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A “DUBIOUS DISTINCTION”: NEW JERSEY’S DRUG-FREE SCHOOL ZONES & DISPARATELY IMPACTED MINORITY COMMUNITIES

TAYLOR R. OVERMAN*

Abstract: Richard Nixon fundamentally changed the prison system in America when he launched the “War on Drugs” in 1969, leading to a series of federal laws imposing harsh mandatory sentences on drug offenders. In an attempt to shield children from drugs, New Jersey followed other states in passing a “drug-free school zone” statute. The statute imposed harsh mandatory minimum sentences for all drug offenders arrested within 1,000 feet of schools, regardless of whether children were involved. This law has had a disparate impact on minorities in New Jersey, who disproportionately populate urban communities that happen to be located within all-encompassing drug-free school zones. This Note analyzes the effect of the statutes passed during the War on Drugs, and argues that New Jersey must modify its drug-free school zone statute to create smaller zones, require a nexus to the school, and focus on drug dealers most likely to target children.

INTRODUCTION

Jason Williams was just nineteen years old when he was arrested for selling cocaine in a drug-free school zone.¹ Despite having no prior criminal record, Jason was convicted and sentenced to forty-five years in a Texas prison.² Jason’s sentence was the result of sentencing enhancements that took effect because two of his alleged sales occurred in a “drug-free school zone.”³ Drug-free school zones, designed to protect children from drugs, covered approximately half of Jason’s hometown of Tulia, Texas.⁴ Barely an adult, Williams

* Articles Editor, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE, 2013–2014.

¹ See JUDITH GREENE ET AL., JUSTICE POLICY INST., DISPARITY BY DESIGN: HOW DRUG-FREE ZONE LAWS IMPACT RACIAL DISPARITY—AND FAIL TO PROTECT YOUTH 3 (Mar. 2006), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/06-03_rep_disparitybydesign_dp-jj-rd.pdf.

² *Id.*

³ *Id.*

⁴ *See id.*

began serving forty-five years in prison for selling one-eighth of an ounce of cocaine, a quantity about the size of a packet of sugar.⁵

Jason is just one of many racial minorities disparately impacted by state drug-free school zone laws.⁶ Responding to the federal “War on Drugs” campaign, states in the 1970s and 1980s enacted sentence-enhancements, known as “drug-free school zone” laws, aimed to combat drug dealers who sold to children.⁷ Under a New Jersey law, for example, anyone convicted of distribution or possession with intent to distribute drugs within 1,000 feet of a school received a mandatory three-year prison sentence.⁸ Originally, judges were allowed no discretion in sentencing someone to less than three years, and there was no requirement that the offense be connected to school children or schools in any way other than proximity.⁹

Studies have shown, however, that New Jersey’s drug-free school zone laws disproportionately affect minorities and fail to protect children from exposure to drugs.¹⁰ In the densely populated cities in New Jersey, the large concentration of schools created “all-encompassing drug-free zones” that cover nearly the whole city.¹¹ Thus, it is extremely likely that any given drug sale taking place in New Jersey’s cities will occur in a drug-free school zone.¹² Because, compared to non-minorities, minorities in New Jersey, and nationwide, disproportionately live in urban areas, the sentence enhancements are disproportionately applied to minorities.¹³

⁵ See *id.*; *Sugar Packets*, DOMINO SUGAR, <http://www.dominosugar.com/sugar/sugar-packets> (last visited May 17, 2014).

⁶ See N.J. STAT. ANN. § 2C:35-7 (West 1987); 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, 796 (2012); Rob Warden, *Town of Tulia: Texas ‘Officer of the Year’ Chalked up 38 Wrongful Convictions*, BLUHM LEGAL CLINIC: CTR. ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/tx/town-of-tulia.html> (last visited May 17, 2014). It was later revealed that an undercover police officer, Tom Coleman, had fabricated the evidence against Williams and several other defendants he had investigated. See GREENE ET AL., *supra* note 1, at 3. Williams was eventually pardoned by Governor Rick Perry and released from prison in August 2003, after serving three years in confinement. See *id.* Nevertheless, the forty-five year sentence raises important questions about the War on Drugs and drug-free school zone offenses. See *id.*

⁷ See Hunter et al., *supra* note 6, at 796–97.

⁸ See N.J. STAT. ANN. § 2C:35-7; Hunter et al., *supra* note 6, at 797–98.

⁹ See Hunter et al., *supra* note 6, at 797–98. Drug-free school zone approaches like this break from the common law principle that a person’s intent defined the severity of the punishment. See *id.* at 798–99.

¹⁰ N.J. COMM’N TO REVIEW CRIMINAL SENTENCING, REPORT ON NEW JERSEY’S DRUG FREE ZONE CRIMES & PROPOSAL FOR REFORM 3–6 (2005), available at <http://sentencing.nj.gov/report/december05.pdf> [hereinafter SENTENCING COMMISSION].

¹¹ *Id.* at 5.

¹² See *id.*

¹³ *Id.*

The disparate impact of the drug-free school zone laws is shocking when examined statically.¹⁴ In 2005, the New Jersey Commission to Review Criminal Sentencing (“the Sentencing Commission”) issued a report after compiling and studying data related to drug-free school zone sentences.¹⁵ The Sentencing Commission reviewed the demographics of the individuals charged with the drug-free school zone offense and found that 96% of those convicted under New Jersey’s law were black or Hispanic.¹⁶ The study showed that the number of minorities arrested under the drug-free school zone offense directly corresponded to the degree of urbanization.¹⁷ While black Americans accounted for only 32.4% of drug arrests in rural areas, the percentage leapt to 76.7% in urban areas.¹⁸ New Jersey is the most densely populated state in the United States, with fourteen times the average population density.¹⁹ The Sentencing Commission found that New Jersey’s three biggest cities, Newark, Camden, and Jersey City, had such a large concentration of schools that they became “all-encompassing drug free zones.”²⁰

In addition to revealing the drug-free school zone law’s disproportionate effect on minorities, the Sentencing Commission found that the law was ineffective at protecting children from drugs.²¹ Only two of the reported drug-free school zone cases between 1987 and 2005 took place on school property.²² None of these cases involved selling drugs to children.²³

The Sentencing Commission’s findings led to New Jersey legislative discussions about the fairness of a mandatory sentence scheme that so harshly distinguishes between people based on where they live.²⁴ Responding to a New Jersey Senate proposal to change the law, former New Jersey Public Defender Yvonne Smith Segars stated that “[t]he majority of [offenders] are nonviolent substance-abusing people who have drug problems But guess what, people in suburbia have drug problems. People in suburbia use drugs. The difference is they don’t live within 1,000 feet of a school zone.”²⁵ New Jersey’s drug-free school zone law has an undeniable effect on the prison system—

¹⁴ *See id.* at 5–7.

¹⁵ *Id.* at 3.

¹⁶ *See id.* at 5.

¹⁷ *See id.* at 15, 20.

¹⁸ *See id.* at 22.

¹⁹ *See id.* at 12.

²⁰ *See id.* at 4.

²¹ *See id.* at 3.

²² *See id.* at 9–10.

²³ *See id.* at 10.

²⁴ *See* Chris Megerian & Mary Fuchs, *A State Divided Over Mandatory Drug Sentences*, NJ.COM (May 31, 2009), <http://www.nj.com/news/ledger/jersey/index.ssf?base/news-13/124374272190290.xml&coll=1>.

²⁵ *See id.*

more than one-third of drug offenders are convicted of the school zone offense, given the high degree of urbanization in the state, and New Jersey has the distinction of ranking third in the nation for the degree of racial disparity in its prisons.²⁶

This Note examines the disparate impact of New Jersey's drug-free school zone law. Part I of this Note will explain the enactment of school zone drug laws in the 1970s and 1980s. Part II will explore the effect of New Jersey's drug-free school zone law on minorities, and how other state legislatures have adapted their statutes to lessen the impact on minorities. Part III of this Note will argue that the best way for New Jersey to target offenders selling drugs to children without being over inclusive is to decrease the drug-free school zones to 200 feet, require an actual nexus to the school, and focus on drug offenders most likely to target children.

I. THE WAR ON DRUGS

The beginning of the War on Drugs in the 1970s and 1980s fundamentally transformed prisons in America.²⁷ Sensationalized reporting on drug use, including the death of basketball star Len Bias after a cocaine overdose, created widespread hysteria over what was believed to be rampant use of drugs.²⁸ In response to public outcry, the federal government passed a series of statutes designed to impose harsh penalties on drug offenders.²⁹ Many of the laws sought to create a safe harbor between children and the effects of the drug trade.³⁰ New Jersey passed legislation modeled after the federal statute.³¹ With-

²⁶ See JUDITH GREENE & MARC MAUER, SENTENCING PROJECT, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES 47 (Mar. 3, 2010), available at http://www.sentencingproject.org/doc/publications/publications/inc_DownscalingPrisons2010.pdf.

²⁷ See MARC MAUER, SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS 1 (Apr. 2009), available at http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf.

²⁸ See MARC MAUER & RYAN S. KING, SENTENCING PROJECT, SCHOOLS AND PRISONS: FIFTY YEARS AFTER *BROWN V. BOARD OF EDUCATION* 3 (Jan. 2004), available at <http://www.prisonpolicy.org/scans/sp/brownvboard.pdf>; SENTENCING PROJECT, FEDERAL CRACK COCAINE SENTENCING 1–2 (Oct. 2010), available at http://www.sentencingproject.org/doc/publications/dp_CrackBriefingSheet.pdf [hereinafter FEDERAL CRACK SENTENCING]. The hysteria was caused by many factors including the “deterioration of inner cities, racial tensions, fear of crime, an unwillingness to tackle social inequalities, the willingness to use crime as a partisan issue, and intense media pressures” HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES 10 (2008), available at http://www.hrw.org/sites/default/files/reports/us0508_1.pdf (quoting JAMES AUSTIN ET AL., JFA INST., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION 1, 6 (Nov. 2007), available at <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf>). Nonetheless, the hysteria was misplaced, as drug crime was actually declining in the 1980s. See Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. OF CRIM. L. 7, 15 (2010).

²⁹ See MAUER & KING, *supra* note 28; FEDERAL CRACK SENTENCING, *supra* note 28.

³⁰ See SENTENCING COMMISSION, *supra* note 10, at 10.

in a few decades, there would be more people serving time in America for drug offenses than there were people serving time in the 1980s for all offenses combined.³²

A. Presidents Nixon & Reagan Wage the War on Drugs

President Richard Nixon officially launched the “War on Drugs,” in 1969 when he created a series of policies designed to combat drug addiction, an issue Nixon claimed, “afflict[ed] both the body and soul of America.”³³ Almost immediately after his term began, he signed into law the Comprehensive Drug Abuse Prevention and Control Act of 1970.³⁴ The Act made it a crime “to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”³⁵

The Reagan administration continued the crackdown in the 1980s by implementing a series of harsh laws to target drug distribution.³⁶ In a 1982 radio address, Reagan promised America, “[d]rugs are bad, and we’re going after them. As I’ve said before, we’ve taken down the surrender flag and run up the battle flag. And we’re going to win the war on drugs.”³⁷ Reagan replaced a system based on judicial discretion with a system of fixed sentences determined by either the type or quantity of drugs for which an individual was arrested.³⁸ As a result, even low-level offenders became more likely to serve a prison sentence.³⁹ The federal government dedicated billions of dollars to the

³¹ See Pub. L. No. 98-473, 98 Stat. 1837, 2069 (codified as amended at 21 U.S.C. § 801 (2006)); SENTENCING COMMISSION, *supra* note 10, at 10.

³² See MAUER, *supra* note 27.

³³ See Richard Nixon, Special Message to the Congress on Drug Abuse Prevention and Control, 1 PUB. PAPERS 739, 748 (June 17, 1971); Spencer A. Stone, Note, *Federal Drug Sentencing—What Was Congress Smoking? The Uncertain Distinction Between “Cocaine” and “Cocaine Base” in the Anti-Drug Abuse Act of 1986*, 30 W. NEW ENG. L. REV. 297, 309–10 (2007).

³⁴ See 21 U.S.C. § 801; Stone, *supra* note 33, at 309–10.

³⁵ See 21 U.S.C. § 801; Stone, *supra* note 33, at 309–10.

³⁶ See HUMAN RIGHTS WATCH, *supra* note 28, at 9.

³⁷ See Stone, *supra* note 33, at 310 (alteration in original) (quoting President Ronald Reagan, Radio Address to the Nation on Federal Drug Policy, 2 PUB. PAPERS 1253 (Oct. 2, 1982). While it is generally believed that the War on Drugs was

launched in response to rising drug crime and the emergence of crack cocaine in inner city communities [In reality,] drug crime was actually declining, not rising, when President Ronald Reagan officially declared the drug war in 1982 From the outset, the war had little to do with drug crime and much to do with racial politics.

See Alexander, *supra* note 28, at 15.

³⁸ See HUMAN RIGHTS WATCH, *supra* note 28, at 10.

³⁹ See *id.*

drug war and courts began giving drug offenders sentences harsher than many murder sentences in other nations.⁴⁰

1. Federal Drug-Free School Zone Offenses

In 1984, Congress amended the Comprehensive Drug Abuse, Prevention, and Control Act to create federal drug-free school zones.⁴¹ This law went on to serve as the prototype for many state school statutes.⁴² Congress imposed mandatory sentences for drug distribution within the drug-free zones, seeking not only to shield children against direct solicitation by drug dealers, but also to prevent the secondary effects of the drug trade, which included drug and gang-related violence and drug paraphernalia.⁴³ The legislature ordered that individuals who distributed drugs in drug-free school zones be punished with “a term of imprisonment, or fine, or both up to twice that authorized” by the former sentencing guidelines.⁴⁴ Under the statute, drug-free school zones extended in a 1,000-foot radius around every school.⁴⁵ Despite the wide radius, Congress did not cite empirical data when it determined this distance as the appropriate zone.⁴⁶ Additionally, Congress did not require the individual to have knowledge he was within a designated school zone to be convicted of a school zone drug offense.⁴⁷

Minorities in densely populated cities are directly impacted by the 1,000-foot drug-free school zone parameter.⁴⁸ In urban communities where there are many schools and people live close together, the 1,000-foot parameter can create cities nearly entirely covered by drug-free school zones.⁴⁹ Urban areas, however, are disproportionately inhabited by minority populations and therefore drug-free school zones lead to more arrests of minorities than whites.⁵⁰ This is so even though African Americans buy and sell drugs at similar rates as

⁴⁰ See Alexander, *supra* note 28, at 17.

⁴¹ See 21 U.S.C. § 801 (2006); SENTENCING COMMISSION, *supra* note 10, at 10.

⁴² See SENTENCING COMMISSION, *supra* note 10, at 10.

⁴³ See *id.*

⁴⁴ See 21 U.S.C. § 801.

⁴⁵ See *id.*

⁴⁶ See *id.* The Prison Policy Initiative did a photographic demonstration on an open road showing that if a person walks 1000 feet away, he or she becomes a tiny speck, barely even noticeable in someone's line of vision. See Aleks Kajstura et al., *1,000 Feet Is Further Than You Think*, PRISON POLICY INITIATIVE (July 2008), http://www.prisonpolicy.org/zones/thousand_feet.html. In the city, the view would likely be obstructed. See *id.* A distance of 1000 feet is so extensive it is not suitable for communicating and transacting drug deals. See *id.*

⁴⁷ See *United States v. Jackson*, 443 F.3d 293, 299 (3rd Cir. 2006).

⁴⁸ SENTENCING COMMISSION, *supra* note 10, at 3–6.

⁴⁹ See *id.* at 5–7.

⁵⁰ See *id.*

whites—in 2008, 10.1% of African Americans used drugs compared with 8.2% of whites.⁵¹

Despite the similarity in drug use, the drug war has been systematically waged in urban, minority communities.⁵² African Americans account for 80 to 90% of drug offenders sent to prison.⁵³ White Americans and those in rural areas are much more likely to avoid being charged with the drug-free school zone offense, even if they similarly engage in identical conduct that urban minorities engage in.⁵⁴ This disparate treatment extends into sentencing as well—in the federal system African Americans spend nearly as much time in prison for drug offenses (58.7 months on average) as white offenders do for violent crimes (61.7 months on average).⁵⁵

Nearly every state has adopted some version of the drug-free school zone law.⁵⁶ While well intentioned, drug laws changed the criminal justice system in America; between 1980 and 2003 the number of individuals serving time for drug-related offenses increased twelvefold.⁵⁷ This War on Drugs has come at a price—during the Bush and Reagan administrations, the federal, state, and local governments spent more than \$100 billion implementing anti-drug policies.⁵⁸ With more money dedicated to drug war policies, from 1987 to 2005 the ratio of drug arrests to general arrests has gone from 1 in 14 to 1 in 8.⁵⁹

⁵¹ U.S. DEP'T OF HEALTH & HUMAN SERVS., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2008 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 25 (2009), available at <http://oas.samhsa.gov/nsduh/2k8nsduh/2k8Results.pdf>; see Alexander, *supra* note 28, at 13. "Illegal drug markets, it turns out—like American society generally—are relatively segregated by race. Blacks tend to sell to blacks, whites to whites, Latinos sell to each other. University students sell to each other. People of all races use and sell drugs." See *id.*

⁵² See Alexander, *supra* note 28, at 13.

⁵³ See *id.* at 14.

⁵⁴ See Aleks Kajstura et al., *An "Urban Effect": Interlocking Sentencing Enhancement Zones Blanket Urban Areas and Barely Touch Rural Populations*, PRISON POLICY INITIATIVE (July 2008), <http://www.prisonpolicy.org/zones/urban.html>.

⁵⁵ See MARC MAUER & RYAN S. KING, SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 22 (Sept. 2007), available at http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf.

⁵⁶ SENTENCING COMMISSION, *supra* note 10, at 10.

⁵⁷ See HUMAN RIGHTS WATCH, *supra* note 28, at 9–11. In 1980 there were 23,700 inmates in state and federal prisons serving time for drug offenses, while by 1999, there were 319,600 inmates serving time for drug offenses. See Christopher J. Tyson, *At the Intersection of Race and History: The Unique Relationship Between the Davis Intent Requirement and the Crack Laws*, 50 HOW. L.J. 345, 379 (2007). Remarkably, there are more people imprisoned for drug offenses today than were incarcerated for any reason in 1980. See Alexander, *supra* note 28, at 14–15. In some states blacks make up 80 to 90% of the convicts sent to prison. See *id.* at 14. "In short, the discretionary nature of drug enforcement practices, focused predominantly in low-income communities of color, coupled with drug sentencing laws, have created catastrophic consequences for these neighborhoods." See MAUER & KING, *supra* note 55, at 23.

⁵⁸ See Tyson, *supra* note 57, at 374.

⁵⁹ See MAUER & KING, *supra* note 55, at 3.

The cost of the War on Drugs is more than just financial.⁶⁰ When Richard Nixon launched the War on Drugs, policies that targeted minorities changed communities.⁶¹ While there is no significant racial difference in rates of drug use, African Americans are disproportionately punished for drug use.⁶² The collateral consequences of criminal convictions has transformed minority communities so much that one scholar refers to the drug war as the “New Jim Crow,” whereby “old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, and exclusion from jury service—are suddenly legal.”⁶³

Furthermore, there is reason to believe that school zone drug laws are ineffective at stopping drug dealers who target children.⁶⁴ In a 1995 *Boston Globe* survey of thirty-seven judges, 83% of judges reported they had never sentenced a “drug kingpin” under the drug-free school zone law, and 94% reported they “usually sentenced addicts, small-time dealers, and couriers.”⁶⁵

2. New Jersey’s Response to the Federal Trend

On April 23, 1987, New Jersey became one of the first states to join the federal War on Drugs when New Jersey Governor Thomas Kean signed New Jersey’s Comprehensive Drug Reform Act into law.⁶⁶ The Act consolidated and amended New Jersey’s criminal drug statutes and created new categories of crimes that punished drug offenders deemed most threatening.⁶⁷ The Act sought to deter and incapacitate drug offenders by imposing strict punishments.⁶⁸

Like the federal prototype, New Jersey’s drug-free school zone law also sought to shield children from illegal drug activity.⁶⁹ The goal of the statute was to “ensure that all school areas adjacent to schools are kept free from drug distribution activities” by imposing “especially stern punishment for those drug offenders who operate on or near schools or school buses, who distribute to juveniles, or who employ juveniles in a drug distribution scheme.”⁷⁰ This law deemed distribution, dispensing, or possessing with intent to distribute a

⁶⁰ See *id.* at 1–2.

⁶¹ See *id.* at 4.

⁶² See Alexander, *supra* note 28, at 13–14.

⁶³ See *id.* at 8 (quoting MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2010)).

⁶⁴ See Kajstura et al., *supra* note 54.

⁶⁵ See *id.*

⁶⁶ See N.J. STAT. ANN. § 2C:35-1.1 (West 1987); SENTENCING COMMISSION, *supra* note 10, at 8.

⁶⁷ See SENTENCING COMMISSION, *supra* note 10, at 8.

⁶⁸ See *id.* at 9.

⁶⁹ See N.J. STAT. ANN. § 2C:35-7; SENTENCING COMMISSION, *supra* note 10, at 9.

⁷⁰ See N.J. STAT. ANN. § 2C:35-1.1.

controlled substance within 1,000 feet of school property a drug-free school zone offense.⁷¹ The statute specifically provided that the violation applied whether or not the offenders were aware of their presence within a drug-free school zone, and whether or not children were involved.⁷² In fact, to be charged with the drug-free school zone offense the offender need not have any intention whatsoever to involve children in drug trafficking.⁷³ In one case, a woman was charged with New Jersey's drug-free school zone offense after attempting to provide trace amounts of heroin to an inmate during a jail visit, when the jail happened to be located within 1,000 feet of a school.⁷⁴

A peculiar aspect of New Jersey's drug-free school zone violation is that a "profit motive" is not a prerequisite to escalating a charge from possession to distribution—one person handing another person a small amount of a drug could be punished as drug distribution.⁷⁵ The United States Supreme Court has called liability statutes like this "generally disfavored" because the criminal law theory of retribution typically requires a culpable mental state before someone is punished.⁷⁶ A traditional aspect of Anglo-Saxon common law is that a person is punished based on harm caused or intent to cause harm.⁷⁷ New Jersey's statute does not require a finding that the defendant knew he was in a drug-free school zone, or that he reasonably should have known he was in a school zone.⁷⁸ In fact, drug-free school zones cover a great percentage of square footage in New Jersey's cities, which "renders any sort of intelligible demarcation impossible."⁷⁹ The statute's lack of a knowledge requirement and definition of distribution creates a situation where a person can be charged

⁷¹ See *id.* at § 2C:35-7; SENTENCING COMMISSION, *supra* note 10, at 9. In 1998, New Jersey passed a second law that enhanced penalties for drug distribution "within 500 feet of public housing, parks, libraries, and museums," expanding the state's drug-free territory. See GREENE ET AL., *supra* note 1, at 22.

⁷² See SENTENCING COMMISSION, *supra* note 10, at 9.

⁷³ See *id.*

⁷⁴ See *State v. Ogar*, 551 A.2d 1037, 1042 (N.J. Super. Ct. App. Div. 1989); SENTENCING COMMISSION, *supra* note 10, at 9.

⁷⁵ See Hunter et al., *supra* note 6, at 798.

⁷⁶ See SENTENCING COMMISSION, *supra* note 10, at 11.

⁷⁷ See Hunter et al., *supra* note 6, at 798–99.

⁷⁸ See *id.* at 799.

⁷⁹ See SENTENCING COMMISSION, *supra* note 10, at 24. In 1985, the Second Circuit rejected a defendant's contention that a drug-free school zone enhancement "does not apply unless a defendant had specific knowledge of the proximity of a school." See Eric A. Johnson, *Rethinking Presumption of Mens Rea*, 47 WAKE FOREST L. REV. 769, 795–96 (2012) (quoting *United States v. Falu*, 776 F.2d 46, 48 (2d Cir. 1985)). Instead, the Second Circuit stated, "[The proximity element] . . . does not criminalize otherwise innocent activity," but rather enhances punishment for the distribution of narcotics, an activity already deemed criminal. See *id.* at 796 (alteration in original) (quoting *Falu*, 776 F.2d at 50). A person convicted of the drug-free school zone offense may also be required to pay a fine of up to \$100,000. See SENTENCING COMMISSION, *supra* note 10, at 10.

with the drug-free school zone offense even if he is not selling drugs and even if he has no connection to children or schools.⁸⁰

As part of its drug-free school zone law, New Jersey established a mandatory minimum sentence for school zone offenses; the sentencing court was required to impose a sentence of at least three years on a defendant found guilty of distribution or possession with intent to distribute any controlled substance within 1,000 feet of a school.⁸¹ This sentence, contingent only on the individual's location relative to a school, was in addition to the original sentence imposed for the drug offense itself.⁸² The New Jersey legislature defined "school" broadly and included "daycare centers, vocational training centers, and so forth."⁸³ The results of the law were especially harsh for first-time offenders.⁸⁴ Before the Act, a person who sold less than a half-ounce of heroin or cocaine outside of a drug-free school zone would be punished for a third-degree offense, with a presumption of not serving time in prison.⁸⁵ After the law, this same person would face a mandatory three-year prison term.⁸⁶

The racial consequences of the War on Drugs have been devastating in New Jersey, given the state's demographics.⁸⁷ The many densely populated cities of New Jersey are disproportionately inhabited by minorities.⁸⁸ Many of these minorities happen to live within the cities' sprawling drug-free school zones, creating a high likelihood of arrest and punishment for school zone offenses.⁸⁹

II. THE RACIAL IMPACT OF DRUG-FREE SCHOOL ZONES

There is a significant relationship between the degree of urbanization and drug-free school zone offenses.⁹⁰ New Jersey's cities are home to hundreds of schools, meaning that drug-free school zones extending in a 1,000-foot radius

⁸⁰ See SENTENCING COMMISSION, *supra* note 10, at 9; Hunter et al., *supra* note 6, at 798.

⁸¹ See SENTENCING COMMISSION, *supra* note 10, at 10; Hunter et al., *supra* note 6, at 797–98. The statute did create an exception for a person who possessed twenty-five grams or less of marijuana. See SENTENCING COMMISSION, *supra* note 10, at 10.

⁸² See Hunter et al., *supra* note 6, at 798.

⁸³ See GREENE ET AL., *supra* note 1, at 22.

⁸⁴ See *id.* at 23–24.

⁸⁵ See *id.*

⁸⁶ See *id.* Ironically, the increasing drug offender population was offset by a decrease in the number of prison offenders being locked up for violent offenses. See GREENE & MAUER, *supra* note 26, at 46. Criminals convicted of violent crimes such as "homicide, sexual assault, assault, robbery, kidnapping, and other sex or person offenses" made up 64% of the prison population in 1986 and only 42% of the prison population by 2003. See *id.*

⁸⁷ See Hunter et al., *supra* note 6, at 802.

⁸⁸ See *id.*

⁸⁹ See *id.* at 802–03.

⁹⁰ See SENTENCING COMMISSION, *supra* note 10, at 24.

from the school often overlap with other school zones.⁹¹ Because of these vast areas, the majority of drug arrests in cities are drug-free school zone arrests, disparately impacting the minority communities who disproportionately live in urban areas.⁹² Other states like Vermont and Massachusetts have adapted their statutes by requiring a nexus to the school, creating smaller zones, and exempting offenses that occur between midnight and 5 a.m. when school is not in session.⁹³ Massachusetts's law was adapted specifically because the state was suffering the same disparate racial impact as New Jersey.⁹⁴

A. New Jersey

New Jersey is one of the most densely populated states in the United States, made up of cities disproportionately populated by low-income minorities.⁹⁵ In the 2000 Census, New Jersey was the most densely populated state in the country with 1,134 people per square mile, fourteen times the U.S. average.⁹⁶ Like in other states with large urban areas, minority residents in New Jersey's urban communities outnumber white residents, even though the state is predominately white.⁹⁷ While 66% of New Jersey's population is white, only 27.2% of its urban residents are white.⁹⁸ In the rural communities, blacks and Hispanics represent only 9.1% of the population compared to 65.7% of the population in urban areas.⁹⁹

This disproportionate racial pattern is significant because densely populated urban areas are replete with drug-free school zones.¹⁰⁰ Newark, an area of just twenty-four square miles, has almost 130 schools.¹⁰¹ Under New Jersey's law, each of these schools is surrounded by a drug-free zone with a 1,000-foot radius.¹⁰² There is notable overlap between the drug-free school zones and in total 51% of Newark falls within a drug-free zone.¹⁰³ In Jersey City and Camden City, the percentage of land encompassed by drug-free school zones is

⁹¹ See *id.* at 14, 24.

⁹² See *id.* at 22, 24.

⁹³ See MASS. GEN. LAWS ch. 94, § 32J (2012); VT. STAT. ANN. tit. 18, § 4237 (2012).

⁹⁴ See Maria Cramer, *A Clash Over Drug Curbs at Schools*, BOS. GLOBE, Jan. 28, 2011, at B1.

⁹⁵ See Hunter et al., *supra* note 6, at 802.

⁹⁶ SENTENCING COMMISSION, *supra* note 10, at 12. "Of the 11 states in the nation with populations greater than eight million people, New Jersey is geographically the smallest (slightly more than 7000 square miles) and is the only state among the 11 whose land mass is less than 40,000 square miles." See *id.*

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *id.* at 14.

¹⁰² See *id.*

¹⁰³ See *id.*

54% and 52%, respectively.¹⁰⁴ In contrast, Mansfield Township, which is classified as a rural area of New Jersey, contains only 6% drug-free zone territory.¹⁰⁵ The large percentage of space protected by drug-free school zones in urban areas, coupled with the high concentration of people, creates a high likelihood that a person arrested for a drug offense in a New Jersey city will be arrested within a drug-free zone.¹⁰⁶ Thus, while only 19% of drug arrests in rural areas take place in a drug-free school zone, that percentage jumps to 81.9% in urban areas, increasing the likelihood the arrestee will be a minority.¹⁰⁷

In 1988, just two years after New Jersey enacted its drug-free school zone law, defendants began challenging the law, claiming it did not provide equal protection under the law.¹⁰⁸ In *State v. Rodriguez*, the defendants, charged with possession of cocaine within a drug-free school zone, contended that New Jersey's school zone law denied them equal protection.¹⁰⁹ Specifically, the defendants claimed that because the drug-free school zones cover more urban areas, the law would inevitably be enforced disproportionately against minorities.¹¹⁰ The case was unsuccessful, as the defendants could not prove a racially discriminatory intent underlying the legislation.¹¹¹

In 2005, the New Jersey Commission to Review Criminal Sentencing found that, while there was no proof that the legislature deliberately targeted minorities in enacting the drug-free school zone law, the law as applied to New Jersey's unique demographics caused a devastating impact on minorities.¹¹² New Jersey's prisons have the "dubious distinction" of holding a greater proportion of drug offenders than any other state in the country—36% of inmates are drug offenders compared to the 20% national average.¹¹³ The Sentencing Commission reviewed statistics of state prison residents and found that 96% of those incarcerated for drug-free zone offenses were minorities, whereas minor-

¹⁰⁴ See *id.*

¹⁰⁵ See *id.* at 14–15.

¹⁰⁶ See *id.* at 15.

¹⁰⁷ See *id.* at 21.

¹⁰⁸ See *id.* at 11.

¹⁰⁹ *State v. Rodriguez*, 542 A.2d 966, 969 (N.J. Super. Ct. Law Div. 1988); see SENTENCING COMMISSION, *supra* note 10, at 11.

¹¹⁰ *Rodriguez*, 542 A.2d at 969; see SENTENCING COMMISSION, *supra* note 10, at 11. The court conceded that the law "incidentally may affect a greater proportion of one race than another." See *Rodriguez*, 542 A.2d at 969.

¹¹¹ *Rodriguez*, 542 A.2d at 969; see *Washington v. Davis*, 426 U.S. 229, 238–39 (1976) (holding that facially neutral statutes that serve a compelling government purpose do not violate equal protection just because one race may incidentally be more affected); SENTENCING COMMISSION, *supra* note 10, at 12.

¹¹² See SENTENCING COMMISSION, *supra* note 10, at 12.

¹¹³ See GREENE ET AL., *supra* note 1, at 22.

ities made up just 76% of the general prison population.¹¹⁴ Most individuals charged with the drug-free school zone offense were arrested in urban areas.¹¹⁵ In fact, only 4.8% of New Jersey's drug-free zone convictions result from arrests in suburban communities, where school zones tend to be designated with signage.¹¹⁶ In rural areas the percentage drops to 0.5%, in sharp contrast to urban areas, which are responsible for 83% of drug-free zone violations.¹¹⁷

The Sentencing Commission noted that the law's goal—to create safe harbor perimeters around schools and designated public areas—was impossible given the all-encompassing nature of the zones.¹¹⁸ The Sentencing Commission compared the situation to what would happen if the entire New Jersey Turnpike became “one enormous reduced-speed highway work zone”—the regulation would likely be ignored entirely.¹¹⁹ If drug-free school zone laws were effective at relocating drug crimes, the Sentencing Commission reasoned, statistics would show high percentages of arrests right outside the drug-free school zone boundary.¹²⁰ In reality, arrest patterns show no awareness of these zones on the part of drug dealers.¹²¹

Moreover, most drug convictions based on the New Jersey drug-free school zone law are not connected to minors, other than mere proximity to a school.¹²² The Sentencing Commission reviewed ninety reported New Jersey trial court drug-free zone decisions and found that not a single case involved an offender selling drugs to a minor.¹²³ Of the ninety defendants in the study,

¹¹⁴ See SENTENCING COMMISSION, *supra* note 10, at 23. National findings show that African Americans and whites are generally equally involved in the illicit drug trade, so these statistics also raise important questions about “the exercise of police and prosecutorial discretion in application of the state’s drug-free zone statutes.” See GREENE ET AL., *supra* note 1, at 29.

¹¹⁵ See SENTENCING COMMISSION, *supra* note 10, at 22.

¹¹⁶ See *id.* at 22, 24.

¹¹⁷ See N.J. COMM’N TO REVIEW CRIMINAL SENTENCING, SUPPLEMENTAL REPORT ON NEW JERSEY’S DRUG FREE ZONE CRIMES & PROPOSAL FOR REFORM 6 (Apr. 2007), available at <http://sentencing.nj.gov/downloads/supplemental%20schoolzonereport.pdf> [hereinafter SENTENCING COMMISSION II].

¹¹⁸ See SENTENCING COMMISSION, *supra* note 10, at 25.

¹¹⁹ See *id.* The Sentencing Commission’s chairman, Judge Hoffman, described that “[g]iant unbroken drug-free zones . . . actually dilute the special protection the laws are supposed to offer” by casting “a net so large that we pull in every fish whether it’s the type of fish we’re looking for or not.” See GREENE ET AL., *supra* note 1, at 26.

¹²⁰ See SENTENCING COMMISSION, *supra* note 10, at 25.

¹²¹ See *id.*

¹²² See *id.* at 10.

¹²³ See *id.* The Sentencing Commission noted that except for within 100 feet of schools, where there are fewer drug arrests, the drug arrests are evenly distributed throughout the 1000-foot zone. See *id.* at 25. There is no notable increase in drug arrests directly outside the drug-free school zone. See *id.*

only two were apprehended on school property.¹²⁴ Neither of those cases involved drug sales to children.¹²⁵ The Sentencing Commission recommended a uniform distance of 200 feet, rather than 1,000 feet, to help the law serve its purpose of protecting children from drugs while also preventing harsh mandates for those who have no connection to schools.¹²⁶

In 2010, the New Jersey legislature modified the drug-free school zone law, giving judges back some of the discretion they had before the mandatory minimum sentencing was imposed.¹²⁷ The modifications did not take the Sentencing Commission's recommendation of changing the 1,000-foot zone around schools to 200 feet.¹²⁸ Instead, the amended statute gave the judge discretion over the sentence if the judge is persuaded by certain factors such as (a) the defendant's criminal record and seriousness of the offense; (b) the actual location where the school zone offense occurred in relation to the school; (c) if school was in session; and (d) if children were present where the offense took place.¹²⁹ The statute still stated that a defendant could not defend the charge by claiming he was unaware that his conduct was within a school zone.¹³⁰

Nevertheless, the benefits of the amended statute were overshadowed when New Jersey's Attorney General responded by issuing a directive.¹³¹ The directive ordered county prosecutors to apply New Jersey's "repeat offender law" for all eligible drug-free school zone violators.¹³² New Jersey's repeat offender law, originally enacted in 1979, requires that habitual offenders receive certain mandatory sentences based on the defendant's prior record.¹³³ This law, which is applied automatically if requested by the prosecutor, pre-

¹²⁴ See *id.* at 10. Eleven were apprehended in their vehicles, thirteen were arrested after search warrants were executed at their homes, and the rest were apprehended in drug-free school zones, but not on school property. See *id.*

¹²⁵ See *id.*

¹²⁶ *Id.* at 5, 29; SENTENCING COMMISSION II, *supra* note 117, at 4. The Sentencing Commission alluded to potential problems with the idea of mandatory minimums in general. See SENTENCING COMMISSION, *supra* note 10, at 33. Specifically, the Sentencing Commission criticized a system that "entirely divest[s] trial judges of their traditional authority to fashion just sentences premised on individualized considerations of the offender and the circumstances of the offense." See *id.* Compared to other crimes in New Jersey's Code of Criminal Justice "where enhanced culpability derives exclusively from a defendant's location," the drug-free school zone offense stands alone in terms of harshness for a non-violent crime. See *id.*

¹²⁷ See N.J. STAT. ANN. § 2C:35-7 (West 1987).

¹²⁸ See *id.*; SENTENCING COMMISSION, *supra* note 10, at 29.

¹²⁹ See N.J. STAT. ANN. § 2C:35-7.

¹³⁰ See *id.*

¹³¹ See Directive No. 2010-4 from Paula T. Dow, Att'y Gen. of N.J., Supplemental Directive Regarding Extended Term Applications Under N.J.S.A. 2C:43-6f in Drug-Free School Zone Cases (July 1, 2010), available at <http://www.nj.gov/oag/dcj/agguide/directives/Dir-2010-4-Brimage-Suppl-070610.pdf> [hereinafter Dow Directive]; Hunter et al., *supra* note 6, at 828.

¹³² See Dow Directive, *supra* note 131, at 5; Hunter et al., *supra* note 6, at 828.

¹³³ See N.J. STAT. ANN. § 2C:43-7 (West 1987); Hunter et al., *supra* note 6, at 828.

vents a judge from distinguishing between serious drug kingpins and those deserving of leniency.¹³⁴

This directive has nullified what could have been a progressive amendment to the drug-free school zone statute, because the repeat offender statute imposes even harsher punishments for those defendants that qualify.¹³⁵ While a judge normally would have discretion to impose a sentence of between three to five years for a third degree drug crime, the habitual offender statute mandates a five to ten year sentence.¹³⁶ For first-degree drug crimes involving drug distribution in large quantities, the disparity is even greater—twenty years to life, with a presumptive fifty-year sentence, rather than ten to twenty years.¹³⁷

In addition, the repeat offender law is “duplicative,” for there are other statutes that allow judges to increase sentences and extend terms of parole eligibility based on the defendant’s record or troubling facts of the arrest.¹³⁸ This “one-size-fits-all” repeat offender law is likely to target older individuals, especially addicts, who are more likely to have a significant record of drug convictions.¹³⁹ The only people likely to escape the net of the extreme repeat offender law are first time drug offenders.¹⁴⁰

B. Approaches Taken in Other States that Minimize Drug-Free School Zone Drug Laws’ Adverse Impact on Minorities

In recent years, other states, including Vermont and Massachusetts, have modified their drug-free school zone statutes.¹⁴¹ In Vermont, the legislature noted the change was motivated by a desire to balance punitive measures with treatment and recovery, recognizing that many drug-addicted individuals sell drugs on a small-scale simply to feed their addictions.¹⁴² Vermont’s modified statute required a nexus to the school by necessitating the incident take place adjacent to school property.¹⁴³ In Massachusetts, the legislature was motivated in part by the state’s drug-free school zone law’s disparate impact on minori-

¹³⁴ See Hunter et al., *supra* note 6, at 828.

¹³⁵ Hunter et al., *supra* note 6, at 828. To qualify, a defendant must have a history of convictions. See *id.*

¹³⁶ See N.J. STAT. ANN. § 2C:43-7; Hunter et al., *supra* note 6, at 805.

¹³⁷ See N.J. STAT. ANN. § 2C:43-7; Hunter et al., *supra* note 6, at 804.

¹³⁸ See Hunter et al., *supra* note 6, at 805.

¹³⁹ See *id.* at 829.

¹⁴⁰ See N.J. STAT. ANN. § 2C:43-7 (West 1987).

¹⁴¹ See MASS. GEN. LAWS ch. 94, § 32J (2012); VT. STAT. ANN. tit. 18, § 4237 (2012).

¹⁴² See Aleks Kajstura et al., *Vermont’s Unique Sentencing Enhancement Zone Statute Emphasizes that the Zone Law Should Be Highly Specific and Only One of Many Responses to Drugs*, PRISON POLICY INITIATIVE (July 2008), <http://www.prisonpolicy.org/zones/vermont.html>.

¹⁴³ See *id.*

ties.¹⁴⁴ The legislature narrowed the drug-free school zone to 300 feet and exempted activity that took place between midnight and 5 a.m.¹⁴⁵

1. Vermont

In 2003, Vermont passed a drug-free school zone statute that was more carefully designed than similar laws in other states.¹⁴⁶ The legislature announced that it would not target drug-addicted individuals who deal drugs on the small-scale to fund their habits, noting these individuals were better suited for drug treatment.¹⁴⁷ Instead, the state would focus on “entrepreneurial drug dealers who traffic in large amounts of illegal drugs for profit” and “pose the greatest threat to the health and safety of Vermonters and should be subject to heightened criminal penalties for their activities.”¹⁴⁸

Vermont’s drug-free school zones are limited to a 500-foot area, and apply only if the property is adjacent to a school or “separated only by a river, stream, or public highway.”¹⁴⁹ This nexus to the school is more likely to deter drug dealers from selling within the zones by making them easily identifiable.¹⁵⁰ This, in turn, helps the state effectuate its intended purpose of drug-free school zone laws: keeping children away from drugs.¹⁵¹

Vermont arrests only about 1,300 people each year for drug offenses and the racial statistics of those arrests are largely consistent with the racial demographics of the state.¹⁵² In Vermont, 95.4% of people are white, and 92.5% of those arrested for drug crimes are white.¹⁵³ African Americans account for only 1.6% of the population and 5.7% of the persons arrested for drug offenses.¹⁵⁴ In comparison, in New Jersey, African Americans are arrested at a rate five times higher than whites, despite the fact that African Americans make up only 14.7% of the population.¹⁵⁵

¹⁴⁴ See Cramer, *supra* note 94.

¹⁴⁵ See MASS. GEN. LAWS ch. 94, § 32J.

¹⁴⁶ See Kajstura et al., *supra* note 142.

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ See VT. STAT. ANN. tit. 18, § 4237 (2012); Kajstura et al., *supra* note 142.

¹⁵⁰ See Kajstura et al., *supra* note 142.

¹⁵¹ See *id.*

¹⁵² See Vermont, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/vermont> (last visited May 17, 2014).

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 11 (Mar. 2009), available at http://www.hrw.org/sites/default/files/reports/us0309_web_1.pdf; State and County QuickFacts: New Jersey, U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/34000.html> (last visited May 17, 2014).

2. Massachusetts

In 2012, Massachusetts altered its existing drug-free school zone law, taking into account the problems produced by the existing “chaotic” school zones.¹⁵⁶ Governor Deval Patrick suggested a plan “designed to give judges more discretion in sentencing, ease prison overcrowding and focus on violent and repeat offenders.”¹⁵⁷ Among other provisions, the new law reduced the 1,000-foot drug-free school zone radius to 300 feet, and exempted drug deals that occur between midnight and 5 a.m.¹⁵⁸

Massachusetts amended its drug-free school zone law in response to concerns about how extensive the zones were in urban areas.¹⁵⁹ One report found that while drug-free school zones covered 29% of the cities in general, they covered 56% of high-poverty areas in Massachusetts’s cities.¹⁶⁰ Almost 80% of the arrests in cities occurred in drug-free school zones, where 73% of the offenders also resided.¹⁶¹ The study found that given the unpredictable patterning of the drug-free school zones “and the fact that dealing frequently occurs close to the homes of dealers resid[ing] in school zones, one would not predict that the school zone law would be effective in steering drug dealers away from schools.”¹⁶²

Massachusetts had additional concerns about the racial impact of the original law.¹⁶³ A study undertaken by a Northwestern University research team found that 80% of Massachusetts’s defendants that received the mandatory sentence under the drug-free school zone statute were black or Hispanic, despite the fact that 45% of those arrested for the violation are white.¹⁶⁴ The study postulated that this discrepancy could be because prosecutors are al-

¹⁵⁶ See MASS. GEN. LAWS ch. 94, § 32J (2012); William N. Brownsberger et al., *An Empirical Study of the School Zone Anti-Drug Law in Three Cities in Massachusetts*, 34 J. DRUG ISSUES 933, 941 (2004). The law also was ineffective at distinguishing between drug kingpins and those who were suffering from drug addiction. See *FAMM Welcomes Mandatory Minimum Sentencing Reforms*, FAMILIES AGAINST MANDATORY MINIMUMS (July 31, 2012), <http://feed.ne.cision.com/client/waymaker1/release/partner/releasedetail.aspx?releaseid=686350&wpylang=en>.

¹⁵⁷ See Denise Lavoie, *Proposal to Shrink Drug-Free School Zone Draws Ire*, BOSTON.COM (Jan. 28, 2011), http://www.boston.com/news/local/massachusetts/articles/2011/01/28/proposal_to_shrink_drug_free_school_zone_draws_ire/.

¹⁵⁸ See MASS. GEN. LAWS ch. 94, § 32J.

¹⁵⁹ See *id.*

¹⁶⁰ See Brownsberger et al., *supra* note 156, at 945.

¹⁶¹ See *id.* at 936, 941. Of the incidents studied, “34% of incidents [were] within 500 feet of the dealer’s home, and only 21% [were] more than 10,000 feet away or in another city.” See *id.* at 941.

¹⁶² See *id.* at 941–43.

¹⁶³ See Cramer, *supra* note 94.

¹⁶⁴ See GREENE ET AL., *supra* note 1, at 15–16.

lowed to drop the threat of the drug-free school zone violation in return for the defendant's cooperation prosecuting others.¹⁶⁵

In addition to concerns about race, the previous law was further criticized for not achieving its intended purpose of protecting children from dangerous drug dealers.¹⁶⁶ In a 1995 *Boston Globe* survey of thirty-seven judges, 83% reported that they had never sentenced a "drug kingpin" under the drug-free school zone law, and 94% reported they "usually sentenced addicts, small-time dealers and couriers."¹⁶⁷ Furthermore, a Justice Policy study found that 71% of the drug-free school zone offenses occurred when school was out of session—during the summer, nighttime, or on weekends.¹⁶⁸ Thus, defendants were suffering harsh punishments even though children were not even present in school when the offense was committed.¹⁶⁹

The Massachusetts branch of Families Against Mandatory Minimums ("FAMM") lauded the amended drug-free school zone law.¹⁷⁰ In a statement, Massachusetts FAMM director Barbara Dougan praised the legislature's recognition that the "one-size-fits-all" sentences were not effective and came at a huge financial cost to the state of Massachusetts.¹⁷¹ The law changed the potential length of sentences for people like Michael Charros, a man sentenced under the previous drug-free school zone drug law.¹⁷² After caring for his ailing father for years, Charros was devastated at his father's eventual passing and began using cocaine.¹⁷³ Upon the request of his supplier, Charros agreed to store a box of drugs overnight.¹⁷⁴ Shortly after, Charros was pulled over by police and arrested.¹⁷⁵ Because his apartment, where the drugs were stored, happened to be within 1,000 feet of a school, Charros received a mandatory sentence of two and a half years under the old drug-free school zone law, in addition to a mandatory fifteen years for trafficking.¹⁷⁶ As a result of the new

¹⁶⁵ See Brownsberger et al., *supra* note 156, at 946.

¹⁶⁶ See Kajstura et al., *supra* note 54.

¹⁶⁷ See *id.* The study also "found that nearly all agreed that 'he or she has had to sentence a drug convict, because of the ironclad sentencing laws, to a term that was 'too severe,' and two-thirds said it happened frequently.'" See *id.* (quoting Dick Lehr, *A Judgment on Sentences*, BOS. GLOBE, Sept. 27, 1995, at 24).

¹⁶⁸ GREENE ET AL., *supra* note 1, at 15.

¹⁶⁹ See *id.*

¹⁷⁰ See *FAMM Welcomes Mandatory Minimum Sentencing Reforms*, *supra* note 156.

¹⁷¹ See *id.*

¹⁷² See *Michael Charros*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/michael-charros/> (last visited May 17, 2014).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

law, Charros will be eligible for parole in 2015, and will likely be released before his initial expected release date of 2018.¹⁷⁷

III. A NEXUS TO SCHOOL ACTIVITY

New Jersey must reform its drug-free school zone statute in a meaningful way for several reasons.¹⁷⁸ As an initial matter, the statute fails to achieve its intended purpose of keeping drugs away from children.¹⁷⁹ A study by the Sentencing Commission found that not a single one of ninety reported drug-free school zone statute cases in New Jersey involved the sale of drugs to a minor.¹⁸⁰ The Sentencing Commission also found that drug dealers display no awareness that they are located within drug-free school zones, thus the law is not a deterrent.¹⁸¹

Further, the law as applied unfairly impacts minorities.¹⁸² Urban minorities account for ninety-six percent of those convicted of drug-free school zone offenses in New Jersey.¹⁸³ Without changing New Jersey's approach to drug-free zones, there will continue to be a direct relationship between the degree of urbanization and the likelihood that a person arrested for a drug offense will be arrested within a drug-free zone.¹⁸⁴

Finally, implementing the current law is expensive.¹⁸⁵ The New Jersey Department of Corrections' budget outpaces spending in other departments.¹⁸⁶ In 2001, the cost of imprisoning New Jersey's drug offenders was greater than the amount one-third of other states spend to run their entire prison system.¹⁸⁷

To solve these problems, New Jersey must first reduce the size of its drug-free school zones, which currently sprawl out 1,000 feet from each school.¹⁸⁸ Second, New Jersey should require a nexus to the school itself by only charging offenders with the drug-free school zone offense if they were

¹⁷⁷ See Thomas Sannicandro, *Rethinking Drugs and Incarceration*, METRO W. DAILY NEWS, (Feb. 16, 2014), <http://www.metrowestdailynews.com/article/20140216/Opinion/140216816>; Michael Charros, *supra* note 172.

¹⁷⁸ See SENTENCING COMMISSION, *supra* note 10, at 3–7.

¹⁷⁹ See *id.* at 3, 10.

¹⁸⁰ See *id.*

¹⁸¹ See *id.* at 25.

¹⁸² See *id.* at 3.

¹⁸³ See *id.* at 23.

¹⁸⁴ See *id.* at 15, 29.

¹⁸⁵ See *id.* at 34.

¹⁸⁶ See SENTENCING COMMISSION II, *supra* note 117, at 5.

¹⁸⁷ VINCENT SCHIRALDI & JASON ZIEDENBERG, JUSTICE POLICY INST., COSTS AND BENEFITS? THE IMPACT OF DRUG IMPRISONMENT IN NEW JERSEY 16 (Oct. 2003), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/03-10_rep_njcostbenefits_dp.pdf.

¹⁸⁸ See SENTENCING COMMISSION, *supra* note 10, at 28–29.

caught on property adjacent to a school.¹⁸⁹ Third, New Jersey should focus on the drug dealers most likely to target children.¹⁹⁰

A. Reducing the Distance Covered by Drug-Free School Zones

The New Jersey drug-free school zone distance of 1,000 feet should be decreased to 200 feet.¹⁹¹ A smaller distance would help serve the law's purpose of protecting children from drug contact, increasing the likelihood of a nexus between the drug activity and school children.¹⁹² There is no documented reason why the legislature chose 1,000 feet as the appropriate distance for a drug-free school zone.¹⁹³ From 1,000 feet away, a person can hardly be seen, and thus it is unfair to presume the drug dealer intended to target children from such a distance.¹⁹⁴ Decreasing the size of the zones would decrease the overall number of people arrested for the offense, many of whom have no relation to school children at all.¹⁹⁵

The smaller drug-free school zone would also increase deterrence.¹⁹⁶ In 2005, the Sentencing Commission suggested to the New Jersey legislature that decreasing the size of the zones to 200 feet would better "ensur[e] that the zones themselves are clearly recognizable by potential law breakers by approximating a line-of-sight approach."¹⁹⁷ If drug-free school zones are reduced to 200 feet, it is extremely unlikely a person would be unaware of his presence within a school zone.¹⁹⁸ By decreasing the size of its drug-free school zones, New Jersey would recognize the basic fact that the state's densely populated urban areas are already overwhelmingly blanketed with drug-free school zones.¹⁹⁹ Because New Jersey's urban areas are disproportionately populated with minorities, smaller drug-free school zones that covered less ground would help reduce the current law's disparate impact.²⁰⁰

¹⁸⁹ See VT. STAT. ANN. tit. 18, § 4237 (2012); SENTENCING COMMISSION, *supra* note 10, at 28–29.

¹⁹⁰ See Kajstura et al., *supra* note 142.

¹⁹¹ See SENTENCING COMMISSION, *supra* note 10, at 5.

¹⁹² See VT. STAT. ANN. tit. 18, § 4237; SENTENCING COMMISSION, *supra* note 10, at 28–29.

¹⁹³ See Kajstura et al., *supra* note 46, at 5.

¹⁹⁴ See *id.*

¹⁹⁵ See SENTENCING COMMISSION, *supra* note 10, at 29.

¹⁹⁶ See *id.* at 28–29.

¹⁹⁷ See *id.* at 28.

¹⁹⁸ *Id.* at 29.

¹⁹⁹ See GREENE ET AL., *supra* note 1, at 26; SENTENCING COMMISSION, *supra* note 10, at 28–29.

²⁰⁰ See SENTENCING COMMISSION, *supra* note 10, at 12.

B. An Adjacent Land Requirement

Beyond decreasing the size of drug-free school zones, the New Jersey legislature should also require that the offense take place in an area that shares a boundary with school property, or be adjacent to a school property and separated only by a river, stream, or public highway.²⁰¹ This requirement would help limit drug-free school zone drug arrests to people dealing drugs with the intent to sell to children.²⁰²

Studies have shown that under the current, large 1,000-foot drug-free school zone, drug dealers may not know they are in a school zone and therefore have no intention to deal to children.²⁰³ To determine the validity of presuming someone within 1,000 feet of a school intends to sell drugs to children, the Sentencing Commission performed an experiment at the Grant School in Trenton, New Jersey.²⁰⁴ As part of the experiment, a subject was placed at various distances away from the school to gauge whether he could still see if he was in a drug-free school zone.²⁰⁵ At distances between 100 and 300 feet, it was more likely a person would be able to see the school when he entered the drug-free school zone, although even within that range the view was impeded at certain angles.²⁰⁶ Yet, when the distance was increased to 500 feet, the school was much harder to see and obstructed by other buildings and trees.²⁰⁷

The Prison Policy Initiative took the experiment further and studied the view and ability to communicate from 1,000 feet.²⁰⁸ The study found the connection between the school and individual at this distance was virtually nonexistent.²⁰⁹ Even with an entirely unobstructed view, a person appears a tiny “speck” from 1,000 feet away.²¹⁰ Given the likelihood that buildings and trees obstruct many views, the distance is not conducive to communication and drug

²⁰¹ See VT. STAT. ANN. tit. 18, § 4237 (2012); SENTENCING COMMISSION, *supra* note 10, at 28–29.

²⁰² See SENTENCING COMMISSION, *supra* note 10, at 9 (explaining the problematic implications of the current law, where a person can be charged with the drug-free school zone offense despite no intention of selling drugs to children); Kajstura et al., *supra* note 142 (discussing how identifiable drug-free school zones deter drug dealers from selling within the area).

²⁰³ See SENTENCING COMMISSION, *supra* note 10, at 28–31.

²⁰⁴ See *id.* at 29, app. C.

²⁰⁵ See *id.*

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See Kajstura et al., *supra* note 46.

²⁰⁹ See *id.*

²¹⁰ See *id.*

transactions.²¹¹ According to these findings, it does not make sense to presume anyone in a 1,000-foot drug-free school zone intends to sell drugs to children.²¹²

The adjacent requirement would more readily ensure that the offender made a conscious choice to sell drugs within a drug-free school zone.²¹³ The Sentencing Commission approved of the idea that culpable defendants—or defendants who *should* know they are within a school zone—be given increased punishments, but found that the laws simply “cast far too broad a net.”²¹⁴ Because the state of New Jersey is not even required to mark drug-free school zones, a statute that requires the offense take place on land adjacent to a school or adjacent and only “separated by a river, stream, or public highway” increases the likelihood that the offender has an un-obstructed view of the school and thus consciously made the choice to bring drugs into the zone.²¹⁵ This would bring New Jersey’s statute in line with traditional Anglo-Saxon common law theories that a culpable mental state is required before someone is punished harshly, considering that the state already has separate laws to deal with the crime of involving minors in drug distribution.²¹⁶ This requirement would reduce the disparate impact on New Jersey’s urban minorities because it would punish only those drug dealers with a connection to schools, rather than subjecting all people to harsher punishment simply because they sold drugs where they live—in urban areas.²¹⁷

C. Focusing on Offenders Most Likely to Sell Drugs to Children

Like Vermont, New Jersey should focus on drug dealers who pose the greatest threat to children rather than cover entire cities with enhancement

²¹¹ See *id.*

²¹² See *id.* This study caused the Prison Policy Initiative to “conclude that the legislature erred in assuming that 1,000 feet was an effective distance with which to deter drug dealers from operating near schools.” See *id.*

²¹³ Hunter et al., *supra* note 6, at 798–99; Kajstura et al., *supra* note 46.

²¹⁴ See SENTENCING COMMISSION, *supra* note 10, at 32.

²¹⁵ See VT. STAT. ANN. tit. 18, § 4237 (2012); Hunter et al., *supra* note 6, at 798–99.

A person may be convicted without even knowing that he was in a school zone. A fact-finder need not even find that the accused reasonably should have known he was in a school zone. The state is not required to mark school zones, and given the huge area encompassed by 1,000 feet from all parts of school property, it is very likely that a person will be unaware that a school is in this vicinity.

See Hunter et al., *supra* note 6, at 799.

²¹⁶ See Hunter et al., *supra* note 6, at 798–99, 805; SENTENCING COMMISSION, *supra* note 10, at 11. “[T]he repeat offender law is duplicative. There are other statutes that give judges the discretion to sentence defendants to extended term sentences and parole ineligibility terms based on a prior record or the individual circumstances of a case.” See Hunter et al., *supra* note 6, at 805.

²¹⁷ See Brownsberger et al., *supra* note 156, at 921, 941.

zones.²¹⁸ Most of the people in prison for drug offenses are not major drug traffickers.²¹⁹ Drug dealers often sell drugs close to where they live, and easily identifiable drug-free school zones encourage drug dealers to move away from the zones, making it more likely drugs will be kept away from children.²²⁰ Barnett Hoffman, chairman of the Sentencing Commission, noted in the Commission's report that never-ending drug-free zones "dilute" the protection the laws were meant to create.²²¹ He explained that they create "a net so large that we pull in every fish whether that's the type of fish we're looking for or not."²²²

While the legislature was moving in a positive direction in 2010 by giving judges discretion over the mandatory sentence, the Attorney General's directive nullified many of the progressive elements of the statute.²²³ The directive, which is still in effect, ordered district attorneys to charge all eligible drug-free school zone violators with the even harsher repeat offender law.²²⁴ The repeat offender law targets older drug addicts who have long histories of drug convictions, while those people may not have any involvement with children at all.²²⁵ If the law continues to punish all drug transactions in the 1,000-foot drug-free school zones, some defendants, likely to be urban minorities, will continue to pay the price for crimes they may have had no knowledge of committing.²²⁶

²¹⁸ See Kajstura et al., *supra* note 142. By crafting their statute in such a way, Vermont properly "tailor[ed] the law to the specific problem the legislators sought to address." See *id.*

²¹⁹ HUMAN RIGHTS WATCH, *supra* note 28, at 11.

²²⁰ See Brownsberger et al., *supra* note 156, at 941–43. Before Massachusetts redesigned its statute, 80% of the drug distribution arrests occurred in drug-free school zones, where 73% of the offenders lived. See *id.* at 933, 941. Despite the close proximity to the schools, only 1% of the cases involved selling drugs to minors, showing that it may just be drug dealers' preference to sell close to where they live. See *id.* at 921, 941. The densely populated areas of New Jersey have substantially more drug-free school zones and are filled with urban minorities. SENTENCING COMMISSION, *supra* note 10, at 21. Those urban minorities are likely to sell drugs where they live and risk being charged with the drug-free school zone offense. See Brownsberger et al., *supra* note 156, at 921, 941; SENTENCING COMMISSION, *supra* note 10, at 21.

²²¹ See GREENE ET AL., *supra* note 1, at 26.

²²² See *id.*

²²³ See *id.*

²²⁴ See Hunter et al., *supra* note 6, at 828.

The lengthy terms of incarceration and parole ineligibility terms under the repeat offender law are mandatory upon request by the prosecution based only on a prior record of any drug distribution offense without consideration of factors that distinguish between the major or violent drug trafficker and the individual ready for treatment. The statute creates an almost impenetrable barrier to an effective determination of who should be punished by incarceration and who would be better suited for a drug court sentence.

See *id.*

²²⁵ See *id.* at 829.

²²⁶ See *id.* at 828–29.

The Sentencing Commission's 2005 findings closed with an appeal to the legislature, noting the state's "regrettable and embarrassing distinction of having the highest percentage of prisoners incarcerated for drug offenses in the country . . . 36% compared to a national average of 20%."²²⁷ The Sentencing Commission wrote:

The most rudimentary notions of justice demand not only that our laws are facially neutral as written but that, as implemented and enforced, they are fair, rational, and proportionate Because New Jersey's present school zone law is incompatible with these principles, the New Jersey Commission to Review Criminal Sentencing strongly urges the Legislature to heed its call for change and enact the Commission's . . . legislation.²²⁸

New Jersey must take action to reduce the degree of racial disparity that has come to dominate its prisons.²²⁹ The best way to do that is by reforming the drug-free school zone offense, which accounts for one-third of all drug crimes under the system.²³⁰ Keeping drugs away from children is a noble goal, but creating tens of thousands of nonviolent felons in the process is a cost that can no longer be tolerated, particularly when done in a racially discriminatory manner.²³¹ The price of a felony conviction is high—losing the right to vote and serve on juries, being restricted from public services, and having difficulty finding housing or an employer who is willing to hire people with criminal backgrounds.²³² New Jersey needs to follow the lead of other states and create

²²⁷ SENTENCING COMMISSION, *supra* note 10, at 34.

²²⁸ *Id.* at 35.

²²⁹ See GREENE & MAUER, *supra* note 26, at 47.

²³⁰ *See id.*

²³¹ See Alexander, *supra* note 28, at 8; SENTENCING COMMISSION, *supra* note 10, at 32. "Drug convictions have increased more than 1000% since the drug war began, an increase that bears no relationship to patterns of drug use or sales." See Alexander, *supra* note 28, at 12.

²³² See Alexander, *supra* note 28, at 15. The results of being labeled a felon are so detrimental that one author has labeled the drug war "The New Jim Crow." *See id.* at 8.

What has changed since the collapse of Jim Crow has less to do with the basic structure of our society than the language we use to justify it. In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color "criminals" and then engage in all the practices we supposedly left behind. Today it is perfectly legal to discriminate against criminals in nearly all the ways it was once legal to discriminate against African Americans. Once you're labeled a felon, the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, and exclusion from jury service—are suddenly legal. As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow.

See id. (quoting ALEXANDER, *supra* note 63, at 2).

a law that applies fairly and punishes people for what they do, not where they live.²³³

CONCLUSION

For years, minorities have suffered at the hands of harsh mandatory sentences established during America's "War on Drugs." In a densely populated state like New Jersey, the current 1,000-foot enhancement zones inevitably disproportionately impact urban minorities. The Sentencing Commission's startling finding that ninety-six percent of those convicted of the drug-free school zone offense were minorities should be a wakeup call to the legislature that drastic measures need to be taken to tailor a law that is unfair. The cities are essentially all-encompassing and overlapping drug-free school zones. Because drug dealers tend to do business close to where they live, most drug arrests occur in the city, and many happened to occur in the enhancement zones regardless of any intent on the part of the offender.

Assuming that anyone carrying drugs within 1,000 feet of a school is attempting to sell drugs to children is irrational. The distance should be decreased to 200 feet, where it is much more likely an offender can see he is in a drugfree school zone and modify his behavior accordingly. Furthermore, because New Jersey's drug-free school zones need not even be labeled, New Jersey should take after Vermont and impose an adjacent land requirement. The law should require that the offender be arrested on property that shares a boundary with the school property, or that is adjacent to the school property and separated only by a river, stream, or public highway. Modifying the statute in this way would maintain a safe harbor around schools but also recognize the reason why strict liability laws like these are generally disfavored. Refusal to modify the drug-free school zone law in New Jersey will only allow the discriminatory scheme to continue.

²³³ See MASS. GEN. LAWS ch. 94, § 32J (2012); VT. STAT. ANN. tit. 18, § 4237 (2012); SENTENCING COMMISSION, *supra* note 10, at 34–35. As the Sentencing Commission aptly put it, "the time has arrived, however, for New Jersey to forthrightly acknowledge the role that these provisions have played in this development and to address the problem accordingly." See SENTENCING COMMISSION, *supra* note 10, at 35. Senator Sandra Cunningham, who has been a proponent of drug-free school zone reform, noted, "[w]e've heard so often that justice is blind, but in New Jersey, when it comes to drug crimes, too many offenders are unfairly penalized based on where they live and not on what crime they committed." See Adrienne Lu, *N.J. Gives Disputed Drug Law New Look: Critics Say Mandating Jail for School-Zone Crimes Is Unfair. An Advancing Bill Would Allow Some Leeway*, PHILLY.COM (Nov. 29, 2009), http://articles.philly.com/2009-11-29/news/25284422_1_drug-free-school-zone-drug-free-school-zone-law. She encouraged "uphold[ing] the original intention of New Jersey's drug-free school zone and continue[ing] to impose hard penalties on violent offenses" but allowing judges "greater authority to dictate sentences for nonviolent offenders." See *id.*