since the distinction is rationally related to the achievement of the valid state objective of ameliorating the conditions of those A-II offenders facing the longest prison time.”¹⁰⁴ This “valid state objective,” however, is not necessarily the goal of the 2005 DLRA.¹⁰⁵

The drive to extend resentencing to A-II offenders was based on the premise that A-II felons were punished severely for relatively minor offenses,¹⁰⁶ and if A-I felons were given the opportunity to be

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *See supra* Part II.C.

⁹⁸ N.Y. CORRECT. LAW § 851(2) (McKinney 2003).

⁹⁹ *See People v. Mills (Mills I)*, No. 94-2116, 2007 WL 173840, at *5 (Onondaga County Ct. Jan. 16, 2007).

¹⁰⁰ 809 N.Y.S.2d 62, 63 (App. Div. 2006).

¹⁰¹ 2005 N.Y. Laws 3435–36.

¹⁰² *Bautista*, 809 N.Y.S.2d at 63.

¹⁰³ Convicted A-II felons are being treated differently based on their respective parole eligibility dates.

¹⁰⁴ *Bautista*, 809 N.Y.S.2d at 63.

¹⁰⁵ *Id.*

¹⁰⁶ Sale of two ounces of narcotics, for example, held a mandatory sentence of life. N.Y. PENAL LAW § 60.04 (McKinney 2009).

resentenced, as presumably more culpable individuals, it was only fair that this opportunity be extended to A-II felons.¹⁰⁷ The New York State Assembly even stated that, in reference to extension of resentencing to A-II felons, “equity demands that eligible A-II drug offenders (a lesser offence [sic]) should also be allowed to appeal for re-sentencing under the new structure.”¹⁰⁸ The legislature intended the 2005 DLRA to provide relief to those who were most impacted by the Rockefeller Drug Laws, A-II felons serving life sentences who committed relatively minor offenses. Furthermore, this objective was realized in the interpretation given to the DLRA by some courts.¹⁰⁹ In *People v. Morales*, the Appellate Division, Fourth Department denied resentencing to an inmate based on the large quantity of narcotics he sold.¹¹⁰ The court held that the DLRA are “intended to afford relief to low level offenders” and, based on the nature of the defendant’s criminal activity, resentencing was inappropriate.¹¹¹

If the *actual* legislative intent was to afford relief to the lowest level offenders since they are the most severely impacted, the rational basis found by the Appellate Division, First Department for treating similarly situated inmates differently is misplaced. The differences in how appellate divisions have interpreted the objectives of the 2005 DLRA, as shown by the First and Fourth Departments’ decisions in *Bautista* and *Morales*, has produced curious results.¹¹² For example, in *People v. Mills*, Mr. Mills was sentenced to an indeterminate sentence of three years to life in 1995, and had since been denied parole on four separate occasions.¹¹³ In 2006, Mills applied for resentencing during his eleventh year of incarceration and was denied, albeit reluctantly, by the resentencing court.¹¹⁴ In determining that Mills was not an “eligible inmate,” the court read into section 851(2) of the corrections law more than the First Department in *Bautista*, and found that “[i]f an inmate is denied release on parole, such inmate shall not be deemed an eligible inmate until he or she is within two years of his or her next scheduled appearance before the State

¹⁰⁷ See S.B. 5880, 228th Leg., Reg. Sess. (N.Y. 2005) (B. Jacket).

¹⁰⁸ *Id.*

¹⁰⁹ See *People v. Morales*, 848 N.Y.S.2d 486, 487 (App. Div. 2007).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See *Mills I*, No. 94-2116, 2007 WL 173840, at *1 (Onondaga County Ct. Jan. 16, 2007).

¹¹³ *Id.* at *4.

¹¹⁴ *Id.* at *5.

Parole Board.”¹¹⁵ New York’s Executive Law section 259-i requires that the parole board reconsider parole not more than twenty-four months from an inmate’s denial of parole.¹¹⁶ Therefore, the relief provided by the 2005 DLRA is not only unavailable to all inmates within three years of parole eligibility, but also to all inmates who have been denied parole, no matter how many years they have served.¹¹⁷ In commenting on the apparent unjust results, Justice Aloï explained that:

it is clear that the State Legislature, by this confusing legislation, has not only failed in their sworn duties in that respect but has more fundamentally failed to implement the Legislature’s express intent of ameliorating long A-II drug sentences by providing more humane and realistic sentences for A-II drug felons.

...

The Court is hopeful that this case will prompt the State Legislature to rewrite the legislation to address the inequities raised by this and similar cases.¹¹⁸

It is clear from Mr. Mills’ situation that the “eligible inmate” limitation produces gross inequities: the resentencing of any A-II felon who is within three years of parole is subject to the discretion of the parole board, rather than the courts or the DLRA’s, and will continue to serve lengthy sentences beyond the mandatory maximums set by the new laws. The purpose of the DLRA was to afford relief to the low-level offenders.¹¹⁹ Limiting the relief, however, to a subclass of low-level offenders undermines this goal by arbitrarily drawing the line at three years from parole eligibility, which results in disparate treatment to inmates who are similarly situated.

Recently, the New York Court of Appeals granted leave to hear Mr. Mills’ appeal.¹²⁰ Unfortunately, the court was unable to provide any relief for Mr. Mills because it was constrained by the “plain meaning” of the 2005 DLRA.¹²¹ Judge Read, in writing for the court held that “Mills was less than three years from parole eligibility

¹¹⁵ *Id.* at *4; N.Y. CORRECT. LAW § 851(2) (McKinney 2003).

¹¹⁶ N.Y. EXEC. LAW § 259-i(2)(a)(i) (McKinney 2010).

¹¹⁷ *Mills I*, 2007 WL 173840, at *4–*5. In this case Mr. Mills’s next scheduled parole hearing was in the spring of 2008, his thirteenth year of incarceration. Currently, the maximum sentence for an A-II felony is ten years.

¹¹⁸ *Id.* at *5.

¹¹⁹ *People v. Morales*, 848 N.Y.S.2d 486, 487 (App. Div. 2007).

¹²⁰ *People v. Mills (Mills II)*, 901 N.E.2d 196 (N.Y. 2008).

¹²¹ *Id.* at 202.

when he applied for resentencing . . . and therefore [he] does not qualify for resentencing.”¹²² Thus, it appears that this problem cannot be solved by the judiciary, but rather requires further legislative action.

The second requirement that A-II offenders must meet to be resentenced is eligibility under section 803(1)(d) of the corrections law.¹²³ As explained above¹²⁴, in order to be eligible for merit time, an inmate must not have committed an A-I felony, a violent felony, or one of the enumerated crimes.¹²⁵ In addition, to earn merit time an inmate must not have significant disciplinary action taken against him while in prison, and must have completed certain programs.¹²⁶ Due to the ambiguous wording of the DLRA, however, which states that the inmate must merely be *eligible* for merit time, while simultaneously referring to section 803(1)(d) which specifies requirements for *earning* merit time, there has been a split in the appellate divisions as to the interpretation of the DLRA that has led to further obstacles for A-II offenders to hurdle.

Subsection (ii) of paragraph (d) of section 803(1) sets out the requirements for merit time eligibility.¹²⁷ The Appellate Division, Second Department has held that being *eligible* for merit time, without having earned it, is all that is necessary for an inmate qualify for resentencing.¹²⁸ For example, in *People v. Sanders*, the trial court found that an inmate who had been disciplined was not qualified to be resentenced since he was not eligible to *earn* merit time under section 803(1)(d)(iv).¹²⁹ The Appellate Division, Second Department found that the DLRA eligibility requirements of correction law section 803(1)(d) do not preclude an inmate, from whom merit time has been withheld, from seeking resentencing if he was *eligible* for merit time according to §803(1)(d)(ii).¹³⁰ The court reasoned that if an application for resentencing was denied

¹²² *Id.*

¹²³ 2005 N.Y. Laws 3435–36.

¹²⁴ *See supra* Part II.C.

¹²⁵ N.Y. CORRECT. LAW § 803(1)(d)(ii) (McKinney 2003).

¹²⁶ § 803(1)(d)(iv).

¹²⁷ To be *eligible*, the inmate cannot have committed an A-I felony, a violent felony, manslaughter in the second degree, vehicular manslaughter in the first and second degrees, criminally negligent homicide, incest, aggravated harassment of an employee by an inmate, sexual offenses, or child pornography offenses.

¹²⁸ *People v. Sanders*, 829 N.Y.S.2d 187, 188 (App. Div. 2007); *see also* *People v. Schulze*, No. 947N/00, 2006 WL 686048 (Nassau County Ct. Mar. 16, 2006) (holding that an inmate need not earn merit time to be “eligible” for resentencing).

¹²⁹ *Sanders*, 829 N.Y.S.2d at 189.

¹³⁰ *Id.* at 188.

based on merit time being withheld, the DLRA “would vest the authority for resentencing in the [New York State Department of Corrections (“DOCS”)] rather than in the sentencing court, a result the Legislature clearly could not have intended.”¹³¹

On the other hand, the Appellate Divisions in the First and Third Departments have held that being *eligible* under subsection (ii) for merit time is not sufficient, but that an inmate must *earn* merit time under subsection (iv).¹³² For example, in *People v. Paniagua*, an inmate was refused resentencing because he committed two disciplinary infractions while incarcerated, making him ineligible to earn merit time.¹³³ The Appellate Division, First Department held that in order to be qualified for resentencing, an inmate must be eligible to *earn* merit time and therefore must not disqualify himself by violating section 803(1)(d)(iv).¹³⁴ The First Department found the rationale of the Second Department in *Sanders* flawed. The court pointed out that the legislature referred to section 803(1)(d) in its entirety when explaining resentencing eligibility, and that therefore the legislature most likely intended that an inmate’s failure to abide by prison rules can be viewed adversely only when in consideration of the inmate’s fitness for re-adjustment to life outside of prison.¹³⁵

At first glance, this reasoning appears to make sense. A closer look at the legislative history, however, reveals that the legislature did not intend to require an inmate to earn merit time as a condition precedent to resentencing. According to the New York State Senate’s memorandum in support of the 2005 DLRA, the Act was designed to extend resentencing to those A-II felony offenders who are

eligible under provisions of section 803 of the correction law to earn merit time credit against their sentence. The law is intended to apply to those . . . offenders who are eligible to earn merit time, but is not intended to require that they have earned merit time allowance before they may apply for

¹³¹ *Sanders*, 829 N.Y.S.2d at 188.

¹³² *People v. Paniagua*, 841 N.Y.S.2d 506, 514 (App. Div. 2007) (First Department); *People v. Williams*, 850 N.Y.S.2d 717, 718 (App. Div. 2008) (Third Department).

¹³³ *Paniagua*, 841 N.Y.S.2d at 513.

¹³⁴ *Id.* at 514.

¹³⁵ *Id.* at 514–15; *see also Williams*, 850 N.Y.S.2d at 718 (agreeing with the reasoning of the First Department, on the basis that nothing in the DLRA or section 803(1)(d) suggests that the legislature intended eligibility requirements to be so narrow as to only mean an inmate who is serving an indeterminate sentence and not convicted of certain enumerated crimes).

resentencing Thus, anyone who is statutorily eligible to earn merit time . . . may apply for resentencing of their class A-II felony controlled substance offense.¹³⁶

Furthermore, the New York State Assembly's parallel memorandum asserts that resentencing is available to any inmate "otherwise not disqualified pursuant to Correction Law section 803, subdivision 1 paragraphs (i) and (ii) (they have committed some disqualifying violent felony or other enumerated felony offense, although need not have completed the work and treatment or other requirements in paragraph (iv) of that section)."¹³⁷

This legislative language supports the Second Department's holding that merit time eligibility is all that is necessary to apply for resentencing, whether or not merit time has been earned. The legislative history has been relied upon by the New York County Supreme Court in *People v. Quinones*¹³⁸ and the Nassau County Court in *People v. Schulze*.¹³⁹ Although *Quinones* has been effectively overruled by the First Department's decision in *Paniagua*, the court correctly recognized the fact that "remedial legislation is to be liberally construed to carry out the reforms contemplated by the legislature."¹⁴⁰

The confusion and varying interpretations of the 2005 DLRA amount to resentencing being withheld from even more inmates sentenced under the old laws. The poor draftsmanship of the DLRA has left the resentencing provisions open to judicial interpretation, and in appellate divisions that tend to be more conservative,¹⁴¹ the interpretations have, not surprisingly, been construed against the inmate. Furthermore, the language of the DLRA provides that appeals of a resentencing denial may only be taken as of right.¹⁴² Therefore, the decision of the appellate division is the supreme law unless the New York Court of Appeals decides to intervene. Thus, the appellate division in which an inmate was originally sentenced determines whether or not he will qualify for resentencing, and the fact that two of the four departments have further restricted resentencing eligibility suggests that the future looks bleak for more than half the A-II offenders currently incarcerated.

¹³⁶ S.B. 5880, 228th Leg., Reg. Sess. (N.Y. 2005) (B. Jacket).

¹³⁷ S.B. 5880, 228th Leg., Reg. Sess. (N.Y. 2005) (B. Jacket).

¹³⁸ 812 N.Y.S.2d 259 (Sup. Ct. N.Y. County 2005).

¹³⁹ No. 947N/00, 2006 WL 686048 (Nassau County Ct. Mar 16, 2006).

¹⁴⁰ *Quinones*, 812 N.Y.S.2d at 271.

¹⁴¹ The Appellate Division, First Department, sits in Manhattan and the Appellate Division, Third Department, sits in Albany.

¹⁴² 2005 N.Y. Laws 3435-36.

IV. THE DRUG LAW REFORM ACTS OF 2004 AND 2005: SUCCESS OR FAILURE?

As explained above, resentencing was not the most effective solution to the injustices created by the Rockefeller Drug Laws. As of May 1, 2008, 364 A-I felons and 350 A-II felons have been resentenced; only 238 A-I felons and 193 A-II felons have been released.¹⁴³ Resentencing, however, is only half of the story since that provision of the DLRA applied retroactively.¹⁴⁴ The other objectives of the DLRA were to make prospective change to the previously harsh drug laws by reducing sentence length, increasing drug quantities to achieve those sentences, using drug treatment for rehabilitation purposes, and providing for a more successful and productive re-entry of offenders into society.¹⁴⁵ The DLRA did indeed reduce sentence length and increase drug quantities to achieve those sentences, but many felt that the DLRA were merely the first step in reform, because nothing had been done since 2005 in the way of further modification.¹⁴⁶ The following sections address the movement for further drug reform in New York State by those who believed that the DLRA were either a failure or incomplete, as well as the resistance to this movement by those who believed that the DLRA were a success. As will be demonstrated below, the advocacy on both sides of the issue produced further change, ultimately manifesting itself in what became the DLRA of 2009.

A. *The DLRA as a Failure: Further Reform Needed*

The cry for further drug law reform did not simply come from those directly impacted by the laws or from those who were sympathetic to their cause. There was an obvious need for a review of the State’s sentencing structure as evidenced by former Governor Spitzer implementation of Executive Order Number 10, in March of 2007.¹⁴⁷ The Executive Order created The New York State Commission on Sentencing Reform and cited four major objectives: (1) criminal sentences appropriately reflecting the seriousness of the offender’s crime; (2) producing an equitable system of criminal

¹⁴³ WILLIAM GIBNEY, LEGAL AID SOCIETY, THE ROCKEFELLER DRUG LAWS—35 YEARS LATER 2 (2008), available at <http://www.legal-aid.org/media/59868/rockydruglawtestimony0508.pdf>.

¹⁴⁴ 2005 N.Y. Laws 3435–36; 2004 N.Y. Laws 3918–19.

¹⁴⁵ See 2004 N.Y. Laws 3918, 3918–25.

¹⁴⁶ See GIBNEY, *supra* note 143, at 2.

¹⁴⁷ Exec. Order No. 10, N.Y. COMP. CODES R. & REGS. tit. 9, § 6.10 (2007).

justice that ensures crimes of similar seriousness result in similar sanctions for similarly situated offenders; (3) simplifying the sentencing structure; and, (4) making the most effective use of the correctional system by exploring alternatives to incarceration, improving educational and vocational training, and improving re-entry preparation that can help the reintegration into society and thereby reduce recidivism.¹⁴⁸

This review of the state sentencing structure appeared to be what many had been waiting for. Primarily, it sought to address the issue of alternatives to incarceration through treatment as well as more efficient use of the correctional system by reducing recidivism through improved training and re-entry programs.¹⁴⁹ To determine the proper reform, testimony was given by many interested parties in New York State. The testimony developed along one common theme: The DLRA was incomplete and more reform was necessary in order to actually ameliorate the harshness of the Rockefeller Drug Laws.¹⁵⁰ Three areas of concern were cited: (1) a need for a treatment-based approach rather than incarceration; (2) divesting the power over sentencing from the executive branch and transferring it to the judiciary; and, (3) formulating a better re-entry program to reintegrate former inmates into the community.

1. Treatment-Based Approach

The first problem cited with the DLRA was its minimal impact on those most affected by the Rockefeller Drug Laws.¹⁵¹ Much was made of the reform to the sentencing structure of class A felonies; but lost in the uproar was the fact that the sentences for non-violent B felonies went nearly unaffected.¹⁵² Although the sentences were reduced by the 2004 DLRA to a determinate sentence of one to nine years, this term of incarceration was among the harshest in the

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Public Hearing in Buffalo Before the New York State Commission on Sentencing Reform* (Nov. 19, 2007) [hereinafter *Buffalo Public Hearing*], available at http://criminaljustice.state.ny.us/legalservices/sentencingreform/transcript_buffalo_public_hearing_20071119.pdf; *Public Hearing in Albany Before the New York State Commission on Sentencing Reform* (Nov. 15, 2007) [hereinafter *Albany Public Hearing*], available at http://criminaljustice.state.ny.us/legalservices/sentencingreform/transcript_albany_public_hearing_20071115.pdf; *Public Hearing in New York City Before the New York State Commission on Sentencing Reform* (Nov. 13, 2007) [hereinafter *NYC Public Hearing*], available at http://criminaljustice.state.ny.us/legalservices/sentencingreform/transcript_nyc_public_hearing_20071113.pdf.

¹⁵¹ *Albany Public Hearing*, *supra* note 150, at 59–65 (statement of Mark Furnish, counsel for Thomas Duane, Senator, State of New York).

¹⁵² 2004 N.Y. Laws 3923.

country and applied to all first-time offenses.¹⁵³ Furthermore, the classification of B felony applied to many low-level offenders. For example, possession of less than one half-ounce of narcotics would fall within the ambit of the B felony classification.¹⁵⁴ The mandatory minimums that attach to B felonies prevent more appropriate forms of punishment such as treatment, because many of the offenders in this class are addicts and do not benefit from incarceration.¹⁵⁵

Furthermore, the incomplete modification displayed that the DLRA was nothing more than an appeasement of those who made efforts to move toward reform. Since there had been no further change between 2005 and 2009, it appeared that the DLRA was detrimental to the reform movement in some ways. It made many believe that reform had taken place, but actually only solved one piece of the puzzle. The lack of further reform caused one legislator who was part of the reform movement to comment that the “Legislature reached a poor compromise and passed [the DLRA] that did very little in the way of Rockefeller Drug Law Reform—but did have tragic consequences of stopping the momentum for reform, and removing the Legislature’s incentive to enact an actual and meaningful repeal of the laws.”¹⁵⁶ Statistics support these notions: even after the DLRA of 2004 and 2005, more people were incarcerated for non-violent drug offenses in 2006 (6,039) and 2005 (5,835), than in 2004 (5,657).¹⁵⁷ Also, as of 2007 thirty-nine percent of those incarcerated in DOCS were convicted for drug possession rather than drug sale, and nearly fifty-four percent of those in DOCS were convicted for the lowest level drug felonies.¹⁵⁸

Consequently, the DLRA of 2004 and 2005 did not reduce the amount of drug-related offenders going to prison, but rather changed the offenses for which they were sent to prison and the amount of time they spent in prison. Although it is a worthy objective to reduce the amount of time people are spending in prison, if the same amount of people or more are being incarcerated, the current punishment model is ineffective. Clearly, deterrence was not achieved. Additionally, many individuals incarcerated were

¹⁵³ *Albany Public Hearing*, *supra* note 150, at 59–65 (statement of Mark Furnish, counsel for Thomas Duane, Senator, State of New York).

¹⁵⁴ N.Y. PENAL LAW § 60.04 (McKinney 2009).

¹⁵⁵ See GIBNEY, *supra* note 143, at 3.

¹⁵⁶ *Albany Public Hearing*, *supra* note 150, at 59 (statement of Mark Furnish, counsel for Thomas Duane, Senator, State of New York).

¹⁵⁷ *Id.* at 61.

¹⁵⁸ *Id.* at 61–62.

not major drug dealers or traffickers, but were addicts who would be better served by treatment rather than prison.¹⁵⁹

2. Executive Discretion

The second area of concern that the DLRA of 2004 and 2005 failed to address was the broad discretion vested in the executive branch. The Rockefeller Drug Laws transferred the power over sentencing and treatment into the hands of prosecutors by setting mandatory minimums that divested the traditional discretion held by a trial judge.¹⁶⁰ The DLRA of 2004 and 2005 did not relieve this and judges had no discretion to order drug treatment.¹⁶¹ Judges were only permitted to order drug treatment to first-time class-A-felony offenders.¹⁶² Judges had almost no power to order treatment for first-time class-B-felony offenders, and were forbidden from ordering drug treatment for second-felony offenders, even if it was clear that addiction was the cause of the crime.¹⁶³ By taking this power from the judges, prosecutors had an advantage in plea negotiations and held the gate key to alternatives to incarceration.¹⁶⁴ It is important to note, however, that prosecutors do not have a neutral perspective like judges do. In the great majority of district attorneys' offices, success and failure is measured by conviction percentages and sentence length.¹⁶⁵ Based on this mentality, many district attorneys' offices were slow to move toward treatment as an alternative to incarceration, even in the face of the then-growing body of evidence that suggested treatment is more cost-efficient and more effective in reducing recidivism.¹⁶⁶

Furthermore, although the DOCS reported that seventy-two percent of inmates are self-identified substances abusers,¹⁶⁷ the DOCS was reluctant to implement the DLRA in terms of admitting

¹⁵⁹ Appropriate treatment models are discussed *infra* Part V.

¹⁶⁰ *Buffalo Public Hearing Before the New York State Commission on Sentencing Reform, Compilation of Written Testimony* 105–09 (Nov. 19, 2007) [hereinafter *Buffalo Public Hearing, Written Testimony*], available at http://criminaljustice.state.ny.us/legalservices/sentencingreform/nys_commission_on_sentencing_reform_buffalo_publichearing20071119.pdf (statement of Craig P. Schlanger, Esq.).

¹⁶¹ See GIBNEY, *supra* note 143, at 7.

¹⁶² See *id.*

¹⁶³ N.Y. PENAL LAW § 70.70 (McKinney 2009); see GIBNEY, *supra* note 143, at 7.

¹⁶⁴ See GIBNEY, *supra* note 143, at 4–5.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 5–7.

¹⁶⁷ DEP'T OF CORRECTIONAL SERVS., IDENTIFIED SUBSTANCE ABUSE 2 (2007), available at http://www.doccs.state.ny.us/Research/Reports/2008/Identified_Substance_Abusers_2007.pdf.

all inmates in need of treatment into the Comprehensive Alcohol and Substance Abuse Treatment Program (“CASAT”).¹⁶⁸ It took litigation on the part of the Legal Aid Society to force the DOCS to honor the specific provisions of the DLRA.¹⁶⁹ For example, in *Grant v. Goord*, Mr. Grant’s enrollment in CASAT was ordered by the supreme court, but admission was denied by the DOCS.¹⁷⁰ The DOCS claimed that the court had no authority to order enrollment in the CASAT, and that discretion was solely in the hands of the DOCS.¹⁷¹ The court held, however, that according to Penal Law section 60.04(6) the sentencing court had the power to order enrollment into the CASAT, and that to “accept the interpretation of the [DOCS] would completely eviscerate the delegation of authority granted by the legislature.”¹⁷²

Also, in *St. Louis v. Commissioner*, the DOCS refused to consider supplemental merit time when determining the eligibility date for participation in CASAT because it had adopted the policy of not considering supplemental merit time in connection with determining CASAT eligibility.¹⁷³ According to the Correction Law, however, “[w]hen calculating in advance the date on which a person is . . . eligible . . . for placement at an alcohol and substance abuse treatment correctional annex, the [DOCS] shall consider and include credit for all potential credits and reductions including but not limited to merit time and good behavior allowances.”¹⁷⁴ The court found that supplemental merit time must be considered in determining eligibility for CASAT because the adopted policy of DOCS is not entitled to deference since its policy was not based upon its special expertise in the field of correctional services, but rather is a matter of pure statutory construction, which is to be determined by the court.¹⁷⁵ The court concluded that the actions of the DOCS were “affected by an error of law, irrational, arbitrary

¹⁶⁸ GIBNEY, *supra* note 143, at 5. The CASAT is an inpatient program operated by the DOCS that provides treatment to drug abusers as an alternative to prison. DEPT OF CORRECTIONAL SERVS., THE COMPREHENSIVE ALCOHOL AND SUBSTANCE ABUSE TREATMENT PROGRAM (2007), available at http://www.docs.state.ny.us/Research/Reports/2008/CASAT_Report_2007.pdf.

¹⁶⁹ See *Grant v. Goord*, 819 N.Y.S.2d 848 (Sup. Ct.2006); *St. Louis v. Commissioner*, No. 7845-07 (N.Y. Sup. Ct. Albany County Mar. 3, 2008).

¹⁷⁰ *Grant*, 819 N.Y.S.2d at 1.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *St. Louis*, No. 7845-07, slip op. at 2, 6.

¹⁷⁴ *Id.* at 5 (citing N.Y. CORRECT. LAW § 851(2)(b) (McKinney 2003) (emphasis added)).

¹⁷⁵ *Id.* at 7.

and capricious, and an abuse of discretion.”¹⁷⁶

These two examples illustrate that the DOCS was reluctant to properly apply the reforms implemented by the DLRA of 2004 and 2005, and that DOCS was able to do so due to its vast power over the correctional system. These powers needed to be curbed in order to effectively realize reform. Also, the immense power the board of parole exhibits over an inmate’s ability to be released has been cited as an issue to be addressed.¹⁷⁷ Although mandatory minimums and indeterminate sentences have been blamed as the source of evil in New York’s drug and sentencing laws, the uncurbed power of the parole board may also be responsible.¹⁷⁸

The shift from indeterminate sentences to determinate sentences was exalted as a victory for drug law reform. This praise, however, failed to appreciate that indeterminate sentencing is the only hope that genuine rehabilitation will be rewarded.¹⁷⁹ Moreover, rehabilitation is a very realistic objective for non-violent criminals, since many of them have committed their offense due to some form of substance addiction. Therefore, determinate sentences are not the answer because they do not allow for efforts at rehabilitation to be rewarded, which will undoubtedly reduce the incentive of inmates to seek treatment.¹⁸⁰

A more appropriate solution may be a revision of the parole system and shifting the focus of parole determinations from the nature of the crime (something that cannot be changed), to the parolee’s efforts at rehabilitation (something that can be changed).¹⁸¹ As shown by the situation of Mr. Mills,¹⁸² the failure to grant parole in some cases is as much of a problem as the lengthy sentences imposed. The determinate sentence structure does not solve this problem because some inmates are ready for release before they have served full sentences. In such cases, the determinate sentence does nothing to promote public safety, but costs valuable tax dollars.¹⁸³ Revision of the parole system in conjunction with reducing the indeterminate sentences may be a

¹⁷⁶ *Id.* at 9.

¹⁷⁷ *Buffalo Public Hearing, Written Testimony, supra* note 160, at 70–72 (statement of Karen Murtagh-Monk and Patricia Warth, Prisoners Legal Services).

¹⁷⁸ *See id.*

¹⁷⁹ *Id.* at 6.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *See supra* Part III.

¹⁸³ *Buffalo Public Hearing, Written Testimony, supra* note 160, at 72–73 (statement of Karen Murtagh-Monk and Patricia Warth, Prisoners Legal Services).

more appropriate avenue for reform than setting fixed determinate sentences that do not take into account the efforts of an inmate to rehabilitate.

3. Reintegration into Society

The third and final major issue that the DLRA of 2004 and 2005 failed to address was the lack of a statewide reintegration program for those newly released from prison.¹⁸⁴ A statewide reintegration program is of the utmost importance because it will help facilitate successful re-entry into the community, reduce substance abuse, and therefore reduce recidivism.¹⁸⁵

Research has shown that many former inmates find the re-entry process unsupportive due to the lack of available resources.¹⁸⁶ Indeed, newly released non-violent offenders consistently have substance abuse problems that require not only treatment, but also mental health services, housing, employment, job training, and other types of emergency services.¹⁸⁷ Without these resources available immediately after release, many people will relapse under the stress of re-entry, which reverses any rehabilitation accomplished while incarcerated.¹⁸⁸ This relapse will most likely result in recidivism and perpetuate what has been coined the “revolving door” phenomenon of the prison system.¹⁸⁹

The only way to prevent this “revolving door” is to provide for pre-release services to inmates so that they may have a successful transition from prison to society, since many government benefits (i.e., social security, Medicaid, and food stamps) take months to receive.¹⁹⁰ Nevertheless, the DLRA did not provide legislatively allocated resources to serve this purpose, and parole/probation

¹⁸⁴ See GIBNEY, *supra* note 143, at 6.

¹⁸⁵ SHREYA MANDAL & KENNETH STEPHENS, LEGAL AID SOCIETY, COMMUNITY RE-ENTRY OF PERSONS WITH ALCOHOL AND/OR DRUG DEPENDENCY RELEASED FROM INCARCERATION AND PROGRESS WITH COLLABORATION BETWEEN PAROLE, CORRECTIONS, AND OASAS 5 (2008), available at http://www.legal-aid.org/media/59890/reentry_testimony_0508.pdf.

¹⁸⁶ See *id.* at 6.

¹⁸⁷ See GIBNEY, *supra* note 143, at 6.

¹⁸⁸ See *id.*

¹⁸⁹ *Illegal Drugs: Economic Impact, Societal Costs, Policy Responses: Hearing Before the Cong. J. Economic Comm.* 110th Cong. (2008) (statement of Anne J. Swern, First Assistant District Attorney, on Behalf of Charles J. Hynes, District Attorney, Kings County, New York) (“[The revolving door phenomenon is as follows: A]ddicts commit[] crime so that they [can] get money to get high, then [are] arrested and sent to prison for a few years, only to come back out of prison still desperate for drugs, and [this] renew[s] the cycle of addition, crime, and imprisonment.”).

¹⁹⁰ See MANDAL & STEPHENS, *supra* note 185, at 6.

officers and treatment programs lack proper re-entry planning and coordination.¹⁹¹ Furthermore, it is not uncommon for newly released prisoners to be misdiagnosed and receive improper treatment. In fact, some newly released prisoners who have been diagnosed with both substance abuse and mental problems return to city jail after they are rejected by community-based treatment, because the state does not provide treatment alternatives for those with co-occurring disorders.¹⁹²

Reintegration is final step in the criminal justice system, and is the most important due to its impact on future criminality. Success will likely reduce crime whereas failure will inevitably increase crime. Nevertheless, reintegration was not addressed by the DLRA of 2004 and 2005, which allowed the “revolving door” of the New York State Prison system to continually turn.¹⁹³ Reform will not be complete until the pressing issue of reintegration is properly addressed.¹⁹⁴

B. The Drug Law Reform Act as a Success: Further Reform Should Be Avoided

The immense impact of the drugs laws on New York State citizens led to an overwhelming cry for reform. This sentiment, however, was not shared by all New Yorkers. Many interested parties claimed that the drug law reform had gone far enough, and that further reform would reverse the positive trends that were established. This “law enforcement perspective” is quite different from those previously discussed; it facilitates an objective view of the drug law reform movement in New York State, and, ultimately manifests itself in the DLRA of 2009.

According to the law enforcement perspective, strict enforcement of drug laws has reduced crime.¹⁹⁵ Proponents of this view link the recent decrease in homicides, shootings, and violent crime to the war on drugs; one prosecutor stated that the link between drugs and violence is “indisputable.”¹⁹⁶ Many resisted further reform

¹⁹¹ See GIBNEY, *supra* note 143, at 6.

¹⁹² See MANDAL & STEPHENS, *supra* note 185, at 6.

¹⁹³ *Buffalo Public Hearing*, *supra* note 150, at 93–98 (statement of Thomas Green, Director, Housing Services, Altamont Program Inc.).

¹⁹⁴ *Id.*

¹⁹⁵ *NYC Public Hearing*, *supra* note 150, at 81–89 (statement of Bridget Brennan, New York City Special Narcotics Prosecutor).

¹⁹⁶ *Id.* at 4.

contesting that the laws were not strict enough.¹⁹⁷ In 2007 the New York City Special Narcotics Prosecutor’s office opined that New York needs a “King Pin” statute to increase penalties for leaders of criminal enterprises, as well as enhanced penalties for the simultaneous possession of a weapon and a controlled substance.¹⁹⁸

Furthermore, the law enforcement community vehemently opposes further B felony reform, since B felonies make up the majority of drug offenses—it is entirely possible to run a large-scale drug business within the ambit of a B felony.¹⁹⁹ Proponents of this view also believe that judicial discretion should not be expanded, but rather limited since mandatory maximums and minimums guide and define the judge’s discretion.²⁰⁰ Providing guidelines, they argue, prevents sentencing from becoming arbitrarily based on the “whim” of the judge and the pressure of the court calendar.²⁰¹

Finally, the law enforcement community does not oppose treatment, but insists that these alternatives remain under their control.²⁰² The primary reason for maintaining mandatory minimums is that treatment will not be effective without it.²⁰³ Requiring mandatory minimums gives prosecutors greater control over treatment programs and alternatives to incarceration because any violation of the prosecutor’s terms will result in automatic prison time, whether prison is appropriate or not.²⁰⁴ Then again, this is assuming that alternatives to incarceration are available.

The District Attorneys Association of New York (“DAASNY”) cites as a major problem the lack of resources available to prosecutors in rural counties, which results in prison being the only option.²⁰⁵

¹⁹⁷ *Albany Public Hearing*, *supra* note 150, at 20–33 (statement of James A. Murphy, III, President, New York State District Attorneys Association); *NYC Public Hearing*, *supra* note 150, at 81–89 (statement of Bridget Brennan, NYC Special Narcotics Prosecutor).

¹⁹⁸ *NYC Public Hearing*, *supra* note 150, at 87–89 (statement of Bridget Brennan, NYC Special Narcotics Prosecutor).

¹⁹⁹ *Albany Public Hearing*, *supra* note 150, at 23 (statement of James A. Murphy, III, President, New York State District Attorneys Association); *NYC Public Hearing*, *supra* note 150, at 85–86 (statement of Bridget Brennan, NYC Special Narcotics Prosecutor) (explaining that B felony offenders can run complex, sophisticated, and profitable drug businesses, for example, an offender was charged with a B felony when caught with a large amount of ketamine, 167 ecstasy pills, four large bags of methamphetamine, one ounce of crack-cocaine, a money counting machine, and \$6,000).

²⁰⁰ *NYC Public Hearing*, *supra* note 150, at 85–87 (statement of Bridget Brennan, NYC Special Narcotics Prosecutor).

²⁰¹ *Id.*

²⁰² *Albany Public Hearing*, *supra* note 150, at 20–33 (statement of James A. Murphy, III, President, New York State District Attorneys Association).

²⁰³ *Id.* at 23–24.

²⁰⁴ *Id.* at 22–23.

²⁰⁵ *Id.* at 24–25.

Outside of the urban centers of the state, many counties do not have drug courts or other alternatives available.²⁰⁶ Even if these alternatives were available, thirty-seven out of sixty-two counties have fewer than ten assistant district attorneys, and twenty counties have fewer than five assistant district attorneys.²⁰⁷ Therefore, even in counties where the district attorney wants to implement alternatives to incarceration, many do not have the resources to dedicate an A.D.A. to full time drug court since this would take away from the prosecution of violent crimes.²⁰⁸

Although the law enforcement community made valid arguments, it failed to recognize that further drug law reform could be directed at ameliorating the affect of the laws on those who were not violent felons or major drug traffickers. In addition, reform was still necessary to address the fact that prison does not always help to rehabilitate, and often, offenders leave prison in no better shape than when they entered; in many cases they may leave in a worse condition.²⁰⁹ The law enforcement community is of the opinion that there is no such thing as “nonviolent drug crimes.”²¹⁰ Due to the link between drugs and violence, however, reducing the number of people addicted to drugs will arguably reduce violence. Rehabilitation will prevent addicts from committing crimes in order to feed their habits, and reduced addiction will limit the demand for drugs and will therefore decrease the profitability of drug dealing. What the law enforcement community fails to recognize is that the “top-to-bottom”²¹¹ drug law enforcement scheme is ineffective because it does not solve the problem; it merely masks it behind prison bars. A “grass-roots” approach would be more effective by addressing the problem from the bottom-to-top.

It is evident from the testimony of the DAASNY that a major problem in implementing drug treatment programs is a lack of resources.²¹² Thus, the blame was not to be placed on the prosecutor, but rather on the legislature. Due to the lack of

²⁰⁶ *Id.* (explaining that many upstate counties do not have the finances or manpower to effectively use alternatives to prison).

²⁰⁷ *Id.* at 23–24.

²⁰⁸ *Id.* at 23–25.

²⁰⁹ Many of these people are incarcerated as class-B-felony offenders.

²¹⁰ *NYC Public Hearing, supra* note 150, at 84 (statement of Bridget Brennan, NYC Special Narcotics Prosecutor).

²¹¹ This expression is used to refer to the approach taken by law enforcement of incarcerating the drug dealers in order to prevent addictions.

²¹² *Albany Public Hearing, supra* note 150, at 23–24 (statement of James A. Murphy, III, President, New York State District Attorneys Association).

resources, district attorney offices that wanted to impose treatment alternatives were unable to, and therefore had to resort to the only option, incarceration. Other than the prison-based drug treatment programs,²¹³ there are no statewide programs that address the need for alternatives to incarceration. Also, the reluctance on the part of many district attorneys to move towards a treatment model can be attributed to the scarcity of these resources in many areas of the state.²¹⁴ It is clear that further reform was necessary from the legislature because the law enforcement community was not the appropriate government body to address this issue, and to be fair, in order to properly conduct its duties and responsibility to the people of the State of New York, it was not in a position to do so.

V. SOLUTIONS FOR FURTHER REFORM

A. *Shift to a Treatment Model*

As noted above,²¹⁵ simply incarcerating all offenders is not an effective solution to the problem of drug abuse and related crime. If the “revolving door” phenomenon is to be halted, a statewide system for rehabilitating offenders is necessary. Recognizing that incarceration does not effectively reduce crime, many advocates of reform have turned to a treatment-based model which, unlike the current correctional-based system, includes a community-based approach.²¹⁶

A significant amount of evidence reveals that community-based treatment works better than incarceration in terms of preventing future crime and keeping communities safe.²¹⁷ Community-based treatment is also more cost-efficient than incarceration because incarceration tends to isolate the incarcerated from their communities, and therefore leads them to return to the same criminal lifestyle once they reintegrate.²¹⁸ If an offender is given

²¹³ The ineffectiveness of these prison-based programs will be discussed *infra* Part V.

²¹⁴ N.Y. STATE COMM’N ON SENTENCING REFORM, THE FUTURE OF SENTENCING IN NEW YORK STATE: A PRELIMINARY PROPOSAL FOR REFORM 27 (2007) [hereinafter N.Y. STATE COMM’N, PRELIMINARY PROPOSAL], available at <http://criminaljustice.state.ny.us/legalservices/sentencingreform/2007prelimsentencingreformrpt.pdf> (explaining that there are large geographical gaps in treatment availability statewide, some counties have one hundred providers, where others have only one).

²¹⁵ See *supra* Part III.

²¹⁶ See GIBNEY, *supra* note 143, at 2–3.

²¹⁷ *Id.* at 2.

²¹⁸ See MANDAL & STEPHENS, *supra* note 185, at 11 (noting that incarceration generally cost \$100 more per day than community-based treatment); Lynne M. Vieraitis et al., *The*

community-based treatment, on the other hand, the likelihood of the offender having problems re-entering into society is diminished.²¹⁹

Currently, the only legislatively mandated treatment alternatives are correctional in nature, and these models have proved to be ineffective.²²⁰ The statewide program used is the Willard Drug Treatment Campus, operated by the DOCS.²²¹ Willard graduates recidivate at a rate of over fifty percent.²²² Some have contested that the inadequacy of Willard is its one-size-fits-all approach.²²³ Individual needs are not accounted for at Willard, and therefore, in many instances offenders receive inappropriate treatment.²²⁴ For example, drug dealers are often sent to Willard for drug abuse, but would be better served by job training, which would reduce their necessity to sell drugs for a living. Also, Willard is not appropriate for people with “co-occurring” disorders—those with mental and substance abuse problems—due to its boot-camp style approach.²²⁵ Finally, the short duration of the Willard program—ninety days—makes it difficult for the treatment to have any lasting, meaningful effect.²²⁶

After reviewing the current treatment system operated by the state, the Commission on Sentencing Reform suggested using a community-based approach to treatment and improving the quality and accessibility of these programs.²²⁷ According to the findings of the commission, recidivism is reduced when community supervision is combined with treatment; however, the success of the treatment depends on its availability, accessibility, and effectiveness.²²⁸ Furthermore, the commission praised the effectiveness of Drug Treatment Courts (“DTCs”), which have reduced recidivism rates by twenty-nine percent, and the Drug Treatment Alternative to Prison

Criminogenic Effect of Imprisonment: Evidence from State Panel Data, 1974–2002, 6 CRIMINOLOGY & PUB. POL’Y 589 (2007).

²¹⁹ See *supra* Part IV.

²²⁰ N.Y. STATE COMM’N, PRELIMINARY PROPOSAL, *supra* note 214, at 5–26.

²²¹ *Id.* at 27.

²²² *Id.* at 28.

²²³ MANDAL & STEPHENS, *supra* note 185, at 7.

²²⁴ *Id.* at 8.

²²⁵ *Id.*

²²⁶ N.Y. STATE COMM’N, PRELIMINARY PROPOSAL, *supra* note 214, at 27.

²²⁷ *Id.* at 27.

²²⁸ *Id.* at 26 & n.165 (defining treatment to include substance abuse programs, mental health programs, and education and employment programs, cognitive behavioral interventions that address criminal thinking and criminal personality, social skills, anger management, moral reasoning, family functioning, relationship with peers and role models, and motivation).

“DTAP”) program, started by Brooklyn District Attorney Charles Hynes, and now available in all five New York City counties.²²⁹

Despite the unprecedented success of these community-based treatment programs, nothing in the Penal Law or Criminal Procedure Law expressly required counties to form these alternatives or expressly permitted judges to require these alternatives in lieu of mandatory minimums.²³⁰ This failure of the legislature left many counties without community-based programs, leaving incarceration or Willard as the only options. In those counties that do have alternatives available to them, entry into the programs is controlled by the district attorney, which prevents many who do not meet the eligibility requirements from obtaining community-based treatment.²³¹ Although these community-based alternatives were not implemented statewide, their effectiveness was undisputed. The New York State Legislature was remiss for failing to adopt these programs. Using these programs as exceptions to mandatory minimums could very well end the cycle of addiction and criminal behavior that typically follows incarceration.²³² The following is a brief overview of treatment programs that were extremely successful in reducing recidivism.

B. Successful Treatment Models: DTC and DTAP

DTCs have shown great success in reducing recidivism.²³³ In the Bronx, the normal recidivism rate for drug offenders who go through the prison system is forty-five percent within two to three years.²³⁴ For those who are engaged in DTCs, the rate drops to fifteen percent.²³⁵ The key to the success with DTCs is that they replace the adversarial approach to prosecution with a clinical approach that emphasizes a team mentality and community restoration.²³⁶ DTCs combine a personalized approach to each

²²⁹ *Id.* at 24, 25 n.160.

²³⁰ *Id.* at 25.

²³¹ *Public Hearings in New York City Before the New York State Commission on Sentencing Reform, Compilation of Written Testimony* 235–37 (2007) [hereinafter *NYC Public Hearing, Written Testimony*], available at http://criminaljustice.state.ny.us/legalservices/sentencingreform/nys_commission_on_sentencing_reform_nyc_publichearing20071113.pdf (statement of Justice Laura Safer Espinoza, Supreme Court Justice, New York State Supreme Court).

²³² See N.Y. STATE COMM’N, PRELIMINARY PROPOSAL, *supra* note 214, at 26.

²³³ See *NYC Public Hearing, Written Testimony*, *supra* note 231 (statement of Justice Laura Safer Espinoza, New York State Supreme Court).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

defendant,²³⁷ constant judicial monitoring, and a graduated system of punishment and reward in order to rehabilitate the individual for successful re-entry into the community. The one flaw of DTCs under prior law, however, was that the judge who presided over the rehabilitation process did not have the authority to place defendants in a DTC or to dismiss charges when the defendant is compliant; all the power was vested in the prosecutor.²³⁸ Thus, prior to the DLRA of 2009 a paradox persisted in that the clinical approach found so successful in DTCs, was not applied in deciding who was eligible to partake in the program.²³⁹

Another highly successful treatment program is DTAP, first instituted in Brooklyn by District Attorney Charles Hynes in 1990.²⁴⁰ At the time of its creation, DTAP was the first treatment diversion program run by prosecutors; within the next two decades, it proved to be not only more effective, but also more cost-efficient than prison.²⁴¹ DTAP is a diversionary program that provides non-violent repeat felony offenders with serious drug addictions and with a community-based program of clinical support and an individualized holistic treatment.²⁴² The two key premises to DTAP are that recidivism is reduced if addiction is effectively treated, and that legal coercion is a powerful motivator to get addicts to succeed in treatment—treatment does not have to be voluntary to be effective.²⁴³

The second premise of DTAP is reflected by a deferred-sentencing model, rather than a deferred-prosecution model.²⁴⁴ This means that in order to participate in the treatment program, a defendant must first plead guilty to his or her charged offense; then, the sentence is deferred while he or she undergoes treatment.²⁴⁵ During treatment, the individual understands that successful completion of

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *See id.*

²⁴⁰ *See Illegal Drugs, supra* note 192, at 4 (statement of Anne J. Swern, First Assistant District Attorney, on Behalf of Charles J. Hynes, District Attorney, Kings County, New York).

²⁴¹ *Id.* at 6, 11–12 (according to the National Center on Addiction and Substance Abuse study, DTAP reduced recidivism when compared to incarceration in re-arrest (39% vs. 58%), re-conviction (26% vs. 47%), and return to prison within two years (2% vs. 15%); DTAP also boasts a 92% rate of employment after completion compared to 26% before, and the cost to admit a defendant into DTAP cost \$32,975 per year, compared to \$64,338 to incarcerate the same defendant in prison for one year).

²⁴² *Id.* at 4.

²⁴³ *Id.* at 5.

²⁴⁴ *See id.* at 9–10 (explaining that the deferred sentencing model increased one-year treatment retention rates by 12% when used instead of the deferred prosecution model).

²⁴⁵ *Id.*

DTAP allows a withdrawal of the guilty plea and a dismissal of the charges, but if the program is not completed, the defendant must serve the previously negotiated prison sentence.²⁴⁶ Another element of DTAP that makes it more successful than the available correctional-based treatment programs is its long-term nature; DTAP lasts from fifteen to twenty-four months.²⁴⁷

Although DTAP is extremely successful, it is also extremely selective.²⁴⁸ Only repeat non-violent felony offenders are eligible, and those who have committed crimes of theft must have been motivated by addiction to qualify.²⁴⁹ Applications can also be denied admission for acts of violence that did not lead to criminal prosecutions, which can be discovered through an extensive background check.²⁵⁰ The district attorneys’ office ultimately decides who is admitted to DTAP, but the program has still provided significant results.

The success of drug treatment programs showed that if New York was to actually reform the drug laws and stop the “revolving door” of the prison system, a statewide program that mimics DTAP is necessary. Also, the DTAP programs needed to be expanded to all who were in need. The exclusivity of Brooklyn’s DTAP program is understandable; however, there are many offenders who are in need of treatment, but do not qualify as an eligible defendant. Many misdemeanor, first-time, and violent offenders have committed their crimes due to addictions, and DTAP programs can be successful in rehabilitating them as well. It was clear that until New York State altered its approach from incarcerate first, treat later, actual reform could not take place because the cycle of addiction, crime, incarceration, and recidivism would not cease.

On the other hand, although the entry experience into the criminal justice system plays a large role in the successful rehabilitation of a drug offender, reintegration into society after an offender leaves the criminal justice system is equally vital. A failed reintegration due to an inability to rejoin and become a productive member of society almost certainly leads to recidivism. Therefore, it was necessary for real drug law reform to focus on reintegration into society.

²⁴⁶ *Id.* at 6–7.

²⁴⁷ *Id.* at 8.

²⁴⁸ *Id.* at 4 (explaining that in eighteen years of operation, only twenty-six hundred individuals have been admitted).

²⁴⁹ *Id.* at 7–8.

²⁵⁰ *Id.* at 7.

C. A Focus on Reintegration

In 2006 New York amended the penal law to include reintegration as a sentencing goal. Penal law section 1.05(6) now includes as one of the purposes of sentencing: “To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, *the promotion of their successful and productive reentry and reintegration into society*, and their confinement when required in the interests of public protection.”²⁵¹ The addition of this language into the sentencing goals was an extremely important first step since it evidenced the legislature’s acknowledgment of the need for comprehensive reform of the sentencing and drug laws that goes beyond incarceration and/or entry into a treatment program. Undoubtedly, after an offender has completed his or her prison term or treatment program, he or she can re-enter society looking for a second chance at a new life. Without transitional assistance to help reintegrate newly released offenders, there is no legitimate opportunity to obtain this new life.²⁵²

As explained above,²⁵³ the re-entry period for an ex-offender is a crucial time that may very well determine whether he or she will commit to leading a new life or recidivate. Without the proper healthcare, subsistence level income, and treatment, reintegration can be stressful and close to impossible.²⁵⁴ Since the addition to the penal law in 2006, however, the New York Legislature has done close to nothing to ensure the transition from incarceration to society is supportive.

In 2007, the New York Social Services Law was amended to provide for the suspension, rather than the termination, of public benefits at the time of incarceration.²⁵⁵ This is important because it ensures that those who are incarcerated will not have to wait for paperwork to be processed, which can take up to forty-five days after they are released from prison, in order to receive benefits.²⁵⁶ This amendment, however, only applies to those who are receiving benefits immediately *preceding* incarceration.²⁵⁷ Of course, those

²⁵¹ N.Y. PENAL LAW § 1.05(6) (McKinney 2009) (emphasis added).

²⁵² SHREYA MANDAL, LEGAL AID SOCIETY, THE FUTURE OF SENTENCING IN NEW YORK STATE 5 (2007), available at <http://www.legal-aid.org/media/29803/ref.pdf>.

²⁵³ See *supra* Part IV.

²⁵⁴ See MANDAL & STEPHENS, *supra* note 185, at 5.

²⁵⁵ 2007 N.Y. Laws 3057–58.

²⁵⁶ See N.Y. STATE COMM’N, PRELIMINARY PROPOSAL, *supra* note 214, at 50–51.

²⁵⁷ *Id.* at 51.

who received benefits before incarceration were not the only persons who required them.²⁵⁸

Consequently, the Commission on Sentencing Reform recognized the need for a proper re-entry program by identifying effective re-entry as the key to reducing recidivism.²⁵⁹ The commission noted that twenty-six thousand offenders are released from prison each year, and that improving release procedures is the only effective way to ensure that a large percentage of those ex-prisoners do not return to prison.²⁶⁰ The concern of inadequate release procedures is particularly acute with respect to drug offenders due to their substance abuse problems, addictions, and weaknesses.

The commission also identified three areas of concern that, if improved, can lead to the successful reintegration of ex-offenders: using step down facilities; enhancing employment and housing opportunities; and, procuring identification, Medicaid, and benefits prior to release.²⁶¹ “Step down facilities” have been used successfully in some counties in the state;²⁶² they operate as a half-way house that allows an ex-offender to gradually re-enter society, while giving him or her assistance in addressing individual needs upon release.²⁶³ Since each prisoner is in a different situation, the step down facilities allow the prisoner to design his or her own re-entry plan to fit their needs.²⁶⁴

Additionally, improving employment and housing opportunities is extremely important for those who have been convicted of drug sale offenses.²⁶⁵ The stigma of conviction, coupled with employer screening, can lead to difficulty in obtaining employment. The difficulty of obtaining employment after release at least partially explains why ex-prisoners frequently relapse into a life of crime.²⁶⁶ As a corollary, ex-offenders who obtain employment often do not return to pre-conviction criminal behavior.²⁶⁷ Some solutions to this employment problem could be to grant incentives to employers who hire ex-prisoners, or to provide for an affirmative defense to negligent hiring claims if the employer can demonstrate compliance

²⁵⁸ Thankfully, this problem was address in the 2009 DLRA as discussed *infra* Part VI.

²⁵⁹ See N.Y. STATE COMM’N, PRELIMINARY PROPOSAL, *supra* note 214, at 26.

²⁶⁰ See *id.* at 40.

²⁶¹ See *id.* at 47–52.

²⁶² Erie County utilizes the Orleans re-entry unit. *Id.* at 48.

²⁶³ See N.Y. STATE COMM’N, PRELIMINARY PROPOSAL, *supra* note 214, at 48.

²⁶⁴ See *id.*

²⁶⁵ See *id.* at 49–50.

²⁶⁶ See *id.* at 49.

²⁶⁷ *Id.*

with Article 23 of the Correction Law.²⁶⁸ Also, housing upon re-entry can be an issue and therefore the public housing requirements need to be reevaluated to allow for non-violent ex-prisoners to gain admission.²⁶⁹

Finally, it is necessary to ensure that prisoners have proper identification, Medicaid and other public benefits *before* they are released into society, because any breaks in the availability of treatment can lead to relapses and a negation of any gains made during incarceration.²⁷⁰ Therefore, the paperwork necessary to receive public benefits must be completed prior to release so that the releasee can receive benefits immediately.²⁷¹

The need for adequate employment, housing, and benefits upon release is essential to successful re-entry, but there is no statewide release procedure in place that provides for these services. Certain counties, however, have instituted re-entry programs that are excellent models for a unified program. These include Community and Law Enforcement Resources Together (“ComAlert”), developed by Brooklyn District Attorney Hynes, and the Legal Aid Resentencing Project (“LARP”), developed by the Legal Aid Society in the greater New York City area.

C. *Successful Re-Entry Projects: ComAlert and LARP*

LARP has been successful in reintegrating ex-prisoners into the community after they have been resentenced under the DLRA.²⁷² LARP’s goal is to rehabilitate ex-prisoners to live a drug-free lifestyle. To that end, the program provides a holistic re-entry model that includes pre-release re-entry planning, diagnostic assessment, short-term counseling, and clinical coordination with

²⁶⁸ Article 23 of the Correction Law states:

No application for . . . employment . . . shall be denied . . . by reason of the individual’s having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of ‘good moral character’ when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless: (1) there is a direct relationship between one or more of the previous criminal offenses and the specific . . . employment sought . . . (2) . . . the granting or continuance of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

N.Y. CORRECT. LAW § 752 (McKinney 2003).

²⁶⁹ N.Y. STATE COMM’N, PRELIMINARY PROPOSAL, *supra* note 214, at 26.

²⁷⁰ *Id.* at 51.

²⁷¹ *Id.*

²⁷² MANDAL & STEPHENS, *supra* note 185, at 6 (explaining that LARP exhibited a seventy percent success rate).

relevant treatment providers.²⁷³ The combination of substance abuse and mental health treatment has produced such significant results, but LARP involved a very limited group of individuals. In order for it to substantially impact the state population, it must be expanded beyond New York City.²⁷⁴

ComAlert is a three to six month transitional assistance program for re-entry that yields a fifty-five percent graduation rate.²⁷⁵ The program initiates re-entry with substance abuse treatment, so that if the individual can stay clean for thirty days, other services are available.²⁷⁶ Once clean, clients are referred to another program that provides transitional employment, housing, job skills training, a twelve-step program, and a course in financial management.²⁷⁷ After nine months of transitional employment, a permanent job search is conducted; once the individual obtains permanent employment, he or she graduates from the program.²⁷⁸ ComAlert has been successful because it fully reintegrates the individual into society by supporting him until he is stable.

ComAlert graduates have substantially lower recidivism rates than those who did not complete the program, or who did not attend.²⁷⁹ ComAlert graduates are four times more likely to be employed than those who did not participate or complete the program.²⁸⁰ Finally, the cost of ComAlert is significantly less than the cost of prison for recidivists.²⁸¹ This success illustrates that these alternatives are more effective and cost-efficient than pure incarceration and release; plus they serve to transform lives and improve communities.

In the spring of 2009, the legislature awoke from its slumber and once again overhauled the drug laws producing the DLRA of 2009. The next section explains the revisions to the law, assesses what meaningful changes were made (if any), and considers the overall progress of the drug reform laws.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Illegal Drugs*, *supra* note 192, at 13 (statement of Anne J. Swern, First Assistant District Attorney, on Behalf of Charles J. Hynes, District Attorney, Kings County, New York).

²⁷⁶ *Id.* at 14.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 15–17 (explaining the success of ComAlert as compared to those who did not complete the program in the rates of re-arrest (29% vs. 48%), reconviction (19% vs. 35%), and reincarceration (3% vs. 7%).

²⁸⁰ *Id.* at 15.

²⁸¹ ComAlert and the transitional employment program costs \$54 per day, while incarceration costs \$183 per day. *Id.* at 17.

VI. THE DRUG LAW REFORM ACT OF 2009

After a five-year hiatus, the drug laws were once again reformed. On April 7, 2009, Governor David Patterson signed into law the DLRA of 2009, which was designed to overhaul the current system. The new laws have numerous components, with various effective dates. Four aspects of the law reform, discussed below, are particularly relevant. Notably, the 2009 DLRA did not merely benefit those who advocated for reform. Rather, alterations were made to both sides of the schematic; while some penalties have been decreased, others are more drastic. Ultimately, the legislature struck a balance, which may (finally) have made some sense.

A. *New Sentencing Structure*

The biggest complaint about the DLRA of 2004 and 2005 was that it failed to address B felonies, which make up a large portion of the felony drug offenses committed.²⁸² Incarceration was mandatory for first time offenders for possession of minimal amounts of drugs, and many believed that this punishment was disproportionate to the crime. Consequently, the DLRA of 2009 improved the punishment scheme for class-B felonies by expanding judicial discretion.

Under the revision, mandatory incarceration is no longer required for first-time class B felony drug offenders, or class C second felony drug offenders with a prior non-violent felony conviction.²⁸³ The alternative to incarceration is a five-year term of probation. Unlike the 2004 and 2005 DLRA's, the 2009 DLRA provides that this alternative to prison can be mandated by the court over the objection of the prosecution.²⁸⁴ If a term of incarceration is imposed, class B felony drug offenders are eligible to receive a determinate sentence of one year or less, coupled with a parole sentence at Willard.²⁸⁵ Additionally, class B and C second-time felony offenders with a prior non-violent felony conviction may receive more lenient determinate sentences than under prior existing law.²⁸⁶ For instance, the minimum determinate sentence for class B offenders

²⁸² See *supra* Part IV.

²⁸³ Barry Kamins, *New 2009 Drug Crime Legislation—Drug Law Reform Act of 2009*, N.Y. ST. B.A. CRIM. L. NEWSL., Fall 2009, at 5.

²⁸⁴ *Id.*

²⁸⁵ *Id.* See also CTR. FOR CMTY. ALTERNATIVES, 2009 ROCKEFELLER DRUG LAW REFORM SENTENCING CHART (2009) [hereinafter SENTENCING CHART], available at <http://www.communityalternatives.org/pdf/SentencingChartforDrugOffenses.pdf>.

²⁸⁶ *Id.*

is reduced from three-and-one-half years to two years, and for class C offenders the minimum penalty is reduced from two years to one-and-one-half years.²⁸⁷

This revision went into effect on the day the new law was signed, April 7, 2009.²⁸⁸ It is applicable to all offenses committed on or after the effective date and to any offense committed prior to that date, but not yet adjudicated.²⁸⁹ Although this revision is not the most significant, it is important because it provides courts with a greater level of discretion, and thereby wrests control from the prosecution. Indeed, if the court believes that probation will better serve an offender, it is now at liberty to impose such an appropriate sentence.

B. The Judicial Diversion Program

By far the most important revision to the drug laws is the judicial diversion program of article 216 of the New York Criminal Procedure Law, effective October 7, 2009.²⁹⁰ This addition to the criminal procedure law creates a statewide statutory program that permits a court—without the consent of the prosecution—to divert selected defendants with demonstrated substance abuse problems to treatment programs in lieu of prison.²⁹¹ Those excluded from eligibility—class A offenders, offenders convicted of a felony in the past ten years in which “merit time” is precluded under correction law section 803(1)(d)(ii), prior and present violent felony offenders—may still obtain diversion, but the consent of the prosecution is required.²⁹²

The diversion procedure is specified in section 216.05 of the criminal procedure law,²⁹³ and provides that an arraigned defendant, who is eligible and has yet to go to trial or accept a plea, may make an application to the court for an alcohol or substance abuse evaluation.²⁹⁴ After the evaluation is conducted by a court-approved professional, either party may request a hearing on eligibility, and evidence may be proffered by both sides.²⁹⁵

²⁸⁷ *Id.*

²⁸⁸ Kamins, *supra* note 283, at 5.

²⁸⁹ *Id.*

²⁹⁰ N.Y. CRIM. PROC. LAW §§ 216.00, 216.05 (McKinney 2009 & Supp. 2010).

²⁹¹ § 216.05.

²⁹² § 216.00(1). *See also supra* Part III for a discussion of those offenses which preclude “merit time.”

²⁹³ § 216.05.

²⁹⁴ § 216.05(1).

²⁹⁵ § 216.05(3)(a).

Ultimately, the court will make a finding of eligibility based on the defendant's history of drug abuse; whether this abuse has led to the criminal behavior; whether participation in judicial diversion can successfully address the abuse; and whether incarceration is necessary for the protection of the public.²⁹⁶ If diversion is indeed ordered, the procedure operates very similarly to the DTAP program discussed above.²⁹⁷ The defendant must plead guilty to a specified offense, agree to any court imposed conditions, and the court retains jurisdiction during the period of treatment.²⁹⁸ Upon successful completion, the court has wide discretion in alternatives to incarceration, such as withdrawal of a guilty plea, dismissal of the indictment, entry of plea to a misdemeanor, or probation.²⁹⁹ Of course, if the defendant violates the conditions of the program, the deal is off.³⁰⁰ It is worth noting, however, that the legislature has instructed courts to consider that even those who successfully complete a diversion program may relapse, and therefore graduated responses should be taken towards a violation.³⁰¹

An additional benefit to successful completion of a judicial diversion program is the conditional sealing of the defendant's record in regards to the committed offense.³⁰² This provision went into effect on June 6, 2009 and is the first instance in New York where a record can be conditionally sealed.³⁰³ If the condition—commission of another crime—does not occur, the offender's record remains sealed to the public, including potential employers.³⁰⁴ If the individual is arrested again, however, the record is unsealed.³⁰⁵ This conditional sealing provision has strong ramifications in the area of potential employment, in that those who qualify for the conditional sealing avoid the implicit bias that some employers hold against ex-convicts.

²⁹⁶ § 216.05(3)(b).

²⁹⁷ *See supra* Part V.

²⁹⁸ § 216.05(4), (5), (8) (explaining that there is an exception to a guilty plea if the prosecution and court agree that there are extraordinary circumstances).

²⁹⁹ § 216.05(10).

³⁰⁰ § 216.05(9).

³⁰¹ *Id.*

³⁰² N.Y. CRIM. PROC. LAW § 160.58 (McKinney Supp. 2010).

³⁰³ *Id.*; Peter Preiser, *Practice Commentaries*, in N.Y. CRIM. PROC. LAW § 160.58 (McKinney 2009).

³⁰⁴ § 160.58(4).

³⁰⁵ § 160.58(8).

C. Resentencing Again

Included in the 2009 reform is another resentencing provision that essentially mimics the resentencing provision of 2004. It went into effect on April 7, 2009 and permits discretionary resentencing of prisoners in the custody of DOCS who were convicted of class B felonies prior to January 13, 2005 (the effective date of the original DLRA) and are currently serving an indeterminate sentence with a maximum of three or more years.³⁰⁶ Under that provision, those who were convicted of a violent felony offense or a crime not eligible for “merit time” pursuant to the correction law in the preceding ten years, and all inmates previously adjudicated as second-time or persistent violent felony offenders, are precluded from resentencing.³⁰⁷ This provision, which was excluded from the first drug law overhaul in 2004 and 2005, affords class B felony offenders an appropriate sentence proportionate to the crime.

The resentencing provisions of 2004 and 2005 were problematic in their application because of poor draftsmanship.³⁰⁸ Unfortunately, it is unlikely that the results of resentencing in 2009 will differ to any significant extent because there was no revision to the actual resentencing scheme; it was merely extended to class B felons. Although the amendment specifies that “[t]he provisions of [the DLRA of 2004] shall govern the proceedings on and determination of a motion brought pursuant to this section,” it is unclear whether this includes the additional requirements that were imposed on the resentencing of A-II felony offenders in the DLRA of 2005.³⁰⁹ The amendment does not discuss the DLRA of 2005, but it would make sense to include those limitations in the 2009 provision because the restrictions imposed in 2005 were a “trade off” for the extension of resentencing to a lesser offense, namely A-II felonies. If this is indeed the situation, as will be determined by its interpretation through case law, resentencing may prove more difficult for those convicted of class B felonies because of the proximity that many inmates may be—due to the short sentences imposed on B felons—to becoming an “eligible inmate” as defined by section 851 of the correction law.³¹⁰ Thus, resentencing may be barred to many of

³⁰⁶ N.Y. CRIM. PROC. LAW § 440.46(1) (McKinney Supp. 2010).

³⁰⁷ § 440.46(5).

³⁰⁸ See *supra* Part III.

³⁰⁹ § 440.46(3); see *supra* Part III.

³¹⁰ N.Y. CORRECT. LAW § 851 (2003); See *supra* Part III (explaining the definition of “eligible inmate” as an inmate that is less than two years from being eligible for parole).

those that it was intended to benefit.

D. Two Additional Offenses

The DLRA of 2009 was not completely one sided. In fact, two new offenses that carry serious penalties have been added to the penal law: operating as a major trafficker, and criminal sale of a controlled substance to a child.³¹¹ Under penal law section 220.77, operating as a major trafficker essentially amounts to a “king pin” statute and is classified as an A-I felony.³¹² It applies to “directors” and “profiteers” of “controlled substance organizations” who sell controlled substances worth \$75,000 in a six-month period or act as the leader of an organization that sells controlled substances worth \$75,000 in a twelve-month period.³¹³ Conviction as a “King Pin” holds a grave punishment—a fifteen to twenty-five year minimum with a maximum life sentence—and the “King Pin” statute is the only drug offense statute that imposes an indeterminate sentence under the existing law.³¹⁴

Additionally, under penal law section 220.48, criminal sale of a controlled substance to a child is a class B felony that will implicate any person over twenty-one years of age who “knowingly and unlawfully sells a controlled substance . . . to a person less than seventeen old.”³¹⁵ The impact of this addition, which is aimed to protect youths, is that it increases the penalty imposed on a first time offender from a determinate sentence with a minimum of one year to a determinate sentence with a minimum of two years.³¹⁶ If probation is considered as an alternative, the period must be for twenty-five years instead of five—and of course, judicial diversion is permitted.³¹⁷

E. The Compromise of 2009

It took an additional five years of activism and waiting, but the

³¹¹ N.Y. PENAL LAW §§ 220.77, 220.48 (McKinney Supp. 2010). Both statutes became effective on November 1, 2009.

³¹² § 220.77.

³¹³ *Id.* For the definitions of “director,” “profiteer,” and “controlled substance organization,” see William C. Dinnino, *Practice Commentaries, in* § 220.77.

³¹⁴ SENTENCING CHART, *supra* note 285. An alternative determinate sentence of eight to twenty years may be imposed if the indeterminate sentence is deemed unduly harsh.

³¹⁵ § 220.48.

³¹⁶ William C. Dinnino, *Practice Commentaries, in* N.Y. PENAL LAW § 220.48 (McKinney Supp. 2010).

³¹⁷ SENTENCING CHART, *supra* note 285.

DLRA of 2009 may have finally produced real reform. Although every area of reform was not addressed by the 2009 revisions, reformists should be very pleased by the outcome. After all, no criminal justice scheme is perfect, and in proportion to the state of the law thirty-five years ago the current system is commendable. Essentially, the most recent revision amounts to a compromise that the legislature struck between the 2004 and 2005 DLRA's, the reform movement, and the anti-reform movement; resulting in one of the best decisions that the legislature made regarding the drug laws in quite some time.

Importantly, judicial discretion was restored in an effort to facilitate a treatment-based approach. Prior to 2009, judicial discretion was prohibited in regards to B felonies. Currently, the court may direct treatment or probation in lieu of incarceration over the objection of the prosecution. Indeed, the decision as to what punishment is necessary rests in the hands of a neutral party, where it should be. Additionally, determinate sentences associated with B felonies have been decreased; therefore, even when incarceration is deemed necessary, it is proportionate.

On the other hand, the legislature was not as comprehensive as it could have been. There was no attempt to implement a statewide treatment program. Even though the judicial diversion program permits a judge to redirect an offender into treatment rather than incarceration, this assumes that the particular county has a drug treatment program. These programs exist in most counties, so hopefully the gap in the statutory provisions will be filled in by judges directing offenders to places where treatment may be available.

With respect to community re-entry, the reformists were not as fortunate. Other than a few minor alterations, re-entry was not addressed, and a statewide re-entry program was not developed. One provision, however, may prove to be significant when an offender is attempting to successfully reintegrate. Effective April 7, 2009, the correction law was amended based on the legislative finding that:

individuals who are enrolled in Medicaid upon release from incarceration, and therefore have access to medical and mental health care and drug treatment, are less likely to be rearrested and to engage in unhealthy behavior. . . . Therefore, the legislature finds that helping to ensure access to Medicaid benefits for persons immediately upon their release from incarceration is essential to ensure adequate

medical care, drug treatment and mental health services.³¹⁸

This conclusion led to correction law section 140-a, which prompts the establishment of a pilot project for filing medical assistance applications for inmates prior to release.³¹⁹ As noted above, offenders who were receiving Medicaid benefits prior to incarceration were allowed to maintain a suspended status, rather than being terminated.³²⁰ This was a good first step, but it did nothing for those who did not previously receive such benefits, leaving a window of opportunity for recidivism. Now, those who are in need of Medicaid benefits can have the necessary paperwork filed before they attempt to reintegrate, thereby making medical and substance abuse treatment available immediately after release from prison.

Finally, minimal revision was made to the resentencing provisions. Although resentencing was extended to B felony offenders, the provisions of the DLRA of 2004 and 2005 went unaddressed. The legislature decided that the resentencing issues are a thing of the past, and that reformists will have to make do with the current provisions. Since the extension of resentencing to class B felons only recently became effective, it will be interesting to see if it suffers from the same pitfalls as the provisions enacted in 2004 and 2005. As discussed above, it seems inevitable due to the poor draftsmanship.

The anti-reformists were not particularly successful. Most of their agenda was based on opposing the reform movement. Although they were in favor of stricter penalties, the majority of their concern revolved around preventing B felony reform, limiting judicial discretion, and maintaining control over diversionary programs. On all three fronts, they were unsuccessful. The only victories can be found in the addition to the penal law of the "King Pin" statute and the "Sale to a Child" statute. Even though these crimes result in harsh penalties, the violators of these statutes are not the type of offenders that the reform movement sought to address, plus, on the whole, the drug laws are entirely more tolerable than they once were. Clearly, the legislature struck a balance, and for the first time, it was in favor of drug offenders.

³¹⁸ 2009 N.Y. Sess. Laws 153 (McKinney).

³¹⁹ N.Y. CORRECT. LAW § 140-a (McKinney Supp. 2010).

³²⁰ See *supra* Part V.

VII. CONCLUSION

As mentioned in the beginning of this note, insanity has been defined as “doing the same thing over and over again, but expecting different results.”³²¹ New York State, however, consistently failed to realize that its drug legislation had been doing just that; repeating itself and expecting different results. As evidenced by the failure of Governor Rockefeller’s crusade, we cannot build ourselves, with bars and bricks, to a safer society. Additionally, the recent “reform” of 2004 and 2005 had done nothing more than produce the “revolving door” of our prison system. Instead of making our society safer, it arguably created a more dangerous one. The majority of drug offenders, especially addicts, did not come out of prison cured, but rather were likely to offend again, because the system implemented for so many years made no effort to treat their problems. New York consistently attempted to mask the drug problem through the process of incarceration, but for so long did not endeavor to actually find a solution. Finally, after thirty-six years an appropriate solution has been proposed. Although it is too early to analyze the effects of the DLRA of 2009, the reform appears to be a valiant attempt to stop the “revolving door,” and actually solve the drug problems that have plagued this state’s population for so many years. As evidenced by the testimony to the sentencing commission,³²² treatment and therapy will produce curative results. Only time will tell whether this approach can completely solve the problem, but it is almost certain that it will not make it worse.

The prison system is necessary for any functioning society. Violent criminals and sex offenders must be separated from society. Other crimes, however, that are “consensual”³²³ do not necessarily require the same punishment as those that endanger the safety of others. Nevertheless, New York consistently dealt with consensual crimes as though they were violent crimes and used incarceration to deal with a problem that could have been cured through other means. Treatment is a more effective and cost-efficient way of dealing with the drug problem. Although long overdue, it is a relief that the legislature took the appropriate action to make treatment a priority. In the words of Assembly Speaker Sheldon Silver, who

³²¹ BROWN, *supra* note 2, at 68.

³²² See *supra* Part IV.

³²³ The term “consensual” is chosen because drug sale, purchase, and use among adults is simply that. Using the term “victimless” immediately spawns a list of those who are indirectly injured by drug offenses, so that term is not used.

was extremely influential in the passage of the 2009 DLRA: "Today, drug use and addiction will no longer be considered solely a criminal matter in this state but a public health matter as well."³²⁴

If New York requires that treatment be considered as an alternative to incarceration, it will drastically change how drug laws are enforced. Instead of employing a system where incarceration is the default sentence for first time offenders and treatment is the exception, treatment should be the primary sentence for first time offenders. This shift in mentality would change the way we look at consensual crimes, and would produce more effective and efficient results.

As evidenced by the unprecedented success of the DTAP program in Brooklyn, treatment can work. Treatment saves money, and more importantly, it changes lives by keeping people out of prison, curing their ailments, and creating productive individuals. Looking at the limited area of the impact on employment proves this result. If every drug user convicted of a felony was treated instead of incarcerated, he or she would not only re-enter society drug-free, but would also be able to achieve gainful employment. The hundreds, if not thousands, who could not obtain meaningful employment because of drug-related felony convictions, who may still have had drug addictions, would be transformed into potentially productive members of society. Although this success is not guaranteed in every situation, failure was certain under the prior approach because former felons were stigmatized due to the public availability of their conviction records. DTAP and similar drug court programs, however, were not previously made available to all of those offenders who were in need. Therefore, the importance of including a treatment-based approach in the legislation is immeasurable.

We cannot change the injustices created by the legislature when it succumbed to Governor Rockefeller's pressure to alter the drug laws in 1973. We can, however, ensure that this approach is not perpetuated in the future. It is evident that mass incarceration does not solve the problem, but rather disguises it. On the other hand, treatment has proved to be an effective means to not only reduce crime, but also to help those who are in need. It appears that the legislature has finally made a reasoned decision, striking a balance between law enforcement and rehabilitation. Whether this

³²⁴ Sheldon Silver, Assembly Speaker, N.Y. State Assembly, Remarks at the Rockefeller Drug Law Press Conference (Apr. 24, 2009), <http://assembly.state.ny.us/Press/20090424a/>.

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balance will produce the intended results, however, remains to be seen.