

## THE HUMAN AND FISCAL TOLL OF AMERICA'S DRUG WAR: ONE STATE'S EXPERIENCE

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## INTRODUCTION

President Richard M. Nixon, in 1971, said that use of illicit drugs was “public enemy number one,” and declared a war on drugs.<sup>1</sup> The declaration of war was made at a time of increasing crime rates, and followed a decade of social upheaval.<sup>2</sup> But it presented an opportunity to decide whether drug use should be treated as a public health problem or a criminal justice problem.

The decision was quickly made to combat addiction and drug use through tough law enforcement and mandatory sentencing laws. The Drug Enforcement Administration, which has focused on domestic law enforcement, interdiction, and eradication of poppy and coca crops in source countries, was created in 1973 to wage this war.<sup>3</sup> New York Governor Nelson Rockefeller, immediately after, signed what came to be called the Rockefeller Drug Laws, a package of extremely punitive provisions.<sup>4</sup> The package mandated, among other things, a minimum prison sentence of fifteen years to life for anyone selling two or more ounces of heroin or cocaine.<sup>5</sup> In 1978, Michigan enacted the so-called “650 Lifer Law,” a statute requiring a sentence of life without parole for anyone convicted of selling, manufacturing, or possessing 650 or more grams of a Schedule I or II opiate.<sup>6</sup>

Despite the tough law enforcement focus, use of illegal drugs increased in the 1970s.<sup>7</sup> In 1973, just over one in ten Americans

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<sup>1</sup> BREAKING THE TABOO—TRAILER (Sundog Pictures & Spray Filmes Dec. 7, 2012), [http://www.breakingthetaboo.info/view\\_documentary.htm](http://www.breakingthetaboo.info/view_documentary.htm).

<sup>2</sup> William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1973 (2008); see, e.g., *The 1960s*, HISTORY.COM, <http://www.history.com/topics/1960s> (last visited Feb. 23, 2013) (during the 1960s, America experienced the Vietnam War, the Civil Rights Movement, and various radical reform groups).

<sup>3</sup> See DRUG ENFORCEMENT ADMIN., DRUG ENFORCEMENT ADMINISTRATION: 1970–1975, at 4, 17, <http://www.justice.gov/dea/about/history/1970-1975.pdf>; Robert B. Charles, *Back to the Future: The Collapse of National Drug Control Policy and a Blueprint for Revitalizing the Nation's Counternarcotics Effort*, 33 HARV. J. ON LEGIS. 339, 368–69 (1996); *DEA Mission Statement*, DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/about/mission.shtml> (last visited Feb. 23, 2013).

<sup>4</sup> Madison Gray, *A Brief History of New York's Rockefeller Drug Laws*, TIME, Apr. 2, 2009, <http://www.time.com/time/nation/article/0,8599,1888864,00.html>.

<sup>5</sup> Joseph B. Treaster, *Minor Players, Major Penalties*, N.Y. TIMES, Mar. 5, 1995, at 29.

<sup>6</sup> PATRICK AFFHOLTER & BETHANY WICKSALL, ELIMINATING MICHIGAN'S MANDATORY MINIMUM SENTENCES FOR DRUG OFFENSES (2002), <http://www.senate.michigan.gov/sfa/Publications/Notes/2002Notes/NotesNovDec02AffholterWicksall.pdf>.

<sup>7</sup> Jennifer Robinson, *Decades of Drug Use: Data From the '60s and '70s*,

(12%) reported they had tried marijuana. In 1977, that percentage doubled to 24%.<sup>8</sup> These patterns continued into the 1980s, when the introduction of a new form of cocaine—crack—caused what was termed “moral panic.”<sup>9</sup> A New York Times front-page story in 1985 heralded the beginning of the crack epidemic.<sup>10</sup> An increase in violence accompanied the epidemic.<sup>11</sup> Public media focused on the violence and other characteristics of the drug, mainly its highly addictive nature and the perils of prenatal exposure.<sup>12</sup> They trumpeted concerns about a generation of “crack babies.”<sup>13</sup> Science has since debunked these views as lacking merit, but public fear and fervor over the drug was real.<sup>14</sup>

The emergence of crack further solidified the already entrenched approach to drug use that focused on tough law enforcement and strict penalties for use or distribution. The Anti-Drug Abuse Act of 1986, signed by President Ronald Reagan, appropriated \$1.7 billion to fund the drug war, gave prosecutors increased powers, and included a 100:1 ratio for crack versus powder cocaine sentencing.<sup>15</sup> In 1986, a talented University of Maryland basketball star, Len Bias, died of a cocaine overdose two days after being selected second by the Boston Celtics in the NBA draft.<sup>16</sup> The “moral panic” grew.

New Jersey, like every other state in the country, began its

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GALLUP (July 2, 2002), <http://www.gallup.com/poll/6331/decades-drug-use-data-from-60s-70s.aspx>.

<sup>8</sup> *Id.*

<sup>9</sup> Chas Critcher, *Moral Panic Analysis: Past, Present and Future*, SOC. COMPASS 1127, 1135 (2008).

<sup>10</sup> Jane Gross, *A New, Purified Form of Cocaine Causes Alarm as Abuse Increases*, N.Y. TIMES, Nov. 29, 1985, at A1.

<sup>11</sup> Roland G. Fryer, Jr. et al., *Measuring the Impact of Crack Cocaine* 6 (Nat'l Bureau of Econ. Research, Working Paper No. 11318, May 2005).

<sup>12</sup> Susan Okie, *The Epidemic That Wasn't*, N.Y. TIMES, Jan. 27, 2009, at D1; Jennifer Robinson, *Decades of Drug Use: Data From the '80s and '90s*, GALLUP (July 9, 2002), <http://www.gallup.com/poll/6352/decades-drug-use-80s-90s.aspx>.

<sup>13</sup> Robinson, *supra* note 12.

<sup>14</sup> See John P. Morgan & Lynn Zimmer, *The Social Pharmacology of Smokeable Cocaine*, in CRACK IN AMERICA 131, 131 (Craig Reinerman & Harry G. Levine eds., Univ. Cal. Press 1997); Okie, *supra* note 12.

<sup>15</sup> DEBORAH J. VAGINS & JESSELYN MCCURDY, CRACKS IN THE SYSTEM 2 (2006); *Limited Success Seen in War Against Drugs*, N.Y. TIMES, Dec. 9, 1987, <http://www.nytimes.com/1987/12/09/us/limited-success-seen-in-war-against-drugs.html>.

<sup>16</sup> Amy Goldstein & Susan Kinzie, *Bias Death Still Ripples Through Athletes' Academic Lives*, WASH. POST, June 19, 2006, at A1, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/18/AR2006061801051.html>.

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own drug war during this period.<sup>17</sup> And while every state saw prison population increase dramatically as a result of the war on drugs,<sup>18</sup> New Jersey's drug war in many respects is an exemplar of everything that can go wrong in the war on drugs. Ultimately, the state's Attorney General conceded that the policing practices of the State Police rooted in drug law enforcement were racially discriminatory.<sup>19</sup> The state's prison population doubled in size, with the majority of that increase directly attributable to the drug war.<sup>20</sup> Because of provisions of the state's drug law (particularly the drug free school zone provision) and the enforcement practices of law enforcement, New Jersey's prison system became the third most racially disparate in the country.<sup>21</sup> These outcomes were an indicator of the staggering human toll New Jersey's war on drugs was having. At the same time, the budget for the state's Department of Corrections, which had to accommodate the vast number of incarcerated drug offenders, soared.<sup>22</sup>

This article examines New Jersey's unique experience in waging its own war on illegal narcotics. Our approach is chronological. Specifically, we examine three distinct periods of the war—the initial stage from 1986 to 1987, when the architecture of this war was established; the period from 1987 to 1995, when the war was in full gear and problems like racial profiling and prison crowding began to surface; and the period from 1996 to present, when efforts to ameliorate some of the most negative outcomes of the drug war were undertaken. These efforts include, most recently, an effort by Governor Chris

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<sup>17</sup> Stephen Hunter et al., *New Jersey's Drug Courts*, 64 RUTGERS L. REV. 795, 796–97 (2012).

<sup>18</sup> SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 1, 2 (2012), [http://sentencingproject.org/doc/publications/inc\\_Trends\\_in\\_Corrections\\_Fact\\_sheet.pdf](http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf).

<sup>19</sup> PETER VERNIERO & PAUL H. ZOUBEK, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 4, 6–7 (1999), [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf).

<sup>20</sup> *New Solutions Campaign: Out-of-Control Prison Growth*, DRUG POL'Y ALLIANCE, [www.drugpolicy.org/sites/default/files/\\_DPAnj\\_prisongrowth.pdf](http://www.drugpolicy.org/sites/default/files/_DPAnj_prisongrowth.pdf) (last visited Feb. 18, 2013).

<sup>21</sup> Bruce D. Stout & Reagan Daly, An Overview of Sentencing and Corrections in New Jersey 22 (Oct. 15, 2007) (presenting to New Jersey GEAR Sentencing/Corrections Task Force).

<sup>22</sup> FEATHER O'CONNOR & RICHARD B. STANDIFORD III, APPROPRIATIONS HANDBOOK: STATE OF NEW JERSEY FISCAL YEAR 1986–87, at B-44 (1986); OFF. MANAGEMENT & BUDGET, STATE OF NEW JERSEY BUDGET: FISCAL YEAR 2005–2006, at D-53 (2005).

Christie—who has declared the drug war “a failure”—to dramatically change the state’s approach to dealing with addicted offenders.<sup>23</sup> We consider the consequences of these events, and review current efforts to change the course of the state’s drug war.

## I. 1986–87: NEW JERSEY’S DRUG WAR BATTLE PLAN IS DRAWN

### A. *The Comprehensive Drug Reform Act of 1987*

New Jersey acted quickly during the fervor of this period to codify a set of drug laws in its criminal code.<sup>24</sup> Lawyers in the office of the legislation’s most prominent and ardent champion, New Jersey Attorney General W. Cary Edwards, drafted the legislation.<sup>25</sup> The bills, Assembly Bill No. A-3270 and Senate Bill No. S-2845, had bipartisan sponsors and support. They were passed unanimously in both houses of the New Jersey State Legislature.<sup>26</sup> On April 23, 1987, New Jersey Governor Thomas H. Kean signed the legislation, the Comprehensive Drug Reform Act (CDRA), into law.<sup>27</sup> He heralded the law’s enactment as “a major step toward attacking the drug abuse problem on as broad a front as possible.”<sup>28</sup> The CDRA, since then, remains the legislative cornerstone of New Jersey’s war against illicit narcotics.<sup>29</sup>

The law’s provisions aligned with approaches taken by other states and the federal government in the drug war: it established law enforcement, not treatment, as the principle strategy for dealing with drug use and imposed harsh sentences for several new drug crimes.<sup>30</sup> A *New York Times* story about the legislation characterized it as “some of the toughest drug legislation in the

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<sup>23</sup> *Gov. Chris Christie: War on Drugs is ‘a Failure’*, STAR LEDGER (July 10, 2012, 7:41 AM), [http://www.nj.com/news/index.ssf/2012/07/gov\\_chris\\_christie\\_war\\_on\\_drug.html](http://www.nj.com/news/index.ssf/2012/07/gov_chris_christie_war_on_drug.html).

<sup>24</sup> Hunter et al., *supra* note 17, at 797.

<sup>25</sup> W. Cary Edwards, *An Overview of the Comprehensive Drug Reform Act of 1987*, 13 SETON HALL LEGIS. J. 5, 5–6 (1989) [hereinafter *An Overview*].

<sup>26</sup> *Id.* at 6.

<sup>27</sup> See N.J. STAT. ANN. § 2C:35–1 et seq. (West 1987); Edwards, *supra* note 25, at 6.

<sup>28</sup> Press Release, Office of the Governor, *Blueprint for a Drug Free New Jersey* (Apr. 23, 1987) (available at [law.njstatelib.org/law\\_files/njlh/lh1987/L1987c106.pdf](http://law.njstatelib.org/law_files/njlh/lh1987/L1987c106.pdf)).

<sup>29</sup> See N.J. STAT. ANN. § 2C:35–1.1 (West 2013).

<sup>30</sup> See *id.*

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nation.”<sup>31</sup> “This is a declaration of war and, in this war, we will take prisoners,” said Governor Kean in a press release about his signing of the legislation.<sup>32</sup>

Most telling about the legislation was that it was directly tied to expanding prison capacity.<sup>33</sup> The CDRA took effect on the day that it was signed—April 15, 1987—but remained “inoperative” until the enactment of another law, Assembly Bill No. 3209.<sup>34</sup> That authorized a \$198 million prison bond issue to be placed before New Jersey voters in November, 1987.<sup>35</sup> Policymakers who occupied the highest echelons of the executive branch therefore clearly anticipated that statewide enforcement of the CDRA’s provisions would necessarily entail a tremendous increase in corrections costs because of an anticipated large-scale imprisonment of drug offenders.

Assembly Bill No. 3209 was passed by both houses of the legislature, and signed by Governor Kean on July 9, 1987.<sup>36</sup> The \$198 million prison construction bond question was placed on the November ballot.<sup>37</sup> The law’s enactment was also the trigger that made the CDRA operative. That made the CDRA effective as of July 9, 1987.<sup>38</sup> Interestingly, that trigger only required that the prison construction bond issue be placed on the ballot in order for the CDRA to become effective.<sup>39</sup> It did not require passage of the bond.<sup>40</sup> However, 60% of voters approved the bond question that year.<sup>41</sup>

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<sup>31</sup> Joseph F. Sullivan, *New Drug Laws Pose Prison Problem*, N.Y. TIMES, May 3, 1987, §11NJ, at 1.

<sup>32</sup> *State v. Brimage*, 706 A.2d 1096, 1099 (N.J. 1998) (quoting News Release, Office of the Governor, Apr. 15, 1987).

<sup>33</sup> JEREMY TRAVIS ET AL., URBAN INST.: JUST. POL’Y CENTER, A PORTRAIT OF PRISONER REENTRY IN NEW JERSEY 19 (2003); W. Cary Edwards, *The Legislative Response to the Drug Problem in New Jersey*, 11 SETON HALL LEGIS. J. 237, 246 (1987–88) [hereinafter *The Legislative Response*].

<sup>34</sup> *Official Commentary to the Comprehensive Drug Reform Act*, 9 CRIM. JUST. Q. 149, 149 (1987) [hereinafter *Official Commentary to the CDRA*].

<sup>35</sup> *See id.* According to Edwards, the Prison Bond Issue has been insisted upon by Governor Kean as a prerequisite to the enactment of the CDRA, and the bond issue fulfilled the Governor’s mandate that drug reform legislation be tied to prison funding reform. *See The Legislative Response*, *supra* note 33, at 246.

<sup>36</sup> *Official Commentary to the CDRA*, *supra* note 34, at 149.

<sup>37</sup> *Id.*; Sullivan, *supra* note 31.

<sup>38</sup> *Official Commentary to the CDRA*, *supra* note 34, at 149.

<sup>39</sup> *Id.*; TRAVIS ET AL., *supra* note 33, at 19.

<sup>40</sup> TRAVIS ET AL., *supra* note 33, at 19; *The Legislative Response*, *supra* note 33, at 246; Sullivan, *supra* note 31.

<sup>41</sup> *1987 Election Information Archive: Public Questions*, N.J. DEP’T ST., DIVISION OF ELECTIONS, <http://www.state.nj.us/state/elections/election-infor mati>

The necessity of increased prison construction was consistent with the overarching punitive thrust of the CDRA's provisions. This in turn aligned with unquestioned primacy of law enforcement's role conceived of by Attorney General Edwards, Governor Kean, and the New Jersey Legislature in the multi-faceted approach to combating drug crime.<sup>42</sup> In this regard, the CDRA created a host of new drug offenses and transferred existing drug offenses from Title 24, New Jersey's Health Code, into the New Jersey's Code of Criminal Justice (Code).<sup>43</sup> Moreover, the drug crimes defined in the CDRA were assigned degrees (first, second, third, and fourth) in order to harmonize each crime with the existing sentencing framework established by the Code when enacted in 1979.<sup>44</sup> For example, the CDRA established the first-degree crime of manufacturing or distribution of cocaine and heroin.<sup>45</sup> Accordingly, a defendant convicted of this offense is exposed to a range of imprisonment consistent with that appropriate for a first-degree crime of between ten and twenty years.<sup>46</sup>

Of critical importance is that the Code, prior to the enactment of the CDRA, very sparingly authorized imposing mandatory periods of parole ineligibility (New Jersey's equivalent of "mandatory minimum sentences").<sup>47</sup> In fact, such punishment was imposed only for crimes of serious violence, such as murder and sexual assault, as well as circumstances in which a firearm was used in the course of a serious crime of violence.<sup>48</sup> In short,

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on-archive-1987.html (follow "Public Questions" hyperlink) (last visited Mar. 31, 2013).

<sup>42</sup> See generally *The Legislative Response*, *supra* note 33, at 19; *An Overview*, *supra* note 25, at 12.

<sup>43</sup> When enacted, the CDRA consisted of twenty-five sections plus an effective date. The first three sections comprised three new chapters in Title 2C of the New Jersey Statutes—i.e., New Jersey's Criminal Code. These Chapters include: Chapter 35 "Controlled Dangerous Substances"; Chapter 36 "Drug Paraphernalia"; and Chapter 36A "Conditional Discharge for Certain First Offenders." *Official Commentary to the CDRA*, *supra* note 34, at 149.

<sup>44</sup> *An Overview*, *supra* note 25, at 10–12; see also *Official Commentary to the CDRA*, *supra* note 34, at 166–68.

<sup>45</sup> N.J. STAT. ANN. § 2C:35-5b(1) (West 2005).

<sup>46</sup> N.J. STAT. ANN. § 2C:43-6a (West 2005) (setting forth ordinary sentencing terms).

<sup>47</sup> Stephen Hunter et al., *New Jersey's Drug Courts: A Fundamental Shift from the War on Drugs to a Public Health Approach for Drug Addiction and Drug-Related Crime*, 64 RUTGERS L. REV. 795, 797–800 (2012).

<sup>48</sup> N.J. STAT. ANN. § 2C:43-6 (West 2005) ("Graves Act"), amended by N.J. STAT. ANN. 2C:35-6 (West Supp. 2012).

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the Code reserved mandatory sentencing for New Jersey's most violent offenders prior to the enactment of the CDRA. Moreover, neither judges nor prosecutors had authority to deviate in any way from these mandatory sentencing provisions.<sup>49</sup>

The CRDA drastically upended the status quo. First, many of the new crimes created by the CDRA, (e.g., being the leader of a narcotics trafficking network, maintaining a drug production facility, and employing a juvenile in a drug distribution scheme), required imposing mandatory periods of parole ineligibility.<sup>50</sup> One new crime in particular, the newly minted "school zone" drug-crime, would be routinely charged against street-level drug offenders, especially in New Jersey's urban areas.<sup>51</sup> This law provided that it is a separate crime of the third degree to distribute CDS within 1,000 feet of a school or school bus, and that a mandatory sentence of one year for marijuana, or three years for any other drug must be imposed.<sup>52</sup> Inevitably, this "school zone" crime became the proverbial tail that wagged the dog with respect to the imposition of mandatory sentencing regarding non-violent drug crimes in New Jersey.<sup>53</sup>

Finally, the CDRA exacts especially harsh punishment on repeat drug offenders.<sup>54</sup> Specifically, the CDRA's "repeat drug offender" provision requires that any defendant convicted of manufacturing, distributing or possessing CDS with intent to distribute who has previously been convicted of such a crime, "shall upon application of the prosecuting attorney" be sentenced to a mandatory extended term of imprisonment with a corresponding period of parole ineligibility.<sup>55</sup> The practical effect of the provision is to, at minimum, double a repeat drug offender's custodial sentence.<sup>56</sup>

Not only did mandatory punishment become the rule rather than the exception with respect to drug crimes, but a singular provision embedded within the CDRA essentially confers final

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<sup>49</sup> Memorandum from N.J. Supreme Court Chief Justice Robert N. Wilentz on Sentencing Guidelines for Dismissals under the Graves Act 2 (Apr. 27, 1981) (available at [http://www.judiciary.state.nj.us/directive/criminal/dir\\_10\\_80.pdf](http://www.judiciary.state.nj.us/directive/criminal/dir_10_80.pdf)).

<sup>50</sup> *Official Commentary to the CDRA*, *supra* note 34, at 150.

<sup>51</sup> N.J. STAT. ANN. § 2C:35-7 (West 2005), *amended by* N.J. STAT. ANN. 2C:35-7b(1)(a)-(d) (West. Supp. 2012).

<sup>52</sup> *Id.*

<sup>53</sup> Hunter et al., *supra* note 47, at 797-800.

<sup>54</sup> *Id.* at 804-05.

<sup>55</sup> N.J. STAT. ANN. § 2C:43-6f (West 2005 & West Supp. 2012).

<sup>56</sup> Hunter et al., *supra* note 47, at 804-05.

sentencing authority in many, if not most, drug cases to prosecutors rather than judges.<sup>57</sup> The provision, N.J. Stat. Ann. § 2C:35-12, applies whenever a defendant pleads guilty to a crime, such as the “school zone” offense, that carries a mandatory period of parole ineligibility.<sup>58</sup> Moreover, the provision expressly prevents a sentencing court from exercising its traditional discretion to impose a lesser or rehabilitative sentence in the absence of a prosecutor’s plea recommendation.<sup>59</sup> More succinctly, this provision of the CDRA “[p]rovide[s] that mandatory terms of imprisonment and terms of parole ineligibility can only be waived with the consent of the prosecutor pursuant to a plea or post-conviction agreement.”<sup>60</sup>

These new offenses were, however, offset by one unique provision of the CDRA, N.J. Stat. Ann. § 2C:3-14.<sup>61</sup> It authorized judges to sentence offenders who met certain criteria (e.g., their offense was non-violent, did not involve a weapon, and was not conducted in a school zone), who were convicted of a drug crime, and who were facing a mandatory term of parole ineligibility to be sentenced to a minimum of six months of residential drug treatment and five years of what was termed “special probation.”<sup>62</sup> In retrospect, it is telling that no planning was done with respect to an increased demand for treatment resources as a result of this provision, unlike the planning for the anticipated increased demand for prison space as a result of enforcement of the CDRA’s provisions and the trigger that tied effectiveness of the CDRA to passage of the prison bond question.<sup>63</sup> In fact, not a single dollar was appropriated for drug treatment with

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<sup>57</sup> N.J. STAT. ANN. § 2C:35-12 (West 2005); *State v. Bridges*, 621 A.2d 1, 7 (N.J. 1993) (holding that a sentencing court that accepts such a plea agreement is precluded from altering “the terms of the prosecutor’s recommended sentence”).

<sup>58</sup> § 2C:35-12; *Bridges*, 621 A.2d at 2, 7.

<sup>59</sup> § 2C:35-12; *Bridges*, 621 A.2d at 7.

<sup>60</sup> § 2C:35-12; *Bridges*, 621 A.2d at 7; *Official Commentary to the CDRA*, *supra* note 34, at 150.

<sup>61</sup> *See generally* N.J. STAT. ANN. § 2C:35-14 (West 2005), amended by N.J. Stat. Ann. § 2C:35-14 (West Supp. 2012); *Official Commentary to the CDRA*, *supra* note 34, at 162.

<sup>62</sup> § 2C:35-14.

<sup>63</sup> GOV’T EFFICIENCY & REFORM COMM’N SENTENCING/CORRS. TASK FORCE, SENTENCING/CORRECTIONS TASK FORCE REPORT 8 (2009) [hereinafter TASK FORCE] (on file with author); *see* Hunter et al., *supra* note 17, at 806–07; *see also* Ron Susswein, *Sentencing Addicts under the Comprehensive Drug Reform Act: To Treat or Not to Treat*, N.J. LAW., Mar. 1994, at 44, 44–45.

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enactment of the CDRA.<sup>64</sup> As a result, the ‘treatment in lieu of incarceration’ provision became a “paper tiger.” Having the authority to sentence an offender to treatment was meaningless to a judge if he or she did not have a treatment program to send them to. As a result, the provision was never invoked until a drug court pilot project started nearly a decade later, which specifically funded additional treatment capacity for offenders sentenced under this provision.<sup>65</sup>

*B. The Statewide Action Plan for Narcotics Enforcement of 1987*

An understanding of the state-wide enforcement of the CDRA’s criminal provisions and the consequences that flowed therefrom requires an appreciation of the dominant role played by the New Jersey Attorney General in the administration of the state’s criminal justice system. Specifically, the New Jersey Attorney General’s powers and duties are established by statute.<sup>66</sup> Those powers, unlike attorneys general elsewhere, clearly include criminal enforcement authority.<sup>67</sup> That authority is exercised through the New Jersey Division of Criminal Justice, established by the Criminal Justice Act of 1970.<sup>68</sup> The Division of Criminal Justice is but one of several divisions, including the New Jersey State Police (NJSP), that comprise the New Jersey Department of Law and Public Safety, which is led by the New Jersey Attorney General.<sup>69</sup>

The Criminal Justice Act, of no less significance, establishes the Attorney General as the state’s chief law enforcement officer, giving him or her authority to investigate and prosecute any case, whether through original jurisdiction or by superseding a county prosecutor.<sup>70</sup> The Attorney General is also authorized to issue directives, guidelines, and policies which all law enforcement agencies—municipal, county, and state—must follow.<sup>71</sup> As the

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<sup>64</sup> TASK FORCE, *supra* note 63, at 8; *see* Hunter et al., *supra* note 17, at 806–08; *see also* Susswein, *supra* note 63, at 45.

<sup>65</sup> *See* Hunter et al., *supra* note 17, at 807–08.

<sup>66</sup> N.J. STAT. ANN. § 52:17B-4 (West 2013).

<sup>67</sup> N.J. STAT. ANN. § 52:17B-101 (West 2013).

<sup>68</sup> *Id.*

<sup>69</sup> N.J. STAT. ANN. § 52:17B-2 (West 2013); N.J. STAT. ANN. § 52:17B-6 (West 2013); N.J. STAT. ANN. § 52:17B-99 (West 2013).

<sup>70</sup> N.J. STAT. ANN. § 52:17B-98 (West 2013); N.J. STAT. ANN. § 52:17B-106 (West 2013).

<sup>71</sup> PAULA T. DOW, REPORT OF THE COUNTY PROSECUTOR STUDY COMMISSION 6 (2011), <http://www.nj.gov/oag/dcj/pdfs/Report-of-the-County-Prosecutor-Study->

Department of Law and Public Safety noted in a recent report: “[t]he Attorney General in this way has both the authority and the duty to establish and enforce uniform statewide policies, practices, and procedures to ensure the most efficient and effective use of the law enforcement resources of all other police and prosecuting agencies throughout the State.”<sup>72</sup>

This considerable power to leverage law enforcement resources at every level of government would be vigorously exercised as never before in connection with New Jersey’s drug war.<sup>73</sup> To complement enactment of the CDRA in January 1988, Attorney General Edwards issued the Statewide Action Plan for Narcotics Enforcement of 1987 (Action Plan), a comprehensive framework for an aggressive, highly coordinated multi-jurisdictional approach to enforcing New Jersey’s recently enacted drug laws.<sup>74</sup>

The Action Plan established 103 directives, thirty-six guidelines, eight strategic objectives, and twenty-three tactical objectives for narcotics enforcement operations around the state.<sup>75</sup> The strategic objectives included: 1) placing “every actor along the drug distribution chain at enhanced risk of identification, apprehension, swift prosecution and stern punishment;” 2) targeting “repeat offenders, large scale or prolific distributors, upper echelon members of organized trafficking networks, manufacturers and persons who distribute to, or employ juveniles in, drug distribution schemes for investigation and prosecution;” and 3) eliminating “all drug presence and distribution activities from established school safety zones and to provide a secure environment conducive to education.”<sup>76</sup>

A revised version of the Action Plan promulgated by the Attorney General in 1993 (Action Plan II) directed all objectives in the 1987 Action Plan to be accomplished “by a strategy which called for the establishment and enhancement of county task forces; for the use of interagency task forces; for enhancing the patrol, investigation, asset forfeiture and prosecution functions; for instituting programs to protect youth, specifically in school

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Commission-2011.pdf.

<sup>72</sup> *Id.*

<sup>73</sup> *See An Overview, supra* note 25, at 6–7.

<sup>74</sup> *Id.*

<sup>75</sup> Letter from Robert J. Del Tufo, Att’y Gen., to Members of the New Jersey Law Enforcement Community Concerning Drug Enforcement: Statewide Narcotics Action Plan (Jan. 1988) (*available at* <http://www.state.nj.us/lps/dcj/agguide/3snap93.pdf>).

<sup>76</sup> *Id.*

'safety zones'; and for increasing training, coordination and grant availability."<sup>77</sup> Specific directives in both the 1987 Action Plan and Action Plan II affirmed that "[n]arcotics enforcement is designated to remain the number one priority for every New Jersey law enforcement agency" and that "[a]ll sworn law enforcement officers shall arrest any person who commits a controlled dangerous substance offense, including a disorderly persons offense, unless such action would jeopardize an ongoing law enforcement operation or there is a compelling public safety reason not to arrest."<sup>78</sup> Notably, both plans specifically tasked the NJSP, by virtue of its role in patrolling New Jersey's major thoroughfares, with interdicting the flow of narcotics "into, through[,] and throughout the State."<sup>79</sup>

## II. 1987–1998: NEW JERSEY'S DRUG WAR IS UNLEASHED

### A. *Prison Growth, Collateral Consequences, Racial Disparity and Costs*

The CDRA led to a dramatic increase in New Jersey's state prison population, as anticipated by the act's supporters, who tied effectiveness of the CDRA to passage of the prison bond question.<sup>80</sup> There were 15,945 inmates in state prisons when the CDRA was enacted in 1987.<sup>81</sup> The state prison population nearly doubled to 30,818 inmates eleven years later, in 1999.<sup>82</sup> The Department of Corrections attributed 62% of that growth directly to the enactment and enforcement of the CDRA.<sup>83</sup> Given that, the CDRA was responsible for the incarceration of over 9,200 individuals over that eleven-year span.<sup>84</sup>

All available evidence indicates that the massive numbers of drug offenders incarcerated under the provisions of the CDRA

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> OFFICE OF LEGISLATIVE SERVS., N.J. LEGISLATURE, DEPARTMENT OF CORRECTIONS STATE PAROLE BOARD, ANALYSIS OF THE NEW JERSEY BUDGET: FISCAL YEAR 2012–2013, at 12–13 (2012), [http://www.njleg.state.nj.us/legislative/pub/budget\\_2013/DOC\\_analysis\\_2013.pdf](http://www.njleg.state.nj.us/legislative/pub/budget_2013/DOC_analysis_2013.pdf).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Bruce Stout, *The Case for Rational Reform*, 34 N.J. REP. 36, 40 (2006), <http://sentencing.nj.gov/downloads/pdf/articles/general3.pdf>.

<sup>84</sup> *See id.*; *see also* OFFICE OF LEGISLATIVE SERVS., *supra* note 80, at 12.

were not major dealers or “kingpins.”<sup>85</sup> In fact, the preponderance of offenders who were incarcerated were low-level, non-violent offenders.<sup>86</sup> Many were addicts who posed little to no threat to public safety.<sup>87</sup> More than 8,000 inmates incarcerated for a drug law violation had no prior convictions for violent offenses, according to a 1995 analysis of the criminal backgrounds of New Jersey’s burgeoning inmate population.<sup>88</sup> More than 2,000 of those inmates had never been convicted of any previous crime.<sup>89</sup> The overwhelming majority of those offenders had serious drug and alcohol addictions, according to Department of Health and Department of Corrections studies.<sup>90</sup> Many were addicts who had become low-level dealers and were serving three-year terms under the CDRA’s drug free school zone offenses.<sup>91</sup>

There were other indications of the tremendous impact the CDRA was having on how the criminal justice system responded to drug offenders. Eleven percent of the state prison population was incarcerated for a drug offense when the CDRA was enacted in 1987.<sup>92</sup> That percentage more than doubled to 25% three years later.<sup>93</sup> That proportion increased to 36% by 2002.<sup>94</sup> More drug offenders were being incarcerated for longer periods of time since enactment of the CDRA, through a combination of an enhanced focus on drug law enforcement, as called for by the Attorney General, and the CDRA’s tough sentencing provisions.<sup>95</sup>

Drug offenders were also subjected to a host of collateral sanctions that were stipulated in the CDRA and elsewhere. These ranged from drug enforcement and demand reduction fees that ran as high as \$1,000 per offense, mandatory driver’s license suspension, exclusion from public housing, and bars from receiving public support.<sup>96</sup> Offenders were also prohibited from

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<sup>85</sup> Stout, *supra* note 83, at 40.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> TRAVIS et al., *supra* note 33, at 16.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 19.

<sup>96</sup> Comprehensive Drug Reform Act of 1987, N.J. STAT. ANN. § 2C:35-1 (West 1987); N.J. STAT. ANN. § 2C:35-15 (West 2008); N.J. STAT. ANN. § 2C: 35-16 (West 2008).

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licensed professions, including barbering and accounting.<sup>97</sup> These ancillary sanctions can have a debilitating effect on an ex-offender's prospects for finding gainful employment and leading a law-abiding life.<sup>98</sup> As a result, thousands of low-level drug offenders, many of whom were addicts, were incarcerated and saddled with other sanctions that significantly detracted from their life chances. In the words of Michelle Alexander, author of *The New Jim Crow*, these offenders "face a lifetime of discrimination, scorn, and exclusion."<sup>99</sup>

The impact of this massive increase in incarceration of drug offenders did not fall equally on all racial and demographic groups. The overwhelming proportions of those incarcerated were young men of color, despite evidence of no differences in drug use or distribution between racial and ethnic groups.<sup>100</sup> Today, 77% of the state prison population is racial and ethnic minorities.<sup>101</sup> New Jersey had the third highest ratio of black-to-white incarceration rates in the nation, behind Iowa and Vermont, according to a 2007 analysis of New Jersey's state prison population conducted by the Vera Institute of Justice.<sup>102</sup>

The fiscal toll was also considerable. The budget for the Department of Corrections was \$289 million when the CDRA was enacted in 1987.<sup>103</sup> The corrections budget more than tripled to \$1.1 billion by 2006 because of explosive growth in the inmate population.<sup>104</sup> The budget for the Department of Corrections was the fastest growing segment of the New Jersey state budget for much of that period.<sup>105</sup> The CDRA had led to a massively expensive program of drug enforcement that resulted in the

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<sup>97</sup> See N.J. STAT. ANN. § 45:1-21 (West 2013); N.J. STAT. ANN. § 45:5B-21 (West 2013); N.J. STAT. ANN. § 45:2B-49 (West 2013).

<sup>98</sup> See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 961 (2003) (examining the consequences of incarceration for employment opportunities).

<sup>99</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW* 177 (2010).

<sup>100</sup> MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* 27-28 (2011).

<sup>101</sup> N.J. DEP'T OF CORR., OFFICE OF POLICY AND PLANNING, OFFENDER CHARACTERISTICS REPORT 1 (2013), [http://www.state.nj.us/corrections/pages/offender\\_stats.html](http://www.state.nj.us/corrections/pages/offender_stats.html).

<sup>102</sup> Stout & Daly, *supra* note 21, at 22-23.

<sup>103</sup> N.J. COMM'N TO REVIEW CRIMINAL SENTENCING, SUPPLEMENTAL REPORT ON NEW JERSEY'S DRUG FREE ZONE CRIMES & PROPOSAL FOR REFORM 5 (2007), <http://sentencing.nj.gov/downloads/supplemental%20schoolzonereport.pdf> [hereinafter N.J. COMM'N].

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

incarceration of thousands of mostly non-violent, addicted drug offenders.

*B. The New Jersey State Police and the Emergence of Profiling*

In 1993, Attorney General Robert J. Del Tufo proclaimed in Action Plan II that the combined “impact of the Action Plan [Action Plan I] and Drug Reform Act [CDRA] was immediate.”<sup>106</sup> The yardstick cited by Del Tufo was the number of drug arrests, which he claimed rose statewide by 71% between 1986 and 1989.<sup>107</sup> School zone arrests, which exposed the arrestee to a mandatory period of imprisonment, likewise increased dramatically from 1,375 in 1987, to 6,582 in 1988, and to 9,497 in 1989, according to the Department of Law and Public Safety.<sup>108</sup>

Curtis Kennedy and Robert Underwood were among the 1,375 individuals arrested in 1987 on drug charges.<sup>109</sup> The circumstances of their encounter with NJSP troopers have a distinctly familiar ring to those remotely acquainted with the racial profiling scandal that enveloped New Jersey eleven years later. Kennedy and Underwood, both African American, were stopped for speeding by troopers with the New Jersey State Police while travelling in a late model Lincoln bearing Ohio plates and heading westbound on Interstate 80.<sup>110</sup> One of the troopers, during the stop, asked for and received the pair’s verbal consent to search the vehicle. The search yielded a bag of suspected cocaine.<sup>111</sup> Curtis, Underwood, and four other minority defendants whose criminal charges also arose from arrests for traffic violations on Interstate 80, filed a consolidated motion seeking internal documents and records from the State Police to substantiate their claim that “their arrests, even if objectively reasonable, were tainted by a long-standing, systematic practice of invidious discrimination against minorities reflected in the selective enforcement of New Jersey’s traffic laws.”<sup>112</sup>

The trial judge denied the defendants’ discovery motion.<sup>113</sup> But an appellate court later concluded that a statistical survey

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<sup>106</sup> Letter from Del Tufo, *supra* note 75.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *State v. Kennedy*, 588 A.2d 834, 836 (N.J. Super. Ct. App. Div. 1991).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 837.

<sup>113</sup> *Id.*

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prepared by the Public Defender's Office, which revealed that 77% of the forty-three of its cases involving motor vehicle stops on Interstate 80 during a three-year period involved minority motorists, was "marginally sufficient" to raise a viable claim of selective enforcement.<sup>114</sup> The appellate court observed that the Public Defender's survey, despite its methodological flaws, "raises disturbing questions concerning whether, as defendants claim, members of minority groups are being targeted or singled out for prosecution of traffic infractions."<sup>115</sup> The court remanded the case to the trial judge for discovery.<sup>116</sup>

Several years later, a suppression hearing of unprecedented length—seventy-two days—began in the Gloucester County Courthouse on November 28, 1994, before Judge Robert E. Francis.<sup>117</sup> At issue was a consolidated motion filed by seventeen African-American defendants who had been arrested by NJSP troopers while travelling on the Turnpike south of exit three during the period between 1988 and 1991.<sup>118</sup> Like Kennedy and Underwood in the earlier *Kennedy* case, all claimed the traffic stops that led to their arrests for drug offenses were based on a *de facto* or explicit policy by the NJSP of targeting minorities for disparate enforcement of the traffic laws.<sup>119</sup> The defendants therefore sought suppression of fruits of their arrests pursuant to the equal protection and due process clauses of the Fourteenth Amendment.<sup>120</sup>

Judge Francis, at the conclusion of the hearing, set forth his findings in a lengthy written decision known as the *Soto* decision issued on March 4, 1996.<sup>121</sup> He determined that the un-rebutted statistical evidence of disproportionate traffic-stops against African-American motorists by members of the New Jersey State Police established a *de facto* policy of targeting black motorists for investigation and arrest.<sup>122</sup> Judge Francis, accordingly, suppressed all evidence of the narcotics seized from the

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<sup>114</sup> *Id.* at 837, 840.

<sup>115</sup> *Id.* at 840.

<sup>116</sup> *Id.* at 840, 842.

<sup>117</sup> N.J. S. JUDICIARY COMM., REPORT OF THE NEW JERSEY SENATE JUDICIARY COMMITTEE'S INVESTIGATION OF RACIAL PROFILING AND THE NEW JERSEY STATE POLICE 11–12 (2001), <http://www.njleg.state.nj.us/racialprofiling/sjufinal.pdf>.

<sup>118</sup> *State v. Soto*, 734 A.2d 350, 352 (N.J. Super. Ct. Law Div. 1996).

<sup>119</sup> *Id.* at 352, 360.

<sup>120</sup> *Id.* at 352.

<sup>121</sup> *Id.* at 350, 352.

<sup>122</sup> *Id.* at 360.

defendants thereby effectively terminating the criminal prosecutions arising from the contested motor vehicle stops.<sup>123</sup>

The Attorney General at the time, Deborah Poritz, chose to appeal Judge Francis's ruling despite the misgivings of several appellate attorneys with the Division of Criminal Justice, according to a comprehensive report on racial profiling issued by the New Jersey Senate Judiciary Committee.<sup>124</sup> An ad hoc committee comprised of members of the State Police and the Attorney General's Office was established at the same time to develop responses aimed at remediating the practices condemned by Judge Francis in the *Soto* decision.<sup>125</sup> But the committee disbanded shortly thereafter, yielding no remedial policies whatsoever.<sup>126</sup>

On November 7, 1996, the Civil Rights Division of the United States Department of Justice (DOJ) informed the Attorney General's Office for the first time of its interest in reviewing the allegations of racial profiling raised in the *Soto* case.<sup>127</sup> The Attorney General at that time, Peter G. Verniero, directed his office to maintain an obdurately defensive posture as to both the pending DOJ inquiry and the *Soto* ruling, which he, like his predecessor, was evidently committed to reversing on appeal.<sup>128</sup> Verniero embraced the strategy, despite the ongoing compilation by the NJSP of statistics—particularly those relating to consent searches—that demonstrated that the frequency of racial profiling was indeed unchanged since the *Soto* ruling.<sup>129</sup>

### C. *The Legislature and Courts Embrace the CDRA*

As the drug war continued apace throughout the 1990s, the Legislature repeatedly amended the CDRA by adding provisions that established new drug crimes and enhanced, significantly in some circumstances, punishment for existing drug-related crimes.<sup>130</sup> The Legislature also sought to significantly toughen

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<sup>123</sup> *Id.* at 352.

<sup>124</sup> N.J. S. JUDICIARY COMM., *supra* note 117, at 13.

<sup>125</sup> *Id.* at 14–15.

<sup>126</sup> *Id.* at 14, 18.

<sup>127</sup> *Id.* at 4, 19.

<sup>128</sup> *Id.* at 13, 19–20.

<sup>129</sup> *Id.* at 20–21.

<sup>130</sup> *See, e.g.*, N.J. STAT. ANN. § 2C:35-4.1 (West 2005) (establishing a first degree crime of “booby trapping” or fortifying property used for manufacturing or distributing CDS); N.J. STAT. ANN. § 2C:39-4(a) (West 2005) (providing that a person who is in possession of a firearm or other weapon while committing a

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the collateral consequences of illicit drug trafficking by enacting a provision titled The Drug Offender Restraining Order Act (DORA) of 1999.<sup>131</sup> DORA provides that when a person is convicted of a drug crime involving the distribution or manufacture of CDS, a court “shall . . . issue an order prohibiting the person from entering any place” connected with the charge for which he was arrested.<sup>132</sup> Notwithstanding the “shall” language, the Act applies only upon request of the prosecutor.<sup>133</sup> Moreover, the restraining order may remain in effect no longer than the maximum term of imprisonment or incarceration allowed by law for the underlying of offenses and shall be made a condition of the defendant’s parole.<sup>134</sup>

A related provision provides that a similar restraining order shall, “upon application of a law enforcement officer or prosecuting attorney,” be entered as a condition of defendant’s release on bail or personal recognizance after his arrest.<sup>135</sup> In addition, the restraining order shall continue, “until the case has been adjudicated or dismissed, or for not less than two years, whichever is less.”<sup>136</sup> In order to facilitate the evictions of tenants who commit, or harbor others who commit drug offenses on leasehold property, the Legislature also enacted a provision that requires courts to provide notice of a defendant’s conviction or juvenile adjudication of a drug offense to the owner of leased premises or the owner’s agent.<sup>137</sup> These provisions collectively ensured that the punitive reach of the CDRA would impose hardship on convicted drug offenders far beyond the confines of New Jersey’s prisons.

Defendants convicted of drug offenses enacted pursuant the CDRA also found New Jersey’s appellate courts disinclined to accept their many and diverse legal challenges to these provisions, especially during the early 1990s. For example, the school zone provision easily withstood claims that the absence of

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drug crime is guilty of a second degree crime).

<sup>131</sup> N.J. STAT. ANN. § 2C:35-5.4 (West 2005); N.J. STAT. ANN. § 2C:35-5.5 (West 2005).

<sup>132</sup> N.J. STAT. ANN. § 2C:35-5.7(h) (West 2005); N.J. STAT. ANN. § 2C:35-5.6 (West 2005).

<sup>133</sup> Letter from David P. Anderson, Jr., Dir. of Office of Prof'l and Governmental Servs., to Assignment Judges (April 18, 2011) (on file with author).

<sup>134</sup> § 2C:35-5.7(j).

<sup>135</sup> § 2C:35-5.7(a).

<sup>136</sup> § 2C:35-5.7(j).

<sup>137</sup> § 2C:35-5.7(d)(4) (West 2005).

a *mens rea* element (i.e., knowledge of the proximity to school property) rendered the statute constitutionally infirm.<sup>138</sup> Defendants were no less successful in challenging the provision on equal protection grounds—that enforcement of the provision would invariably fall disproportionately on minority drug offenders, who reside in predominantly urban areas of the state.<sup>139</sup>

As discussed previously, the CDRA explicitly precluded judges from reducing sentences negotiated through a plea agreement between the State and defendant where the crime carries a mandatory minimum sentence.<sup>140</sup> This provision, when enacted as part of the CDRA, was without precedent in New Jersey law. At that time, courts could exercise their traditional authority to impose a lesser sentence than that contemplated by a negotiated plea agreement, and furthermore possessed the power to even suspend the imposition of a sentence altogether.<sup>141</sup> N.J. Stat. Ann. § 2C:35-12, however, expressly precludes a court from imposing a lesser prison term than that mandated by the plea agreement.<sup>142</sup> Thus, on the one hand, the provision specifically authorizes plea-bargaining in circumstances where a mandatory minimum sentence is implicated. This was done, presumably in part, to circumvent the Supreme Court of New Jersey's edict, issued in 1981, expressly forbidding plea agreements, which eliminate mandatory Graves Act penalties (for offenses in which a firearm is involved).<sup>143</sup> On the other hand, the provision constitutes a particularly audacious curb on the judiciary's traditional sentencing authority: the sentencing judge is foreclosed from imposing a sentence less than that contemplated by the plea agreement only in cases involving drug crimes, most of which are resolved through negotiated plea agreements.

Predictably, reliance on N.J. Stat. Ann. § 2C: 35-12 by prosecutors precipitated a torrent of litigation during the next decade and beyond, with defendants initially arguing that the provision clearly violated the constitutional doctrine of separation

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<sup>138</sup> State v. Ivory, 592 A.2d 205, 211 (N.J. 1991).

<sup>139</sup> State v. Rodriguez, 542 A.2d 966, 969 (Super. Ct. Law. Div. 1988).

<sup>140</sup> N.J. STAT. ANN. § 2C:35-12 (West 2005).

<sup>141</sup> State v. Warren, 558 A.2d 1312, 1316–17, 1320 (N.J. 1989).

<sup>142</sup> § 2C:35-12.

<sup>143</sup> State v. Connell, 506 A.2d 829, 833 (N.J. Super. Ct. App. Div. 1986) (citing N.J.S.A. 2C:43-6, *Supreme Court Memorandum, April 27, 1981-Plea Bargaining*, at 188).

of powers.<sup>144</sup> In 1992, the Supreme Court of New Jersey in two companion cases, *State v. Lagares* and *State v. Vasquez*, did indeed conclude that the provision was constitutionally infirm.<sup>145</sup> The Supreme Court of New Jersey nonetheless declined to strike down the provision, and instead judicially salvaged it by compelling the Attorney General, in consultation with county prosecutors, to promulgate guidelines for the exercise of prosecutorial discretion in waiving mandatory sentences so as to promote uniformity and to prevent arbitrariness.<sup>146</sup> In retrospect, these decisions mark the first significant engagement between New Jersey's Judiciary and Executive Branch directly arising from the enforcement of the CDRA. Although it can be reasonably argued that both *Lagares* and *Vasquez* represent an early capitulation by the New Jersey Supreme Court to the Executive Branch with respect to the latter's zeal in combating drug crime, this issue and many others would await further adjudication in the coming years.<sup>147</sup>

### III. 1998–PRESENT: RECONSIDERATION AND REFORM

#### A. *The Turnpike Shooting and Response*

With the benefit of hindsight, one can easily fix the date when the untrammelled forward momentum of New Jersey's drug war came to an abrupt and unexpected halt. On the afternoon of April 23, 1998, Troopers John Hogan and James Kenna stopped a van for a traffic violation while patrolling a section of the New Jersey Turnpike in Mercer County.<sup>148</sup> The officers fired eleven

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<sup>144</sup> See, e.g., *State v. Lagares*, 601 A.2d 698, 705 (N.J. 1992); *State v. Vasquez*, 609 A.2d 29, 33 (N.J. 1992).

<sup>145</sup> *Lagares*, 601 A.2d at 704–05; *Vasquez*, 609 A.2d at 32–33; see also *State v. Gerns*, 678 A.2d 634, 640–41 (N.J. 1996) (holding that it is “neither arbitrary nor capricious” for the prosecutor’s recommendation of a reduced sentence to be based “on the value of the cooperation received from a defendant”); *State v. Bridges*, 621 A.2d 1, 7 (N.J. 1993).

<sup>146</sup> *Lagares*, 601 A.2d at 704.

<sup>147</sup> In 1998, the Supreme Court of New Jersey concluded that the guidelines promulgated by the Attorney General pursuant to its earlier decisions were inadequate to satisfy the separation of powers doctrine as well as the Code’s goal of uniformity of sentencing. The Court therefore ordered the Attorney General to adopt new guidelines to be rigorously adhered to in every county. *State v. Brimage*, 706 A.2d 1096, 1106 (N.J. 1998).

<sup>148</sup> Tom Avril, *Troopers Deny Charges in Shooting: John Hogan and James Kenna Have Been Indicted for Firing at Four Minority Men in a Van on the Turnpike*, PHILA. INQUIRER, Oct. 13, 1999, at B1; Ronald Smothers, *2 New Jersey*

shots into the van during the course of the stop, apparently in self-defense, which injured three of the four unarmed occupants.<sup>149</sup> The two officers later pled guilty to criminal charges related to the incident and acknowledged during their plea hearing that they stopped the vehicle specifically because its occupants were African-American and Latino.<sup>150</sup> Furthermore, the troopers expressly testified that the practice accorded with their drug interdiction training that reinforced the notion that minorities were more likely to be drug traffickers.<sup>151</sup> The Turnpike Shooting (as the incident became known) instantly propelled the issue of racial profiling to the forefront of both state and national politics and provoked a reassessment of national drug policy.<sup>152</sup>

The Supreme Court of New Jersey, in a recent decision, had occasion to provide a concise chronology of key events that unfolded in the immediate aftermath of the Turnpike Shooting.<sup>153</sup> Not only did the Attorney General's Office abandon its appeal in *Soto*, but also on the very same date, April 20, 1999, it issued a report that forthrightly acknowledged "that the problem of disparate treatment [of minority motorists by the New Jersey State Police] is real not imagined."<sup>154</sup> This report, titled the *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling (Interim Report)*, also recommended the implementation of a series of steps to ensure that all routine traffic stops made by NJSP personnel would be conducted impartially and in compliance with all constitutional strictures.<sup>155</sup>

Later that year, the State entered into a consent decree with the United States Department of Justice. A federal judge, the Honorable Mary L. Cooper, signed the Consent Decree and Order Appointing An Independent Monitoring Team (IMT) on December 30, 1999 and May 12, 2000, respectively.<sup>156</sup> The Consent Decree

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*State Troopers Indicted in Turnpike Shooting*, N.Y. TIMES, Sept. 8, 1999, at B1.

<sup>149</sup> Smothers, *supra* note 148.

<sup>150</sup> David Kocieniewski, *New Jersey Troopers Avoid Jail In Case That Highlighted Profiling*, N.Y. TIMES, Jan. 15, 2002, at A1.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *State v. Herrera*, 48 A.3d 1009, 1012–13 (N.J. 2012).

<sup>154</sup> *Id.* at 1019; *see also* PETER VERNIERO & PAUL H. ZOUBEK, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 4 (1999), [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf).

<sup>155</sup> VERNIERO & ZOUBEK, *supra* note 154, at 4.

<sup>156</sup> OFFICE OF THE ATTORNEY GEN., STATE OF N.J. DEP'T OF LAW & PUB.

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required oversight of the NJSP by a court-appointed monitoring team and implementation of numerous reform measures, many of which were embodied in the 1999 *Interim Report*.<sup>157</sup> Pursuant to the Consent Decree, the Office of State Police Affairs was established within the Office of the Attorney General to ensure implementation of the terms of the consent decree and to provide coordination with the IMT and U.S. Department of Justice relating to NJSP matters.<sup>158</sup>

The New Jersey Senate Judiciary Committee released its report on racial profiling on June 11, 2001, following two months of highly publicized public hearings in March and April 2001.<sup>159</sup> Two years later, the New Jersey Legislature heeded one of the Senate Judiciary Committee's key recommendations by enacting into law a provision that created a third-degree crime of official deprivation of constitutional rights—a criminal statute that for all intents and purposes made the act of racial profiling by law enforcement personnel an indictable offense.<sup>160</sup>

Importantly, the Attorney General's acknowledgement of disparate treatment by minority motorists in its *Interim Report* had direct legal ramifications in many drug-related criminal prosecutions throughout New Jersey involving claims of racial profiling by the NJSP. The Supreme Court of New Jersey, by order entered on January 31, 2000, directed the statewide consolidation of those cases and assigned a seasoned criminal trial judge, Walter R. Barisonek, to hear all motions for discovery related to racial profiling.<sup>161</sup> Six months later, an appellate court alleviated what for many criminal defendants could have potentially been an insuperable burden of establishing a colorable basis for a claim of selective enforcement by the NJSP.<sup>162</sup> It did so by concluding that the *Soto* decision, the *Interim Report*, and the absence of any evidence of an attempt on the part of the NJSP to remediate the practice of racial profiling prior to 1999 together established that colorable basis, thereby entitling many criminal

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SAFETY, TWELFTH PROGRESS/STATUS SUMMARY OF THE CONSENT DECREE ENTERED INTO BY THE UNITED STATES OF AMERICA AND THE STATE OF NEW JERSEY REGARDING THE NEW JERSEY DIVISION OF STATE POLICE (2005).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> N.J. S. JUDICIARY COMM., *supra* note 117, at v.

<sup>160</sup> N.J. STAT. ANN. § 2C:30-6 (West 2003).

<sup>161</sup> *State v. Herrera*, 48 A.3d 1009, 1020 (N.J. 2012).

<sup>162</sup> *Id.*; *see also State v. Ballard*, 752 A.2d 735, 752 (N.J. Super. Ct. App. Div. 2000).

defendants arrested by NJSP personnel during motor vehicle stops to voluminous amounts of material and data relating to NJSP interdiction policies and practices.<sup>163</sup>

In the wake of this decision, Judge Barisonek and the Attorney General agreed that African-American or Hispanic-American defendants were entitled to discovery for motor vehicle stops by NJSP from January 1, 1988 through April 20, 1999 on the Turnpike, its extensions Interstate 80 and Route 78, the Garden State Parkway and other interstate roads.<sup>164</sup> By orders dated November 28, 2001 and February 20, 2002, Judge Barisonek ordered, among other information, disclosure of random stop data for 1200 stops per year for different trooper stations for a period spanning several years.<sup>165</sup> The Attorney General, confronted with the enormity of its discovery obligations and the prospect of that same discovery material being relied upon to advance presumably compelling selective enforcement claims, instead moved before Judge Barisonek to dismiss seventy-seven criminal cases in 2001 and another eighty-six cases the following year.<sup>166</sup> The Attorney General explained that he sought dismissal “in the interests of justice in an effort to move forward.”<sup>167</sup> In granting the Attorney General’s dismissal motion in 2002, Judge Barisonek recognized that the Attorney General’s decision to dismiss these cases represented “an extraordinary act of discretion . . . to help alleviate this problem and help confront this issue head on.”<sup>168</sup> Finally, in September 2009, a federal judge granted a joint application to terminate the Consent Decree after two independent monitors reported substantial and uninterrupted compliance by the NJSP.<sup>169</sup>

The foregoing discussion does not purport to constitute the definitive account of racial profiling in New Jersey by law enforcement personnel. For purposes of this article, however, it should be manifestly apparent that New Jersey’s experience with racial profiling was an obvious and direct outgrowth of policy decisions made at the uppermost levels of the Executive Branch to aggressively mobilize New Jersey’s law enforcement resources

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<sup>163</sup> *Herrera*, 48 A.3d at 1020.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 1021.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 1019–20.

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at every level and, further, to establish as the highest priority the enforcement of New Jersey's newly enacted criminal drug laws. It is no coincidence that the Attorney General himself acknowledged that the period—January 1, 1988 through April 20, 1999—wherein criminal defendants were entitled to racial profiling discovery and, subsequently, dismissal of their charges, was a time-frame bracketed by two pivotal events: the promulgation of Statewide Action Plan for Narcotics Enforcement of 1987, and the issuance of the *Interim Report*.<sup>170</sup> In so doing, the Attorney General directly tied the state's admitted racial profiling history with enforcement of the CDRA.

Furthermore, it cannot be denied that the emergence of racial profiling in New Jersey, was, at a very minimum, heavily influenced by the federal government's drug war. For example, in 1986, the Drug Enforcement Administration's "Operation Pipeline" enlisted police departments across the nation to search for narcotics traffickers on major thoroughfares and advised officers that Latinos and West Indians dominated the drug trade and therefore warranted extra scrutiny.<sup>171</sup> Only one year later, "Operation Pipeline" was incorporated into in-service training for NJSP personnel and, significantly, is also discussed in that section of the Attorney General's 1988 Action Plan pertaining to "Basic Patrol and Investigative Activities."<sup>172</sup> John Farmer, Jr., whose tenure as New Jersey Attorney General spanned the most concrete reform initiatives, clearly apprehended this, telling a *New York Times* reporter,

In a lot of ways, the Justice Department in Washington has been going through what we in New Jersey went through . . . The troopers in the field were given a mixed message. On one hand, we were training them not to take race into account. On the other hand, all the intelligence featured race and ethnicity prominently.

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<sup>170</sup> Here it deserves mention that Colonel Clinton Pagano, who served as Superintendent of the New Jersey State Police from 1975 to February 1990, explicitly testified at the *Soto* suppression hearing that aggressive drug interdiction by NJSP was, from its very inception, an integral component of New Jersey's overarching enforcement strategy to combat illicit narcotics that commenced in the late 1980's. *State v. Soto*, 734 A.2d 350, 358 (N.J. Super. Ct. Law Div. 1996).

<sup>171</sup> David Kocieniewski, *New Jersey Argues that the U.S. Wrote the Book on Race Profiling*, N.Y. TIMES, Nov. 29, 2000, at A1, <http://www.nytimes.com/2000/11/29/nyregion/new-jersey-argues-that-the-us-wrote-the-book-on-race-profiling.html>.

<sup>172</sup> *Soto*, 734 A.2d at 358.

So what is your average road trooper to make of all this?<sup>173</sup>

*B. The Emergence of Drug Courts in New Jersey*

In 1997, Governor Christine Todd Whitman recognized that N.J. Stat. Ann. § 2C: 35-14, which authorizes treatment in lieu of imprisonment for select non-violent offenders, was not being used because of the absence of treatment capacity to serve addicted offenders.<sup>174</sup> Whitman created a drug court pilot project in three counties.<sup>175</sup> This pilot project required that participating offenders be subject to a CDRA-mandated prison term.<sup>176</sup> This requirement ensured that participants would be diverted from the Department of Corrections, which allowed Whitman to pay for the pilots by transferring funds from the Department of Corrections to the Department of Health.<sup>177</sup> Residential drug treatment resources were dedicated specifically for the treatment of drug court offenders sentenced under the provisions of N.J. Stat. Ann. § 2C: 35-14 in the pilot drug courts.<sup>178</sup>

In 1999, the Chief Justice of the New Jersey Supreme Court charged the Conference of Criminal Presiding Judges with reviewing drug courts to determine whether they should be expanded statewide.<sup>179</sup> The following year the Conference cited drug courts as a “best practice,” a commendation that was endorsed by the Judicial Council shortly thereafter.<sup>180</sup> Legislation funding statewide expansion of drug courts was signed on September 6, 2001, and drug courts were operational statewide three years later.<sup>181</sup>

A 2010 report on New Jersey’s drug courts noted that over 9,000 offenders had been admitted to drug courts since they were created.<sup>182</sup> There were an average of 1,274 offenders admitted to

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<sup>173</sup> Kocieniewski, *supra* note 171.

<sup>174</sup> See N.J. STAT. ANN. § 2C:35-14 (West 1987); Hunter et al., *supra* note 17, at 807.

<sup>175</sup> N.J. ADULT DRUG COURTS, A MODEL FOR SUCCESS: A REPORT ON NEW JERSEY’S ADULT DRUG COURTS 6 (2010) [hereinafter A MODEL FOR SUCCESS].

<sup>176</sup> STATE OF N.J. ADMIN. OFFICE OF THE COURTS, MANUAL FOR OPERATION OF ADULT DRUG COURTS IN NEW JERSEY 5 (2002).

<sup>177</sup> *Id.* at 6.

<sup>178</sup> *Id.*

<sup>179</sup> *New Jersey Drug Courts*, N.J. ADMIN. OFF. CTS., <http://www.judiciary.state.nj.us/drugcourt/> (last visited Feb. 24, 2013).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> A MODEL FOR SUCCESS, *supra* note 175, at 15.

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drug courts annually in the 2006 through 2010 span.<sup>183</sup> The report compares prison and drug court costs (including treatment and supervision costs) and concludes that drug courts save \$13,000 per offender over traditional handling.<sup>184</sup>

*C. The New Jersey Commission to Review Criminal Sentencing*

Reconsideration of certain key provisions of the CDRA and their impact would not occur until the establishment of the New Jersey Commission to Review Criminal Sentencing by the New Jersey Legislature in 2004, despite the fact that the CDRA was directly entwined with the problem of racial profiling, and had exacted significant human and fiscal costs since its enactment in 1987.<sup>185</sup> The Legislature, in creating the Commission, observed that since the New Jersey Criminal Code was enacted in 1978, many new offenses had been added and many existing punishments had been enhanced through subsequent amendments.<sup>186</sup>

The Legislature specifically directed the Commission, by statute comprised of the most influential stakeholders in New Jersey's criminal justice system, to review the Code's sentencing provisions and to issue recommendations for legislation to be enacted that would ensure sentences are fair and proportionate.<sup>187</sup> The Commission's broad, if somewhat vague, legislative mandate did not explicitly reference consideration of the CDRA.<sup>188</sup> Nonetheless, a swift and clear consensus emerged among Commission members that certain provisions of the CDRA were in immediate need of examination and possible reform.<sup>189</sup> As a result, the Commission immediately embarked on several initiatives relating to the CDRA as its first order of business.<sup>190</sup>

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<sup>183</sup> *Id.* at 14.

<sup>184</sup> *Id.* at 16.

<sup>185</sup> See Hunter et al., *supra* note 17, at 802, 829; *New Jersey Commission to Review Criminal Sentencing*, N.J. DEPT LAW & PUB. SAFETY (2005), <http://sentencing.nj.gov/>.

<sup>186</sup> N.J. COMM'N TO REVIEW CRIMINAL SENTENCING, REPORT ON NEW JERSEY'S DRUG FREE ZONE CRIMES & PROPOSAL FOR REFORM 3 (2005), [http://www.sentencing.nj.gov/dfz\\_report\\_pdf.html](http://www.sentencing.nj.gov/dfz_report_pdf.html).

<sup>187</sup> *Id.*; *New Jersey Commission to Review Criminal Sentencing*, *supra* note 185.

<sup>188</sup> Commission to Review Criminal Sentencing Act, Ch. 265, N.J. Pub. L. 2003.

<sup>189</sup> N.J. COMM'N TO REVIEW CRIMINAL SENTENCING, *supra* note 186, at 28.

<sup>190</sup> *Id.*

The Commission initially advocated amending a provision of the CDRA that required the mandatory two-year suspension of driving privilege for anyone convicted (or, in the case of juveniles, adjudicated delinquent) of any drug crime.<sup>191</sup> The statute applies without regard to any nexus between the underlying offense and the safe operation of a motor vehicle.<sup>192</sup> Over 17,000 licenses were suspended pursuant to this statute in 2000 alone, according to statistics compiled by the New Jersey Department of Motor Vehicles.<sup>193</sup> The Commission, through testimony and written submissions to the Legislature, encouraged legislators to amend the provision to confer a modicum of discretion to judges.<sup>194</sup> Waiver of the suspension would be permitted upon a showing of compelling circumstance (i.e., where the defendant demonstrates that deprivation of his or her driving privileges would entail extreme hardship and alternative means of transportation are unavailable).<sup>195</sup>

In a letter to the Assembly dated April 12, 2005, the Commission urged passage of Assembly Bill No. 878, arguing in part that the impact of the current provision was at cross-purposes with the preeminent goal of rehabilitation.<sup>196</sup> The Commission asserted in particular that for many offenders, suspension of driving privileges could obstruct their ability to obtain drug treatment as well as impede compliance with other conditions of probation or parole that require routine and dependable transportation.<sup>197</sup> In 2006, the Legislature amended the provision to incorporate the hardship exception.<sup>198</sup>

In the meantime, the Commission conducted research and compiled data in furtherance of what proved to be its most

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<sup>191</sup> N.J. Stat. Ann. § 2C:35-16 (West 2008).

<sup>192</sup> *See id.*

<sup>193</sup> KEN ZIMMERMAN & NANCY FISHMAN, ROADBLOCK ON THE WAY TO WORK: DRIVER'S LICENSE SUSPENSION IN NEW JERSEY 12 (2001).

<sup>194</sup> Press Release, Drug Policy Alliance, First Recommendation by New Sentencing Commission Urges Support for Legislation Allowing Hardship Exception for Driver (Feb. 23, 2005) (*available at* <http://www.drugpolicy.org/news/2005/02/first-recommendation-new-sentencing-commission-urges-support-legislation-allowing-hards>).

<sup>195</sup> *Id.*

<sup>196</sup> Letter from Hon. Barnett Hoffman, Chair, New Jersey Commission to Review Criminal Sentencing, to Assemblyman Peter J. Barnes, New Jersey Assembly (Apr. 12, 2005) (on file with authors).

<sup>197</sup> *Id.*

<sup>198</sup> N.J. Stat. Ann. § 2C:35-16 (West 2008).

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significant and influential report.<sup>199</sup> As noted previously, a central objective of the CDRA is to protect school children from the malicious impact of the illicit drug trade. In furtherance of the goal, the Legislature, as part of the CDRA, enacted a provision that criminalized the distribution of CDS within 1,000 feet of school property as a third-degree crime carrying a three-year mandatory minimum.<sup>200</sup> Moreover, appellate courts expansively construed “school property” to encompass “daycare centers, vocational training centers, and so forth.”<sup>201</sup> Critics of the law contended, often without empirical support, that because of New Jersey’s unique demographics, enforcement of the school zone law invariably ensnared a disproportionate number of minority offenders who resided in densely populated areas “blanketed in interlocking ‘drug free zones.’”<sup>202</sup> In fact, as discussed above, criminal defendants unsuccessfully litigated legal claims premised on the disparate impact of the law shortly after the law’s enactment.<sup>203</sup>

Employing sophisticated mapping technology and data derived from numerous sources, the Commission’s finding confirmed beyond doubt the school zone law was, bluntly stated, a persistent and effective engine of racial disparity, based on what the Commission described as the law’s intrinsic “urban effect.”<sup>204</sup> In 2004, African American and Hispanic offenders accounted for 96% of those inmates imprisoned for violating the school zone law.<sup>205</sup> Moreover, arrest data demonstrated that the law, presumably due to its ubiquitous applicability in New Jersey’s urban areas, had no empirically discernible deterrent impact regarding drug crime committed in proximity to school property.<sup>206</sup>

The Commission’s report was accompanied by proposed legislation that, if enacted, would reduce the size of the zones from 1,000 feet to 200 feet and, moreover, upgrade the crime from

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<sup>199</sup> See generally N.J. COMM’N TO REVIEW CRIMINAL SENTENCING, *supra* note 186.

<sup>200</sup> Hunter et al., *supra* note 17, at 797–98.

<sup>201</sup> JUDITH GREENE ET AL., JUSTICE POLICY INST., DISPARITY BY DESIGN 22 (2006).

<sup>202</sup> JUDITH GREENE, FAMILIES AGAINST MANDATORY MINIMUMS, NEW JERSEY SENTENCING & A CALL FOR REFORM 13 (2003).

<sup>203</sup> N.J. COMM’N TO REVIEW CRIMINAL SENTENCING, *supra* note 186, at 11.

<sup>204</sup> GREENE ET AL., *supra* note 201, at 26.

<sup>205</sup> N.J. COMM’N TO REVIEW CRIMINAL SENTENCING, *supra* note 186, at 5.

<sup>206</sup> *Id.* at 27.

third-degree to second-degree while eliminating a mandatory period of parole ineligibility.<sup>207</sup> Notwithstanding the unanimous support of both law enforcement organizations and the editorial boards of every major newspaper in the State, proposed legislation to amend the school zone in accordance with the Commission's recommendations languished in the both the Assembly and Senate.<sup>208</sup> The Commission, in a supplemental report issued the following year, lamented this fact.<sup>209</sup> That same report disclosed the persistence of the law's racially disparate impact predicated on a review of updated corrections statistics.<sup>210</sup>

In a subsequent report issued in April 2007, the Commission endeavored to examine the efficacy of the New Jersey Drug Court Program.<sup>211</sup> Premised on its finding that the program furthered the objectives of reducing correctional costs and recidivism among ex-offenders, the Commission again drafted model legislation intended to expand eligibility provisions of the so-called special probation statute, and thereby significantly increase participation in the rehabilitation program by otherwise prison-bound offenders.<sup>212</sup> In contrast to the proposed changes to the school zone law, the Legislature swiftly enacted the Commission's recommended amendments without significant modification in 2008.<sup>213</sup> The Commission's final major report documented the relentless accretion of legislative amendments to the Code since its enactment in 1979 to increase punishment for existing and new crimes.<sup>214</sup> The report concluded that these changes, including those wrought specifically by the CDRA, necessitated, at a minimum, an urgent reassessment of the current sentencing architecture embodied in the Code.<sup>215</sup>

On May 19, 2008, at the urging of then Attorney General Anne Milgram, legislators introduced Assembly Bill No. A-2762.<sup>216</sup> The

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<sup>207</sup> *Id.* at 1.

<sup>208</sup> N.J. COMM'N, *supra* note 103, at 11.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 5–6.

<sup>211</sup> NEW JERSEY COMM'N TO REVIEW CRIMINAL SENTENCING, NEW JERSEY'S DRUG COURTS, SPECIAL PROBATION AND PROPOSAL FOR REFORM 3 (2007).

<sup>212</sup> *Id.* at 37–43.

<sup>213</sup> N.J. STAT. ANN. § 2C:35–14(a)–(l) (West 2005 & Supp. 2011).

<sup>214</sup> *See generally* N.J. COMM'N TO REVIEW CRIMINAL SENTENCING, STATUTORY CHANGES TO SENTENCING UNDER THE NJ CODE OF CRIMINAL JUSTICE: 1979 TO THE PRESENT 3 (2007).

<sup>215</sup> *Id.* at 3–4.

<sup>216</sup> FAMILIES AGAINST MANDATORY MINIMUMS, NEW DRUG-FREE SCHOOL ZONE BILLS IN NEW JERSEY HOUSE AND SENATE ASSEMBLY BILL A-2762 & SENATE BILL

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proposed bill, jointly sponsored by members of the Assembly Law and Public Safety Committee and Senate Judiciary Committee, called for amending the school zone law by authorizing judges to waive the mandatory period of parole ineligibility or place on probation a defendant convicted of the school zone offense upon consideration of several factors.<sup>217</sup> To the astonishment of some observers, the bill was subsequently amended to allow any defendant serving a sentence authorized by the school zone law to move for reconsideration of his or her sentence and to be resentenced in accordance with the new law if the judge concluded that the sentence imposed did not serve the interests of justice.<sup>218</sup> The Legislature thereby ensured that the new provision would have complete retroactive effect.

As passage of this legislation hung precariously in the balance at the close of 2009 legislative session, a letter dated December 8, 2009, signed by eight former New Jersey Attorneys General was delivered to outgoing Governor Jon Corzine and the Legislature.<sup>219</sup> The letter began with an expression of strong support for passage of the legislation and an exhortation that it be passed by the end of the year.<sup>220</sup> The Attorneys General further expressed their collective perspective that “[m]andating sentences for nonviolent drug offenders regardless of individual circumstances wastes money and does not increase public safety.”<sup>221</sup> Furthermore, mandatory sentences for nonviolent drug offenders tie judge’s hands and prevent them taking advantage of treatment alternatives which “save lives, cut crime[,] and reduce costs.”<sup>222</sup> Notably, one of the eight signatories was former Attorney General W. Cary Edwards, during whose tenure New Jersey’s drug war was conceived and implemented.<sup>223</sup> Governor Corzine signed the bill into law on January 12, 2010, after it passed in the Senate on December 10, 2009, and in the Assembly

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S-1866 (2008), [http://www.famm.org/Repository/Files/Final\\_one-page\\_NJ\\_school\\_zone\\_bill%20\\_10-3-08\\_.pdf](http://www.famm.org/Repository/Files/Final_one-page_NJ_school_zone_bill%20_10-3-08_.pdf).

<sup>217</sup> *Id.*

<sup>218</sup> N.J. STAT. ANN. § 2C:35-7a (West 2005).

<sup>219</sup> Letter from John J. Degnan, Robert Del Tufo, Zulima Farber, W. Cary Edwards, John Farmer, Jr., Peter C. Harvey, Deborah T. Portiz & James R. Zazzali, former N.J. Attorneys Gen., to Governor Jon S. Corzine & Members of the N.J. Legislature (Dec. 8, 2009) [hereinafter Att’ys Gen. Letter] (on file with authors). Former Attorney General Peter Verniero did not sign the letter.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*; see *An Overview*, *supra* note 25, at 5–7.

thereafter on January 7, 2010.<sup>224</sup>

The Commission came to an abrupt end in 2009, despite the fact that the Legislature finally did amend the CDRA's drug free school zone provision, albeit five years after the Commission issued its report documenting the problems with that provision.<sup>225</sup> In that year, Governor Corzine signed legislation abolishing the Commission to Review Criminal Sentencing and creating a new Criminal Sentencing and Disposition Commission.<sup>226</sup> While some have speculated that the Commission's demise was rooted in the fact that elected officials were uncomfortable with its focus on modifying the CDRA,<sup>227</sup> the real reasons that the Commission was abolished will never be known. Neither Governor Corzine nor his successor, Governor Christie ever made appointments to the new Criminal Sentencing and Disposition Commission, which has never met.<sup>228</sup>

*D. Government Efficiency and Reform Sentencing/Corrections Task Force*

On April 7, 2006, Governor Corzine signed Executive Order No. 9, creating a Government Efficiency and Reform Commission (hereinafter GEAR) to identify more cost effective approaches to government operations.<sup>229</sup> In October 2007, the Commission created a Sentencing/Corrections Task Force (hereinafter Task Force), and charged the Task Force to examine “existing statutes, programs and operations related to sentencing, incarceration, discharge and reintegration and assess the extent to which they contribute to deterrence, recidivism reduction and other public safety goals” and where they fail to meet those goals, “recommend alternative approaches designed to make more effective use of the State's resources.”<sup>230</sup> The GEAR Commission was chaired by a retired Chief Justice of the New Jersey Supreme

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<sup>224</sup> N.J. STAT. ANN. § 2C:35-7 (West 2005); Assemb. 213-2762, 1st Sess., Bill Tracking (N.J. 2008).

<sup>225</sup> N.J. STAT. ANN. § 2C:48A-1 (West Supp. 2011); § 2C:35-7; N.J. COMM'N TO REVIEW CRIMINAL SENTENCING, *supra* note 186, at 5–6.

<sup>226</sup> § 2C:48A-1.

<sup>227</sup> Bruce Stout & Ben Barlyn, *Reconvene Criminal Sentencing Commission*, EVERYTHING JERSEY (Apr. 6, 2012, 6:00 AM), [http://blog.nj.com/njv\\_guest\\_blog/2012/04/reconvene\\_criminal\\_sentencing.html](http://blog.nj.com/njv_guest_blog/2012/04/reconvene_criminal_sentencing.html).

<sup>228</sup> *Id.*

<sup>229</sup> Exec. Order No. 9 (Apr. 7, 2006), available at <http://nj.gov/infobank/circular/eojsc9.htm>.

<sup>230</sup> TASK FORCE, *supra* note 63, at 2.

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Court, and its membership included another retired Supreme Court justice, a former state attorney general, a former director of the attorney general's criminal division, the Commissioner of Corrections, the Chairman of the Parole Board, and several public members.<sup>231</sup>

The GEAR Task Force quickly focused its attention on the CDRA. First, it endorsed the Commission to Review Criminal Sentencing's proposed amendments to the drug free school zone law.<sup>232</sup> Second, it proposed a pilot project to test a major change to the state's drug court system.<sup>233</sup> Specifically, the GEAR Task Force recommended a two county pilot that would make drug court mandatory for offenders who met the drug court eligibility criteria.<sup>234</sup> Stating that "addicts, by virtue of their very addiction, may be the least able to understand the need for treatment[.]" the Task Force concluded that too many addicted offenders who would benefit from treatment were opting to serve prison time instead of the voluntary judicially supervised treatment regimens ordered in the existing drug court system.<sup>235</sup>

The Task Force concluded: "[t]he foundation for our position is built on a solid body of data demonstrating that mandatory treatment can be as effective, if not more effective, than voluntary treatment."<sup>236</sup> Recognizing that engagement in treatment is also important, the Task Force recommended that failure to participate by offenders ordered into drug court should be considered an aggravating factor at resentencing, essentially ensuring that offenders who refused to participate would receive longer prison terms.<sup>237</sup>

As part of this two-county pilot-project involving mandatory drug court, the Task Force recommended that one of the pilot-project counties be served by the current drug treatment infrastructure, and that the second county be served by a significantly enhanced treatment system, where patients would move between levels of care as indicated by the American Society

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<sup>231</sup> *Id.* at 3; see Att'y's Gen. Letter, *supra* note 219; N.J. Comm'n on Gov't Efficiency & Reform, *Boards & Commissions Appointment*, [https://www.net1.state.nj.us/GOV/APPT/GOV\\_APPT\\_WEB/Default.aspx](https://www.net1.state.nj.us/GOV/APPT/GOV_APPT_WEB/Default.aspx) (last visited Mar. 4, 2013).

<sup>232</sup> TASK FORCE, *supra* note 63, at 3.

<sup>233</sup> *Id.* at 13.

<sup>234</sup> *Id.* at 12–14.

<sup>235</sup> *Id.* at 12–13.

<sup>236</sup> *Id.* at 12.

<sup>237</sup> *Id.* at 14.

of Addiction Medicine (ASAM) Patient Placement Criteria; where they could receive medications (such as methadone and buprenorphine) to assist in treatment; where treatment staff are trained in motivational interviewing; and where treatment for dually diagnosed (e.g., substance abuse and mental health disorder) clients is available.<sup>238</sup> The Task Force concluded that the two-county arrangement allows for an evaluation to determine “whether the enhanced treatment services yield improved client outcomes (i.e., higher rates of recovery and reduced recidivism).”<sup>239</sup> The recommendation was not acted upon by the Corzine administration, despite the renown of the GEAR Task Force members and the fact that the Task Force estimated that their recommended mandatory drug court pilot project would save \$3.2 million over three years.<sup>240</sup>

#### *E. Governor Christie and the Failed Drug War*

With the brashness for which he is now well known, New Jersey Governor Chris Christie unambiguously proclaimed that “[t]he war on drugs, while well-intentioned, has been a failure,” in a speech given at the Brookings Institution on July 9, 2012.<sup>241</sup> With rhetorical flourish, he asserted that “[w]e’re warehousing addicted people every day in state prisons in New Jersey, giving them no treatment” and that even “[i]f you’re pro-life, as I am, you can’t be pro-life just in the womb . . . . Every life is precious and every one of God’s creatures can be redeemed, but they won’t if we ignore them.”<sup>242</sup>

Given his background as a former federal prosecutor, his party affiliation, and the highly politicized nature of drug policy generally, Governor Christie’s blunt rhetoric was, to many, at once surprising and welcome.<sup>243</sup> However, whether Christie intends to actually promote policies consistent with his stated belief about the failed War on Drugs very much remains uncertain. Importantly, he has not called for any reassessment,

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<sup>238</sup> *Id.* at 14–16.

<sup>239</sup> *Id.* at 17.

<sup>240</sup> *Id.* at 1, 3, 19.

<sup>241</sup> *Gov. Chris Christie: War on Drugs is ‘a failure’*, EVERYTHING JERSEY (July 10, 2012, 7:41 PM), [http://www.nj.com/news/index.ssf/2012/07/gov\\_chris\\_christie\\_war\\_on\\_drug.html](http://www.nj.com/news/index.ssf/2012/07/gov_chris_christie_war_on_drug.html) [hereinafter *Christie: War on Drugs*].

<sup>242</sup> *Id.*

<sup>243</sup> *Chris Christie*, WALL ST. J., <http://topics.wsj.com/person/C/chris-christie/5890> (last visited Feb. 18, 2013).

much less a dismantling, of the legal framework established by the CDRA that today remains largely intact. And it is unquestionably the CDRA that is the principal reason that New Jersey continues to imprison “addicted people every day in state prisons in New Jersey.”<sup>244</sup>

Governor Christie, however, has championed a component of the GEAR Task Force's recommendations. Specifically, Governor Christie proposed a statewide initiative to expand drug court admission criteria and to make drug court mandatory for eligible offenders.<sup>245</sup> Christie's proposal included the provision that refusal to participate in treatment would be considered an aggravating factor at resentencing, but it included none of the GEAR Task Force proposals regarding enhanced treatment services.<sup>246</sup> The bill, Senate Bill No. 881, passed both houses with only one dissenting vote and was signed into law by Governor Christie on July 19, 2012.<sup>247</sup>

To date, the mandatory provision of Senate Bill No. 881 has yet to be implemented; there is a six-month delay in the provision's effective date.<sup>248</sup> Several members of the legislature sponsored appropriation bills as companions to Senate Bill No. 881, but the Governor indicated that he was not supportive of additional spending measures, and no appropriation reached his desk.<sup>249</sup> It remains unclear how this initiative will be implemented in the coming months.

#### CONCLUSION

The CDRA was enacted in 1987 at a time of great concern and fear about drug abuse and amid considerable rhetoric about a war

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<sup>244</sup> *Christie: War on Drugs*, *supra* note 241.

<sup>245</sup> Governor Chris Christie, State of the State Address (Jan. 17, 2012) (transcript available at <http://nj.gov/governor/news/addresses/2010s/approved/20120117.html>); Chris Christie, Gov. State of N.J., A Discussion on Restoring Fiscal Integrity and Accountability (July 9, 2012), available at [http://www.brookings.edu/~media/events/2012/7/09%20christie/20120709\\_christie\\_fiscal\\_integrity.pdf](http://www.brookings.edu/~media/events/2012/7/09%20christie/20120709_christie_fiscal_integrity.pdf); N.J. Gov. Msg., 2013 S.B. 881 (Westlaw 2013).

<sup>246</sup> N.J. Gov. Msg., 2013 S.B. 881 (Westlaw 2013); see generally TASK FORCE, *supra* note 63, at 13–15.

<sup>247</sup> N.J. STAT. ANN. § 2C:35-14.1–3 (West 2012); S. 215-881 (N.J. 2012).

<sup>248</sup> N.J. STAT. ANN. § 2C:35-14.3.

<sup>249</sup> S.B. 2125, 115 Leg., 1st Sess. (N.J. 2012) (appropriating \$2 million to drug court, not signed); A.B. 3175, 115 Leg., 1st Sess. (N.J. 2012) (appropriating \$5 million to drug court, not signed); see generally Megan DeMarco, *Assembly Committee Backs Limited Drug Treatment Program*, STAR-LEDGER, May 15, 2012, at 23.

on drugs.<sup>250</sup> The Governor and the Attorney General made drug enforcement a top priority and the Attorney General used his powers to mandate a focus on enforcement of the provisions of the CDRA by local law enforcement.<sup>251</sup> The CDRA's principal focus was on deterring drug use and selling through the imposition of swift and severe sanctions.<sup>252</sup> Despite a provision authorizing judges to sentence certain addicted offenders to drug treatment in lieu of mandatory prison sentences, no money was appropriated to make treatment resources available to sentencing judges, and the provision was not used until a decade later, when a drug court pilot project funded treatment programs specifically for use by criminal court judges.<sup>253</sup> Instead, the CDRA's primary and explicit goal was to deter illegal drug use and sales through the imposition of swift and severe criminal sanctions.<sup>254</sup>

The Act was unique in several respects. It was the first legislation that imposed mandatory minimum sentences for other than violent crimes.<sup>255</sup> One of the offenses for which there was a mandatory minimum sentence was a new offense of selling, or possessing with intent to sell, illegal narcotics within 1,000 feet of a school or school bus, a provision that would be revisited decades later.<sup>256</sup> The CDRA also restricted judicial discretion and gave enormous powers to prosecutors.

The impact of the CDRA was significant and particularly problematic among those states that undertook their own anti-drug initiatives. The Act created a legacy of mistreatment of minorities. First, in 1999, the New Jersey Attorney General issued a report acknowledging "that the problem of disparate treatment [of minority motorists by the New Jersey State Police] is real[,] not imagined."<sup>257</sup> This unprecedented admission of racist policing practices was directly tied to enforcement of the CDRA's provisions.<sup>258</sup> Then, in December 2005, the New Jersey Commission to Review Criminal Sentencing researched the

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<sup>250</sup> See *An Overview*, *supra* note 25, at 5–6.

<sup>251</sup> *Id.* at 6–7.

<sup>252</sup> See, e.g., N.J. STAT. ANN. § 2C:35-5(b)(1) (West 2005).

<sup>253</sup> Hunter et al., *supra* note 47, at 807–08; see also Susswein, *supra* note 63, at 44.

<sup>254</sup> *An Overview*, *supra* note 25, at 12.

<sup>255</sup> *Id.* at 18–19.

<sup>256</sup> N.J. STAT. ANN. § 2C:35-7(a) (West 2005).

<sup>257</sup> OFFICE OF THE ATT'Y GEN., INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 4 (1999).

<sup>258</sup> *Id.* at 7.

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efficacy and impact of the drug-free school zone provision of the CDRA, and concluded that the provision was “profoundly discriminatory” towards minorities.<sup>259</sup> New Jersey’s prison population more than doubled, with the bulk of that growth attributed to the provisions of the CDRA.<sup>260</sup> The overwhelming focus of enforcement of the CDRA was on minorities, and New Jersey’s prison system became one of the most racially disparate in the country as the prison population swelled from the incarceration of drug offenders.<sup>261</sup>

Thousands of drug offenders who completed prison terms found themselves exposed to collateral sanctions of a drug conviction mandated in the CDRA and elsewhere.<sup>262</sup> These sanctions, including fines and fees, exclusion from licensed professions, and bars from public housing and student loans, added to the significant disadvantage in employment prospects that a criminal conviction presents.<sup>263</sup> The human toll of CDRA was significant, and has resulted in the imprisonment and lifelong disadvantage for thousands of mostly young men of color.<sup>264</sup>

As significant as the human costs of the CDRA have been, the fiscal impact has also been extraordinary. First, the CDRA did not become effective until a question asking voters to approve a \$198 million prison construction bond was placed on the ballot.<sup>265</sup> Voters subsequently approved that bond.<sup>266</sup> The budget of the Department of Corrections more than tripled, from \$359.9 million in 1987, the year the CDRA was enacted, to \$1.1 billion in 2006.<sup>267</sup> There is no price tag on the costs incurred by law enforcement

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<sup>259</sup> N.J. COMM’N TO REVIEW CRIMINAL SENTENCING, *supra* note 186, at 5.

<sup>260</sup> N.J. DEPT. OF CORRECTIONS, OFFENDER CHARACTERISTIC REPORT (1999), available at [https://dSPACE.njstatelib.org/xmlui/bitstream/handle/10929/19084/Corrections\\_Offender\\_Characteristics\\_1999.pdf?sequence=1](https://dSPACE.njstatelib.org/xmlui/bitstream/handle/10929/19084/Corrections_Offender_Characteristics_1999.pdf?sequence=1).

<sup>261</sup> See generally N.J. DEPT. OF CORRECTIONS, OFFENDERS IN N.J. CORRECTIONAL INSTITUTIONS ON JAN. 3, 2012, BY RACE/ETHNIC IDENTIFICATION (2012), available at [http://www.state.nj.us/corrections/pages/offender\\_stats.html](http://www.state.nj.us/corrections/pages/offender_stats.html).

<sup>262</sup> HEATHER YOUNG KEAGLE, CENT. APP. RES., ORAL ARGUMENT SENTENCING GUIDELINES 193 (2011).

<sup>263</sup> Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances”: Restoring Economic Rights for Ex-offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 558 n.214, 559 n.216 (2006).

<sup>264</sup> See generally N.J. DEPT. OF CORRECTIONS, *supra* note 261.

<sup>265</sup> *Official Commentary to the CDRA*, *supra* note 34, at 149.

<sup>266</sup> *Id.*

<sup>267</sup> OFFICE OF MGMT. & BUDGET, STATE OF N.J., SUMMARIES OF APPROPRIATIONS TABLE IV, at B-46 (2006); OFFICE OF MGMT & BUDGET, STATE OF N.J., SUMMARY OF FISCAL YEAR 1986–1987 APPROPRIATION RECOMMENDATIONS, at B-2 (1986).

and other segments of the state's criminal justice system attributable to enforcement of the CDRA, but the Attorney General's directive made enforcement of the CDRA the top law enforcement priority.

In the quarter century since the CDRA was enacted, several changes have been made to how New Jersey handles drug offenders. In 1996, the state began a drug court pilot program.<sup>268</sup> That pilot program went statewide in 2004, although statewide drug courts serve fewer than 1,600 offenders annually.<sup>269</sup> The mandatory driver's license revocation clause of the CDRA was amended to restore judicial discretion regarding license revocation.<sup>270</sup> One of the most pernicious clauses of the CDRA, the drug free school zone provision, was also amended to restore judicial discretion. In 2009, a decade of independent oversight of the NJSP for disparate treatment of minorities was lifted.<sup>271</sup> Last, just in the past year, legislation to expand drug court criteria and mandate participation for eligible addicted offenders was enacted.<sup>272</sup>

These changes have had a significant and dramatic impact on how the New Jersey criminal justice system responds to drug offenders. Over 12,000 addicted offenders have entered into New Jersey's drug courts since they were established in 1996.<sup>273</sup> The proportion of the state's prison population incarcerated for drug crimes has dropped from 36% in 2002 to less than one-quarter (22%) today.<sup>274</sup> The number of incarcerated drug offenders has dropped precipitously—from 10,385 in 1999 to 5,224 in 2012.<sup>275</sup>

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<sup>268</sup> *New Jersey Drug Courts*, N.J. ST. JUDICIARY, <http://www.judiciary.state.nj.us/drugcourt/> (last visited Feb. 24, 2013).

<sup>269</sup> *Id.*; A MODEL FOR SUCCESS, *supra* note 175, at 14.

<sup>270</sup> N.J. STAT. ANN. § 2C:35-16(a) (West 2005).

<sup>271</sup> STATE OF N.J. OFFICE OF THE STATE COMPTROLLER, REPORT ON LAW ENFORCEMENT PROFESSIONAL STANDARDS 2–3 (2010).

<sup>272</sup> David Karas, *Gov. Chris Christie Cuts Low-level Drug Offenders Some Slack*, NJ.COM (Jul. 20, 2012, 7:45 AM), [http://www.nj.com/mercer/index.ssf/2012/07/gov\\_chris\\_christie\\_cuts\\_low-le.html](http://www.nj.com/mercer/index.ssf/2012/07/gov_chris_christie_cuts_low-le.html).

<sup>273</sup> *Id.*

<sup>274</sup> N.J. DEPT. OF CORRECTIONS, OFFENDERS IN N.J. CORRECTIONAL INSTITUTIONS ON JAN. 3, 2012, BY BASE OFFENSE (2012), *available at* [http://www.state.nj.us/corrections/pages/offender\\_stats.html](http://www.state.nj.us/corrections/pages/offender_stats.html); N.J. DEPT. OF CORRECTIONS, OFFENDERS IN N.J. CHARACTERISTIC REPORT ON JAN. 13, 2003, BY BASE OFFENSE 7 (2003), *available at* [https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/19086/Corrections\\_Offender\\_Characteristics\\_2003.pdf?sequence=1](https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/19086/Corrections_Offender_Characteristics_2003.pdf?sequence=1).

<sup>275</sup> OFFENDERS IN N.J. CORRECTIONAL INSTITUTIONS ON JAN. 3, 2012, BY BASE OFFENSE, *supra* note 274; OFFENDERS IN N.J. CORRECTIONAL INSTITUTIONS ON

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The lifting of independent oversight of the NJSP was based on data indicating that racial minorities were no longer being treated differently.

The actions that New Jersey has taken represent steps that other states that are revisiting past drug war policies can consider. Yet, despite these modifications to the CDRA and to enforcement strategy, the principal strategy of the Act remains in place—drug offenders, for the most part, are subject to severe, often mandatory terms of punishment. In 2012, 5,224 offenders were incarcerated in state prisons for drug crimes under provisions of the CDRA.<sup>276</sup> At an annual cost of \$54,865 per inmate per year, New Jersey continues to spend more than \$230 million per year to incarcerate these drug offenders.<sup>277</sup> And despite the enormous human and fiscal toll that the CDRA continues to take, drug use in New Jersey has remained relatively unchanged since 2002, when the Substance Abuse and Mental Health Administration first began reporting state specific data from the National Survey on Drug Use and Health.<sup>278</sup> Despite a proclamation by Governor Christie that the drug war is “a failure,” and despite his support for the legislation mandating drug court for select non-violent addicted offenders, the drug war is marching on in New Jersey, and it continues to leave a mounting human and fiscal toll in its wake.<sup>279</sup> Until New Jersey, and other states in similar situations, revisit their drug war policies in a more complete and comprehensive way, that toll will continue to mount.

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JAN. 3, 2012, BY RACE/ETHNIC IDENTIFICATION, *supra* note 261.

<sup>276</sup> OFFENDERS IN N.J. CORRECTIONAL INSTITUTIONS ON JAN. 3, 2012, BY BASE OFFENSE, *supra* note 274.

<sup>277</sup> VERA INST. OF JUSTICE, THE PRICE OF PRISONS: NEW JERSEY FACT SHEET 1 (2012); Karas, *supra* note 272.

<sup>278</sup> U.S. DEPT. OF HEALTH & HUMAN SERV., NEW JERSEY STATES IN BRIEF 1–2, <http://www.samhsa.gov/statesinbrief/stateInBrief.aspx?state=NJ>.

<sup>279</sup> Rich Lowry, *The Drug War Recedes?*, NATIONALREVIEW.COM (Jul. 20, 2012, 12:00 AM), <http://www.nationalreview.com/articles/310104/drug-war-recedes-rich-lowry#>.