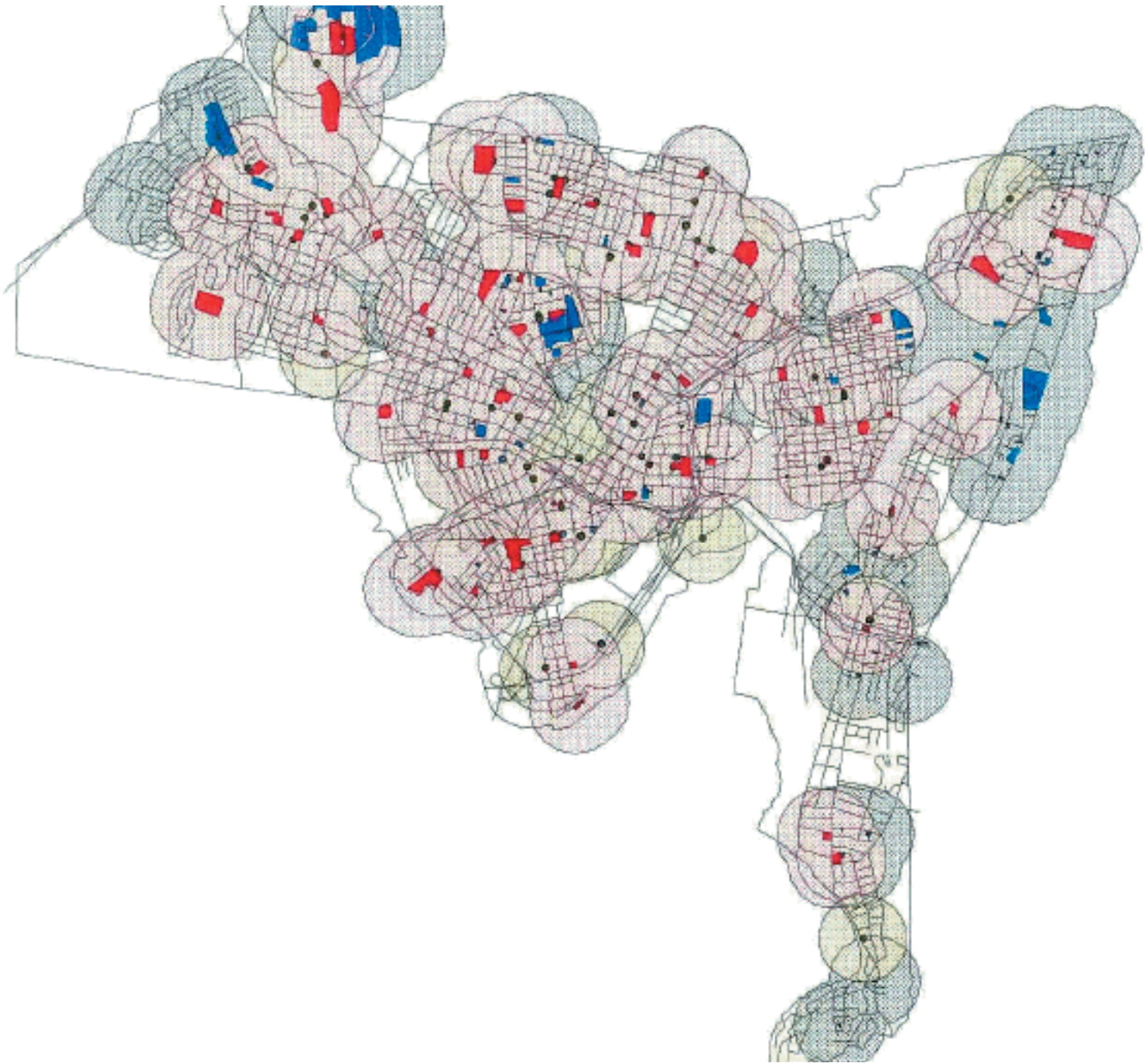




A Justice Policy Institute Report  
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Judith Greene, Kevin Pranis, Jason Ziedenberg  
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## **Disparity by Design:** How drug-free zone laws impact racial disparity – and fail to protect youth

**The City of New Haven, Connecticut—Drug-Free Zone Coverage.  
1500 ft Buffer for Schools, Daycare Centers, and Housing Authority Projects**



**Background:** Connecticut’s drug-free zone law holds that drug offenses occurring within 1,500 feet of a school, a licensed child day care center, or a public housing property is subject to an enhanced penalty. As this map developed by the Office of Legislative Services shows, virtually the entire city of New Haven is covered by drug-free zones.

Source: Coppolo, George. *“Drug Sales Near Schools, Day Care Center and Public Housing Projects”* (January, 2001). Hartford, Connecticut: Office of Legislative Services.



## About the authors

Judith Greene is a criminal justice policy analyst. She is a research associate of the Justice Policy Institute and the Women's Prison Association. Over the past decade she has received a Soros Senior Justice Fellowship from the Open Society Institute, served as a research associate for the RAND Corporation, as a senior research fellow at the University of Minnesota Law School, and as director of the State-Centered Program for the Edna McConnell Clark Foundation. From 1985 to 1993 she was Director of Court Programs at the Vera Institute of Justice.

Ms. Greene's articles on criminal sentencing issues, police practices, and correctional policy have appeared in numerous publications, including *The American Prospect*, *Corrections Today*, *Crime and Delinquency*, *Current Issues in Criminal Justice*, *The Federal Sentencing Reporter*, *The Index on Censorship*, *Judicature*, *The Justice Systems Journal*, *Overcrowded Times*, *Prison Legal News*, *The Rutgers Law Journal*, and *The Wake Forest Law Review*.

Kevin Pranis is a criminal justice policy analyst and a campaign strategist. A research associate of the Justice Policy Institute and a past Soros Justice Fellow, Mr. Pranis has produced educational materials, training manuals, reports, and white papers on topics that include corporate accountability, municipal bond finance, political education, prison privatization and sentencing policy. His work has been covered in numerous publications, including *The New York Times* and *The Wall Street Journal*.

Greene and Pranis are co-directors of Justice Strategies: [www.justicestrategies.net](http://www.justicestrategies.net)

Jason Ziedenberg is the executive director of the Justice Policy Institute. As JPI's former research director, Ziedenberg authored two dozen reports, including "*Drugs and Disparity: The Racial Impact of Illinois' Practice of Transferring Young Drug Offenders to Adult Court*," the first national analysis of the impact of Illinois drug-free zone law on juvenile offenders.

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## **I. Introduction:** **Drug-free zone laws from Tulia, Texas to Tacoma, Washington**

In January of 2000, 19-year-old Jason Williams was convicted of selling a total of 1/8 oz. of cocaine on four separate occasions. Although he had no prior convictions, the Texas youth was sentenced to 45 years in prison under a state law provision that increases penalties for drug sales that occur within 1,000 feet of a school or park. As it turns out, roughly half of Williams' hometown of Tulia falls within these "drug-free zones."

Williams was just one of 46 Tulians – including more than 10 percent of the town's black population – caught up in a law-enforcement sweep initiated by a single undercover officer who claimed that he had bought drugs from each of them. Half faced enhanced prison terms under the drug-free zone statute, and many pled guilty in order to avoid Williams' fate.

In the months that followed sentencing, it became clear that the evidence used to convict Williams and the other defendants had been fabricated by Tom Coleman, the undercover officer. The wrongfully convicted Tulians were pardoned by Governor Rick Perry in August 2003, but the incident remains a vivid example of the dangerous excesses of the nation's increasingly unpopular "war on drugs."

The Tulia case has helped to raise discussion in Texas and elsewhere about the wisdom of allowing courts to rely on the uncorroborated testimony of police and informants. However, less attention has been paid to the role of the drug-free zone enhancement in intimidating many of Williams' fellow defendants from even attempting to prove their innocence.

Texas is not the only state that assigns stiff penalties to drug offenses that take place within "prohibited zones": In 1970, Congress enacted an early version of a "school zone" law, and starting in the mid-1980's, state governments began to follow suit. By 2000, an analysis by the National Alliance for Model State Drug Laws (NAMSDL) found that all 50 states and the District of Columbia had enacted statutes increasing penalties for drug offenses committed in prohibited zones surrounding schools and other public and quasi-public locations.

The motive for the enactment of drug-free zone laws is easy to understand. Lawmakers want to protect children from drug activity by creating a safe harbor around schools and other locations that they might frequent.

Given the fact that nearly every state has adopted some version of a drug-free zone law, many of which have been in place for over a decade, it is surprising that so little effort has been made to assess their impact. Until New Jersey's Sentencing Commission undertook an investigation in 2005, no state had taken a comprehensive look at whether drug-free zone laws actually deter drug activity near schools or at what unintended consequences might result from casting wide zones of prohibition around a long list of institutions and places.

New Jersey was one of the first states to enact its own version of the federal drug-free zone statute, so it is appropriate that the state was the first to seriously scrutinize the law's effects. Spurred by advocates who raised concerns about the impact of the drug-free zone laws on urban communities, the New Jersey state legislature established a sentencing commission in 2004 that made the laws the subject of its first investigation.

After more than a year of research and discussion among the Commission's 15 members, who include representatives from law enforcement and all three branches of state government, the Commission came to several startling conclusions:

*National Alliance for Model State Drug Laws (NAMSDL) found that all 50 states and the District of Columbia had enacted statutes increasing penalties for drug offenses committed in prohibited zones.*

*The New Jersey Sentencing Commission – Drug-free zones: “a devastatingly disproportionate impact on New Jersey’s minority community.”*

- First, the Commission found that in urban areas where schools, parks, and public housing developments are numerous and closely spaced, overlapping zones turn entire communities into prohibited zones – erasing the very distinction between school and non-school areas that the law was intended to create.
- Second, the Commission found that, by blanketing densely populated black and Hispanic neighborhoods, the laws were creating unwarranted racial disparity in the use of incarceration for people convicted of drug offenses. The Commission termed the result *“a devastatingly disproportionate impact on New Jersey’s minority community.”*
- Third, the Commission determined that the laws had failed entirely to accomplish their primary objective of driving drug activity away from schools and schoolchildren. The Commission found that the law had no measurable deterrent effect and was not being used to sanction individuals that sell drugs to children.

The results of the New Jersey Sentencing Commission’s research should alarm policymakers in other states where drug-free zone statutes are similarly structured. While no other jurisdiction has conducted a similarly comprehensive assessment of its drug-free zone laws, examination of information that is available from localities in other states suggests that the real picture is, if anything, worse than that depicted by New Jersey’s commission.

Research conducted in Massachusetts and Connecticut supports the notion that urban communities of color are disproportionately impacted by prohibited zones, and that enforcement of the laws has little or nothing to do with protecting children. Apart from the structural inequalities created by applying large zones to densely populated urban communities, however, research conducted in Massachusetts, as well as our analysis of the data presented in the New Jersey report, suggests that there may be sharp disparities in the way drug-free zone laws are *enforced*. Further, the Tulia example and data from Washington state support what some court officials are saying about the laws – that the primary function of drug-free zone laws is not to drive drug activity away from schools but to deter defendants from exercising their right to trial.

Thanks to the work of concerned policymakers and reform advocates across the country, public discussions have been sparked in many states about the fairness and efficacy of drug-free zone laws. This report is designed to inform those discussions by reviewing empirical findings, primarily from three states – Massachusetts, New Jersey, and Connecticut – where enough information is available to answer key questions. The report also documents efforts by policymakers and advocates in a few other states – Illinois, Utah, and Washington – to challenge long-held assumptions that drug-free zone laws are protecting children and enhancing public safety.

## II. What are drug-free zones, and where have they been enacted?

“The purpose of drug-free school zones was to protect children and schools by insulating them from drug activity. We recognized that the “war on drugs” would be won or lost in the schoolhouse. Our intention was to create a safe harbor for children by pushing the pushers away. Unfortunately, the current 1,000-foot zones have failed to achieve that objective.”

- New Jersey Assistant Attorney General Ron Susswein

Drug-free zone laws provide heightened penalties for drug offenses that occur within restricted areas surrounding schools, public housing projects, parks, playgrounds, and other proscribed locations. The typical statute establishes a 1,000-foot zone surrounding schools and equal or smaller zones for other structures or locations, but the size of the zone can vary from 300 feet to three miles depending the state. Most drug-free zones apply only to manufacture, distribution, or possession of a controlled substance with intent to distribute, but a few also cover simple drug possession.

*Alabama’s three-mile zone around both schools (including colleges and universities) and public housing projects, covers an area of more than 27 square miles.*

A handful of states make drug activity in a prohibited zone a separate, stand-alone offense, but in most states the drug-free zone charge is an enhancement to the penalty imposed for the underlying possession or sale offense. The penalties and penalty enhancements assigned to drug-free zone violations vary widely, but in many states they include mandatory or presumptive sentences. Like other mandatory minimum drug sentencing laws, these statutes have contributed to prison population growth, and to racial and ethnic disparity in the use of incarceration.

### Offenses vs. enhancements

*Drug-free zone laws come in two forms. 1) The first designates distribution and/or possession of illegal drugs in a prohibited zone as a distinct crime that carries a specific penalty or penalty range. 2) The second, more common form of the law provides for heightened or additional penalties when specified drug crimes occur in a prohibited zone. Although the consequences for defendants are often similar, the legal distinction is important, and the report attempts to maintain it by referring either to drug-free zone “offenses” (separate crimes) or “enhancements” (heightened and additional penalties) when describing the laws and how they function.*

The first drug-free zone law was enacted in a rudimentary form as part of the Comprehensive Drug Abuse, Prevention and Control Act of 1970 and amended to its current form in 1984 when the “crack” epidemic hit urban areas of the U.S. The federal statute provides a penalty enhancement that applies to distribution, possession with intent to distribute, or manufacture of a controlled substance within 1,000 feet of a school, college, or playground; or within 100 feet of a youth center, swimming pool, or video arcade. Drug-free zone offenses are subject to twice the maximum punishment authorized for offenses committed outside the zones. The only exemption is for cases involving five grams or less of marijuana.

In the summer of 1986, Len Bias, an all-American college basketball star at the University of Maryland, collapsed from a cardiac arrest in his dorm room and died shortly thereafter.

The news that his death may have been related to a drug overdose fueled enactment of drug-free zone laws, modeled on the federal statute, in state after state. By 2000, a draft analysis prepared by the National Alliance for Model State Drug Laws (NAMSDL) found that all 50 states and the District of Columbia had enacted statutes increasing penalties for drug offenses committed in prohibited zones surrounding schools and other public and quasi-public locations.<sup>1</sup>

### **The parameters of state drug-free zone statutes – size, location, offenses, and penalties**

There is no central repository of information on state sentencing laws upon which to base a comparative analysis of drug-free zone statutes. The best available information comes from the NAMSDL survey, which is neither comprehensive nor current but which is helpful in drawing some general conclusions about how the laws have been structured.<sup>2</sup>

#### **Zone size: From 300 feet to 3 miles**

The typical drug-free zone extends 1,000 feet in every direction from the property line of the school or other covered structure or location – roughly the length of three football fields. A number of states have, however, established zones that are more narrowly focused on the area immediately surrounding schools and other locations that children frequent.

Minnesota, North Carolina, and Rhode Island lawmakers determined that a 300-foot zone provides the necessary protection for children.<sup>3</sup> Drug-free zones in Alaska and Wyoming extend 500 feet from schools, while lawmakers in Hawaii set the boundary at 750 feet. Vermont lawmakers opted not to establish a specific “zone” and instead reserved enhanced penalties for drug deliveries that take place within school grounds, on property adjoining school grounds, or on school buses.

On the other hand, a handful of states went in the opposite direction. In Connecticut and Mississippi, drug-free zones extend 1,500 feet from institutions;<sup>4</sup> Missouri and Oklahoma establish zones that reach 2,000 feet;<sup>5</sup> and South Carolina designates a half-mile (2,640 feet) as the radius of drug-free school zones. While Mississippi, Missouri, Oklahoma, and South Carolina are somewhat less densely populated, diluting the effect of the expanded zones, Connecticut has the fourth-highest population density in the nation which magnifies the impact of the larger zone.

No other state, however, approaches the scale chosen by lawmakers in Alabama who established a *three-mile* (15,840-foot) zone around both schools (including colleges and universities) and public housing projects. Each zone covers an area of more than 27 square miles – nearly half the size of the state’s fifth-most populous city (Tuscaloosa) and more than half the size of Boston. In Birmingham, the “school-zone” surrounding the University of Alabama campus alone encompasses bulk of the central city and comes within blocks of the international airport.

#### **Locations: From schools to shopping malls**

A few states have narrowly tailored their drug-free zone statutes to focus on schools, the original target of the laws. Most, however, have attached the zones to locations such as parks and public housing developments, and more than a few have tacked on a laundry list of other public and private structures and locations.

States such as Arizona, Hawaii, Kansas, Kentucky, Montana, New Mexico, North Carolina, North Dakota, Ohio, Vermont, and Wyoming maintain drug-free zone laws that penalize drug activity that takes place in and around elementary and secondary schools. On the other end of the spectrum, Arkansas lawmakers have cast a wide net that includes public parks, public housing, day care centers, colleges and universities, recreation centers, skating rinks, Boys' and Girls' clubs, substance abuse treatment facilities, and churches. In Utah, coverage is extended not only to schools, parks, and churches but also parking lots and shopping malls. As the list of structures and locations covered by the statutes grow, drug-free zones proliferate, merging into "super-zones" that become difficult to avoid or even to recognize.

### **Offenses: From sales to simple possession**

The overwhelming majority of states with drug-free zone statutes apply them to offenses that involve manufacture, distribution, or attempts thereof (including possession with intent to distribute), rather than simple drug possession. But a few state statutes – including those in Alaska, Arizona, Connecticut, Delaware, Indiana, Michigan and Oklahoma – also exposed individuals who simply possess a controlled substance in a drug-free zone to enhanced penalties.<sup>6</sup>

The Connecticut statute imposes a two-year mandatory minimum prison sentence for simple drug possession within 1,500 feet of a school or day care center. Arizona's drug-free zone statute also establishes mandatory, enhanced prison terms for individuals caught with even personal-use quantities of drugs within a school zone. However, the law is trumped by Proposition 200, a voter initiative barring the use of imprisonment for first- and second-time drug possession that was passed on two occasions with overwhelming public support.<sup>7</sup>

Some states have tailored their drug-free zone laws to exclude defendants who are themselves minors and/or students. For example, the statutes in Delaware specify that the defendant must be 18 years of age. Connecticut's two-year mandatory minimum law for simple possession exempts students if they are enrolled in the school in question.

### **Penalties: Mandatory minimums and sentencing enhancements**

People convicted of drug-free zone offenses in Alabama, Connecticut, and Massachusetts face a fixed mandatory minimum penalty enhancement that is added to any sentence imposed for the underlying drug offense, while Washington state defendants face a two-year enhancement to their presumptive sentencing guidelines range. Those charged with drug-free zone offenses in New Jersey, on the other hand, face a separate three-year mandatory minimum prison term, although the sentence may be merged with the sentence imposed for the drug charge. The length of the mandatory term can be reduced by prosecutors if the defendant agrees to plead guilty.

Not every state assigns a fixed sentence or enhancement to drug-free zone violations. Many drug-free zone enhancements – including those employed in Indiana and Texas – raise the felony class of the underlying offense, exposing the defendant to a more severe penalty or penalty range.

In some states, youth who would otherwise be under the jurisdiction of the juvenile justice system can be prosecuted in adult court, and sentenced to an adult institution if the offense occurs in a drug-free zone.



## **Narrowing the scope of zones, and their reach**

Several states' lawmakers have taken a somewhat more nuanced approach to distinguish conduct that is likely to place children at risk from conduct that poses little danger to them. These distinctions include factors such as the purpose of the transaction (whether drugs are exchanged for profit, or are simply shared); the time of day; the presence of children; and whether the incident takes place on public or private property.

Under Arizona's drug-free zone law, defendants convicted of possessing or selling drugs on public property within 1,000 feet of a school face mandatory, enhanced prison terms. The same penalty applies to offenses that occur on private property, but only if the incident takes place within 300 feet of a school.

Colorado lawmakers restricted the state's 1,000-foot drug-free zone to areas that are accessible to the public, exempting private residences and other non-public locations where the risk that schoolchildren would accidentally be exposed to drug activity is low.

Many states have carved a relatively narrow exception for drug transactions that occur in a private residence that happens to fall within a drug-free zone. Generally, the exception applies only if no children were present in the residence and if the criminal conduct was not pursued for profit.

The private-residence exception is typically structured as an affirmative defense – meaning that the burden is on the defendant to prove that the drug transaction meets the criteria described above. It is not considered an element of the crime, so the prosecution is not required to prove that the criteria for the exception have not been met in order to secure a conviction.

### III. The case law on drug-free zones

Federal and state drug-free zone statutes have withstood challenges framed on constitutional grounds.<sup>8</sup> Appellate courts have shown little appetite for restricting the reach of these laws, and have given great deference to legislatures and to law enforcement in reviewing the statutes' construction and application. Legal challenges to drug-free zone statutes have raised four basic arguments:

- First, defendants have argued that the statutes violate the constitutional prohibition against double jeopardy, penalizing them both for committing a drug offense, and for committing the same offense in a prohibited zone.
- Second, defendants have argued that the statutes violate the constitutional requirement of due process by holding them criminally liable for unintentional presence in a prohibited zone.
- Third, defendants have argued that the statutes fail to meet the constitutional standard of equal justice because they subject individuals, certain classes of individuals, or whole communities to harsher punishment than others for similar conduct.
- Fourth, defendants have argued that particular applications of the statutes exceed the laws' intent to protect children from drug activity.

Appellate courts have generally found the statutes to be rationally related to a legitimate public purpose that outweighs concerns over both alleged unequal treatment and the lack of a requirement that the state prove either criminal intent or a specific danger to children. Many courts have noted that the conduct of defendants convicted of drug-free zone offenses is still criminal absent the drug-free zone statute.

These holdings, issued mostly during the early to mid-1990s, appear to reflect official and public sentiment at the time that the drug war was reaching its peak. Moreover, they rest on the assumption that drug-free zones really do protect children – an assumption that is now challenged by mounting evidence that drug-free zone laws have failed to deter drug use, or deflect drug sales away from schools.

#### Double jeopardy

In New Jersey, where selling, manufacturing or possessing drugs with intent to sell them in a drug-free zone is a separate offense rather than a sentencing enhancement, appellate courts have ruled that the drug-free zone charge and the generic distribution charge must merge unless the offenses require proof of different facts.<sup>9</sup> Where, on the other hand, drug-free zone laws function as enhancements rather than separate offenses courts have upheld the application of increased penalties for the underlying offense.

Alabama courts have ruled that, under the state's peculiarly harsh drug-free zone statutes, a defendant convicted of selling drugs within three miles of *both* a school and a housing project must receive *two* mandatory five-year prison terms which must run consecutive to one another and to any sentence imposed for the underlying offense, resulting in a *minimum* 10-year prison sentence.<sup>10</sup>

#### Due process

Drug-free zone laws and convictions have been challenged on grounds that these laws violate due process because they do not require the state to prove that the defendant

knowingly and intentionally violated the prohibition against conducting drug activities in a prohibited zone. Defendants have argued that they were unaware of the presence of a drug-free zone, removing the element of “mens rea” – guilty knowledge – from their conduct. In one case, for example, a Washington state defendant contended that he should not receive an enhanced sentence because there was no way for him to know that he was within 1,000 feet of the “school” in question – a “general education equivalency” program with no actual school grounds.<sup>11</sup>

Appellate courts in Washington state and elsewhere have rejected claims that a drug-free zone law cannot be applied where prosecutors fail to prove that the defendant knowingly and intentionally committed a drug offense in a prohibited zone. First, although most crimes include some element of *mens rea*, courts have held that it is within the power of lawmakers to dispense with the *mens rea* requirement and create a strict liability crime, so long as the provision is rationally related to a legitimate public purpose.<sup>12</sup>

Second, several courts have pointed out that *mens rea* is not altogether missing as an element of proof in drug-free zone statutes, since it remains an element of the underlying drug offense.<sup>13</sup> Once a defendant has crossed the threshold by intentionally engaging in illegal drug activity, the prosecution is not obligated to also prove that the defendant intentionally crossed the threshold with respect to his or her presence in a prohibited zone.

Defendants have also mounted due process challenges by contending that their conduct did not violate the purpose of the law, which is to protect children. An Ohio man who was charged under that state’s drug-free zone law for a transaction that took place in his home argued that sale of a small amount of cocaine to another adult in a private residence posed no direct risk to schoolchildren, and that the statute therefore could not apply.<sup>14</sup> The appellate court held, to the contrary, that Ohio’s drug-free zone statute says what it means, and means what it says – children or no – noting that the language of the statute was clear on its face without resort to the rules of statutory construction. The court considered the dangers of drug activity in the vicinity of schools and schoolchildren to be self-evident, and the defendant’s conduct to fall squarely within the provisions of the law.

### **Equal protection**

Defendants have claimed that drug-free zone laws violate the constitutional guarantee of equal protection by arbitrarily subjecting certain individuals to harsher punishment than that imposed on others convicted of similar conduct outside drug-free zones. Some have argued that the statutes violate the principle of equal protection because the enhanced penalties are more likely to apply to people of color who live in densely populated urban neighborhoods than to whites who are more likely to live in suburbs and rural areas where the zones are less prevalent.

Both variants of the equal protection claim have been rejected by appellate courts. A New Jersey court observed that lawmakers have wide latitude in establishing laws to further legitimate public purposes.<sup>15</sup> A court in Alabama noted that the activities covered by the drug-free zone laws are already illegal and that no “suspect class” is involved.<sup>16</sup>

In responding to specific claims that the statutes are racially discriminatory, appellate courts in Florida, Indiana, Massachusetts, and Ohio noted that the appellants cited no statistical evidence of the laws’ disparate impacts.<sup>17</sup> Several courts observed that a showing of discriminatory intent would *also* be required in order to strike down the law on constitutional grounds. In [Commonwealth v Taylor](#), the Massachusetts court also pointed out that those who sell drugs commit crimes with or without the drug-free zone statute, and are therefore hardly entitled to special protection as a “suspect class.”

*An Indiana appellate court upheld the conviction of a man for delivering marijuana to an undercover officer in his second-floor apartment, which happened to lie 959 feet from the property line of the nearest school building.*

## Construction and application of the law

Finally, defendants have challenged the use of drug-free zone laws in their particular cases, claiming that the application exceeded the intent of the legislature and/or a strict reading of the statute. Many of these challenges center on the definition of “school” and “school grounds.”

Defining “school” for purpose of a school-zone statute is one of the few areas where courts have set limits on drug-free zone laws. Courts in Indiana and Wisconsin ruled that colleges and universities are not “schools” for purposes of their respective drug-free zone statutes,<sup>18</sup> while courts in Florida, Indiana and Massachusetts excluded pre-schools from their definitions.<sup>19</sup>

On the question of how the distance between the location of the incident and the protected location should be measured, however, courts have consistently applied the most expansive definition possible: a straight line. In 1992, an Indiana appellate court upheld the conviction of a man for delivering marijuana to an undercover officer in his second-floor apartment, which happened to lie 959 feet from the property line of the nearest school building according to an expert surveyor.<sup>20</sup>

The defendant contended that the “line of sight” measurement used by the state’s surveyor was inappropriate because neither he nor children could proceed in a straight line through barriers such as buildings, fences and creeks. The appellate court concluded otherwise, holding that the law’s intent was clear: to punish those who deal drugs within 1,000 feet of school property. The practice of measuring zones in a straight line or “as the crow flies” has consistently been endorsed by other state courts and federal courts.

With few exceptions, courts have also applied a broad reading to drug-free zone laws by applying them to cases of drug possession with intent to distribute where no proof was offered that the intended place of distribution also lay within a drug-free zone. A Washington state appellate court found that the phrase “within one thousand feet of the perimeter of the school grounds” applied to the word “possession” and not the word “deliver” in the phrase “manufacturing, selling, delivering, or possessing with intent to manufacture, sell or deliver.” The court held that an individual arrested while passing through a drug-free zone in possession of drugs he or she intends to distribute elsewhere is nonetheless subject to a drug-free zone enhancement.<sup>21</sup>

A New Jersey trial court’s determination that two defendants’ conduct did not fall under the state’s drug-free zone law because their presence in the prohibited zone was fortuitous was overruled by an appellate court.<sup>22</sup> The trial judge argued that “some reasonable limitation” must be implied to preserve the legislative intent. To do otherwise, the judge argued, would “result in clearly frivolous or inappropriate or unfair results, having nothing to do with protecting schoolchildren.” The higher court disagreed, insisting that the statute imposed a “bright line test” based on distance, in which the nexus between defendants’ activities and schoolchildren was not a factor.

An appellate court in Colorado has recently taken the opposite position, determining that the state must show that the defendant intended to distribute the controlled substance to a person within or on the grounds of the school or housing development in question.<sup>23</sup>

Florida courts have also shown greater willingness to reign in the excesses of the state’s drug-free zone law. In a case involving a man who bought drugs from an undercover police officer, a Florida appellate court affirmed a trial judge’s decision to impose a lesser sentence than required in the sentencing guidelines for a drug-free zone offense, based on the following facts:



- The crime occurred on a Saturday afternoon in a residential neighborhood known as an active drug market
- The seller was an undercover police officer who could not be mistaken for a child
- While the officer was deliberately standing within 1,000 feet of a school in order to expose the defendant to an enhanced penalty, there was no evidence that the defendant realized he was in a protected zone.
- The defendant was an adult male who intended the cocaine for his own use, and there was no reason to believe that he planned to distribute it to a minor.<sup>24</sup>

# Tulia, Texas

In 1999 the Texas panhandle town of Tulia became the site of the most notorious drug-sting scandal in history. The ease and speed with which so many individuals – mostly black – were wrongfully convicted and sentenced to prison has led some to consider the drug war the front line in a new battle for civil rights in the United States.

The crisis began when undercover officer Tom Coleman filed claims that he had purchased drugs from 46 different people in the small town. The law-enforcement sweep he set off netted 13 percent of Tulia's black adults. Two dozen people in Tulia had been sentenced to prison based entirely on Coleman's uncorroborated testimony before it was totally discredited.

All but one of the charges brought against the Tulia defendants were alleged to have involved between one and four grams of cocaine. At least 23 defendants faced penalty enhancements because the drug deals were alleged to have been made within 1,000 feet of a school or a park. Much of the town of Tulia – which covers just a bit more than a square mile – falls into one or another drug-free zone.

Delivery of between one and four grams of cocaine is normally a second-degree felony, punishable under Texas law by two to 20 years in prison. But if the prosecutor adds a zone enhancement, the charge becomes a first-degree felony, exposing the defendant to a penalty range of five to 99 years.

The first drug-free zone defendant to be tried was Jason Williams. A 19-year-old with no prior convictions, Williams had been charged with four separate sales of "eight-balls" – equal to 1/8 oz. or 3.5 grams – of cocaine. Two of the sales were alleged to have been made in a drug-free zone. Williams decided to fight the charges at trial. The jury found him guilty and sentenced him to 45 years in prison.

Cash Love was one of the few whites charged in the Tulia sting. A jury convicted him of eight separate deliveries, some with drug-free zone enhancements. The jury stipulated that the sentences they imposed would be served consecutively, for a total of 361 years in prison.

Kareem White was charged with five separate eight-ball cocaine sales. The prosecutor sought a drug-free zone enhancement, boosting the charge to first-degree. After an hour and a half of deliberation a jury found White guilty. He waived his right to jury sentencing and requested sentencing by the trial judge, who slammed White with a 60-year prison term.

After seeing the results of the first few trials, other defendants who faced drug-free zone charges felt they had no alternative but to accept plea offers from the district attorney. Willie B. Hall faced seven separate charges involving small amounts of cocaine and marijuana along with school-zone and park-zone enhancements. To avoid risking the kind of sentence Jason Williams received from his jury, Hall waived his right to a trial and agreed to plead guilty, accepting an 18-year prison sentence in the bargain.

Looking at seven charges involving powder cocaine and a zone enhancement, Tim Towery also accepted an offer of 18 years in prison, and pled guilty on the same day as Hall. Daniel G. Olivarez, a 20-year-old with no prior record, faced three sales cases for small amounts of marijuana and cocaine. His plea bargain yielded a 12-year prison sentence.

A team of lawyers assembled and spearheaded by NAACP Legal Defense Fund attorney Vanita Gupta brought a vigorous challenge against the Tulia drug-sting convictions. In 2003 the Texas Court of Appeals ordered a special evidentiary hearing to determine if four of the defendants, including Jason Williams, had been convicted solely on Coleman's testimony. After presentation of the evidence the hearing judge recommended that the convictions be vacated.

Shortly after the hearing Tom Coleman was indicted on three counts of aggravated perjury. In August 2003 Texas Governor Rick Perry issued pardons for the 35 Tulians who had been wrongfully convicted in the cases filed by Coleman.

According to Gupta, the drug-free zone law played a major role in the Tulia debacle by helping the district attorney secure guilty pleas from innocent defendants. "The prosecutor used the zone charge as an arbitrary tool to intimidate innocent people," Gupta says. "The way the zone enhancement increases the risk of a maximum sentence would dissuade *any* rational person from going to trial. The enhanced sentence range is deliberately used to clobber people with sentences without any regard for proportionality."

## IV. State case studies

The following case studies examine the impact and efficacy of drug-free zone laws in several states, as well as current efforts to reform these laws.

In Massachusetts, where 80 percent of those sentenced with the drug-free enhancement are ethnic and racial minorities, two different research efforts have determined that the laws are not working as intended. Researchers affiliated with the Boston University School of Public Health found that decisions by police and prosecutors to invoke the statute had little or nothing to do with keeping drugs away from schoolchildren. A research team at Northeastern University School of Law found disturbing patterns of racial disparity in arrests and charging practices. The case study also explores a controversy that has erupted in Great Barrington over the prosecution of several middle-class, white youths under the drug-free zone law.

In New Jersey, where an astounding 96 percent of the prisoners serving time for drug-free zone offenses are black or Hispanic, the state's sentencing commission has taken a comprehensive look at the drug-free zone laws and found that the law has no deterrent effect and is a major contributor to alarming levels of racial disparity in incarceration. The sentencing commission put forward a reform proposal which seeks to remedy the failures and unintended consequences of the current statute.

Connecticut's elevated levels of racial disparity in imprisonment have placed the state above the rest of the nation. The state's drug-free zone law is one of the toughest in the nation, establishing zones that cover an area more than twice as large as prohibited zones in New Jersey and Massachusetts, and attaching a mandatory minimum prison term to simple drug *possession* within a prohibited zone.<sup>25</sup> Connecticut's advocates and activists have recently put drug-law reform at the top of the state's criminal justice agenda. After winning an historic campaign for equity in sentencing for crack and powder forms of cocaine, they are now pressing for reform of the harsh drug-free zone law.

Although most research and debate about the merits of drug-free zones have been taking place in northeastern states, the issue has surfaced elsewhere as well. In Washington state, the drug-free zone law establishes zones around school bus stops – extending the reach of these laws to less populated areas far from schools – and puts enormous pressure on defendants to plead guilty rather than face long prison terms. Seattle's top prosecutor has issued a charging policy designed to narrow the scope of the law and restore drug-free zones to their original legislative intent – a move that was followed by a sharp reduction in the use of drug-free zone enhancements.

The four case studies are augmented with short profiles of relevant developments in Illinois, where juvenile justice advocates won reform of a law requiring automatic transfer of youth to adult courts for drug-free zone offenses, and in Utah, where the chair of the parole board has urged lawmakers to repeal one of the nation's most broadly written drug-free zone statutes.

## Massachusetts

Zone size: 1,000 feet (schools)/100 feet (parks & playgrounds)

Locations: Schools, parks, and playgrounds

Offense: Distribution or possession with intent to distribute

The Massachusetts statute, enacted in 1989, establishes 1,000-foot penalty enhancement zones around schools and 100-foot zones around parks and playgrounds. Defendants convicted of distributing or possessing drugs with intent to distribute in a drug-free zone face a two-year mandatory minimum term that must be served on top of any penalty imposed for the underlying offense. Massachusetts prosecutors, however, typically drop the drug-free zone enhancement in exchange for a guilty plea. The enhancement does not apply to simple drug possession charges.

A pioneering effort to determine whether school-zone laws actually protect schools was undertaken in Massachusetts by William N. Brownsberger, a drug policy expert and former Assistant Attorney General for Narcotics, for the state.<sup>26</sup> In 2001, Brownsberger, who conducted the research for the Boston University School of Public Health, published findings from analysis of a sample of 443 drug sales cases in three Massachusetts cities – Fall River, New Bedford, and Springfield.

Brownsberger sought to determine whether the law was being used effectively to deter and punish drug activity in the vicinity of schools. He discovered that most drug sales were taking place within school zones, but that neither the transactions nor the way the law was enforced appeared to have anything to do with schoolchildren.

Examination of school-zone maps in each jurisdiction demonstrated that large chunks of each city were blanketed by interlocking drug-free zones. In total, 29 percent of territory in all three cities fell within a prohibited zone. The proportion was even greater in high-poverty areas, where 56 percent of the surface area lay enclosed in school zones.

### **Seven in 10 drug-free zone incidents occurred when school was not in session, and less than one percent involved sales to youth**

*Researchers were told by police that disparity had to do with “whether it’s a good kid or a bad kid.”*

The fact that sales in 80 percent of the drug cases studied occurred in school zones reflected the density of schools in high-poverty/high-drug-dealing areas. Of the incidents that took place in school zones, however, 71 percent occurred when school was not in session – on weekends, at night, or during the summer. Furthermore, *less than one percent of the incidents in the sample involved dealing to minors.*

Brownsberger also found that factors that might be rationally related to the purpose of the laws (whether or not school was in session; nearness of the sale location in regard to a school within the zone) did not appear to affect prosecutors’ decisions as they filed charges or offered negotiated pleas. He concluded that the primary impact of these laws is not to drive drug activity away from schools but to raise the penalties faced by individuals who sell small amounts of drugs.

Brownsberger argues that a special penalty to protect children is a good idea, but that the Massachusetts law is drawn too broadly to have that effect. By blanketing large geographic areas with drug-free zones, the law makes it virtually impossible for sellers to avoid them. As Brownsberger puts it, “We’re not giving anyone any incentive not to sell drugs near schools.” He recommends reducing the zone to between 100 to 250 feet.

### **Nonwhites are more likely to be charged with offenses that carry a drug-free zone enhancement**

Another seminal piece of research on the impact of the Massachusetts school zone law was undertaken by a Northwestern University research team at the request of Judge Sydney Hanlon, an ex-federal prosecutor who presides in the Dorchester District Court in



Boston.<sup>27</sup> Judge Hanlon was concerned that black and Hispanic defendants in her court seemed much more likely to be charged with a drug-free zone offense and face the two-year mandatory prison sentence than whites.

Massachusetts sentencing data indicate that 80 percent of defendants that received mandatory, enhanced sentences under the drug-free zone statute are black or Hispanic, even though 45 percent of those arrested for drug violations statewide are white. The research team examined 200 Dorchester District Court cocaine cases – half involving black and Hispanic defendants, and half whites.

*William N. Brownsberger, a drug policy expert and former Assistant Attorney General for Narcotics, for the state: “We’re not giving anyone any incentive not to sell drugs near schools.”*

Eligibility for the school-zone enhancement is based on two factors. First, the incident must have taken place within 1,000 feet of a school or within 100 feet of a playground. Second, the defendant must be charged with delivery, or a related offense such as possession with intent to deliver, rather than mere drug possession. When they examined court records, the researchers found that, among those eligible for a school zone charge, black and Hispanic suspects were somewhat more likely to be charged – 75 percent versus 63 percent.

Their examination of police records, however, yielded much more disturbing results. While roughly 80 percent of all arrests took place within a school zone (meeting the first eligibility criteria), only 15 percent of whites were charged with an eligible offense (distribution or possession with intent) compared to 52 percent of non-white defendants.

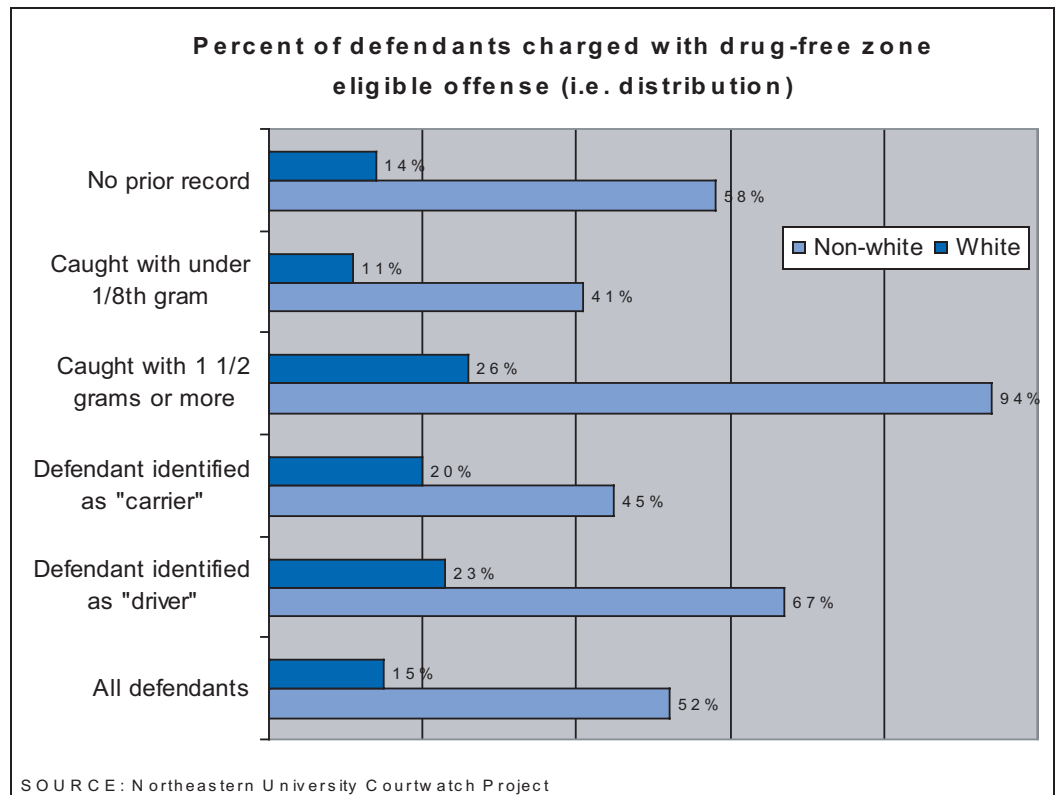
### **Non-white drug defendants face stiffer charges than whites for similar conduct**

In an effort to determine why non-white defendants were so much more likely to be charged with more serious offenses, the researchers examined the police records and found them rife with what appeared to be disparate treatment. Two-thirds of nonwhites described as the “driver” of a car involved in a drug transaction were charged with distribution, while three-quarters of whites described as drivers were charged with simple possession. Nonwhites identified as “carriers” were more than twice as likely to be charged with a school-zone eligible offense.

The same pattern of disparity emerged when the researchers considered drug amount and prior record. Among those caught with more than a gram and a half of cocaine, ninety-four percent of minority defendants were charged as dealers compared to just over a quarter of whites. For those caught with less than 1/8 of a gram, the likelihood of being charged with delivery or possession with intent was nearly four times as great for nonwhites as for whites. Finally, defendants with no prior records were four times more likely to be charged with eligible offenses if they were nonwhite.

When researchers interviewed police officers about their charging practices, they were told time and again, “it has to do with whether it’s a good kid or a bad kid.”

## Nonwhites far more likely than whites to face school-zone enhancement for similar conduct



The preceding Dorchester research was based on a relatively small number of cases. But the findings point in a clear direction and correspond to Judge Hanlon’s experience, which suggests that they should be taken very seriously.

### **Blacks and Hispanics account for 80 percent of drug-free zone convictions**

Information published in the Massachusetts Sentencing Commission’s 2004 Survey of Sentencing Practices shows that the state’s drug-free zone law continues to have a powerful and racially disparate impact on drug enforcement.<sup>28</sup> In a state where non-Hispanic whites make up 80 percent of the resident population, the Commission reports that blacks and Hispanics made up nearly 80 percent of those convicted of drug-free zone violations.

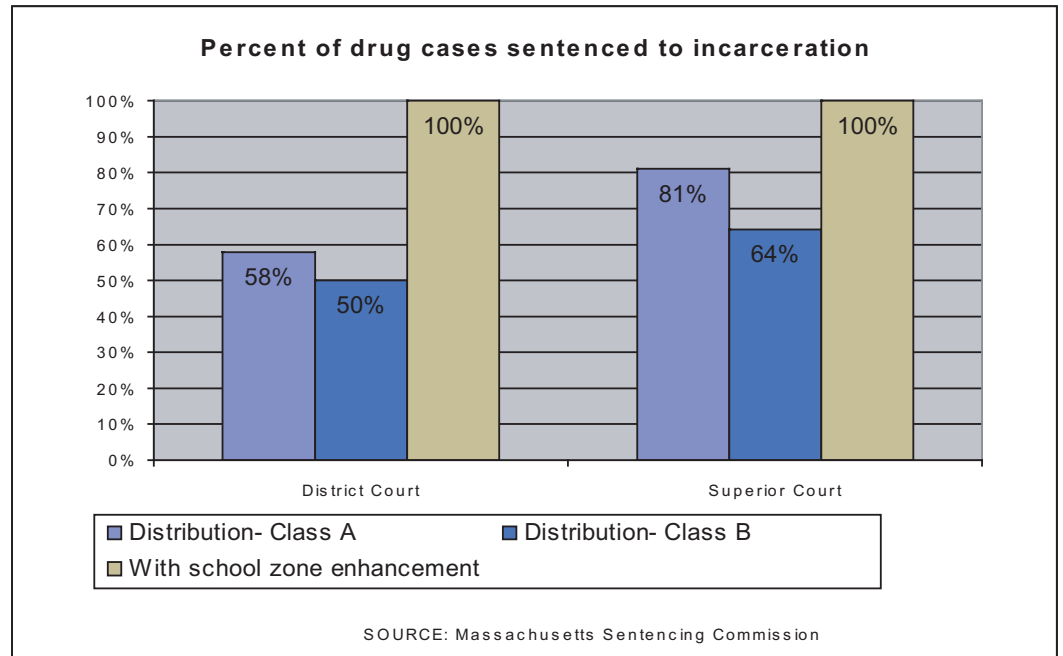
The Commission’s survey contains a breakdown of the underlying drug charges in drug-free zone cases, along with a series of tables that detail use of incarceration for all cases sentenced in the state’s District and Superior Courts, broken down by offense and the defendant’s “prior criminal history group.” Using the information provided, it is possible to examine how outcomes in drug-free zone cases differ from outcomes in cases where the underlying offenses are the same.

The data show that, while *all* of the defendants convicted of distributing drugs in a prohibited zone were sentenced to at least two years of incarceration as is required by statute, many defendants convicted of the same offenses with no zone enhancement received non-incarcerative sanctions. In District Court, where two-thirds of drug-free zone cases were disposed, just *half* of defendants convicted of Class B drug distribution

– the conviction that most frequently accompanies a drug-free zone violation – were sentenced to a term of incarceration.

The figure was higher, but only slightly, at 58 percent for those convicted of Class A distribution – the second-most common underlying offense. The gap between drug-free zone and non-zone dispositions was smaller but still significant in Superior Court, where 81 percent of Class A distribution cases and 64 percent of Class B distribution cases result in incarceration.

### All drug-free zone convictions resulted in a minimum two-year prison or jail sentence



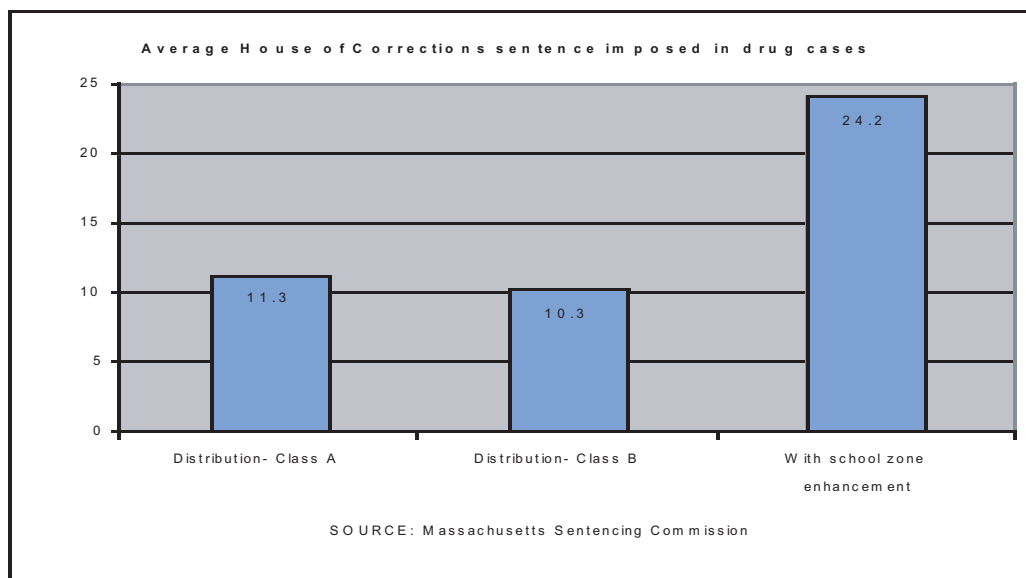
### Drug-free zone defendants are sentenced to twice as long in jail

Data on mean sentence length show that drug-free zone defendants are not only more likely to be incarcerated than their counterparts, but also to receive twice as much jail time. The mean House of Corrections terms imposed in Class A and B distribution cases were 11.3 months and 10.3 months, respectively, compared to 24.2 months in drug-free zone cases.

The defendants who were sentenced with drug-free zone enhancements were somewhat more likely to have a criminal record than their counterparts who were convicted of Class A and Class B distribution with no zone enhancement. Even after adjusting for the possible impact of the defendant's prior criminal history group on sentencing, however, it appears that a third of those currently being sentenced to prison or jail under the drug-free zone law might have received a non-incarcerative sanction if the law were not in effect.<sup>29</sup>

Further, the typical House of Corrections sentence imposed in a drug-free zone case is over twice as long as the sentence for individuals convicted of the same underlying offense with no enhancement, which means that, absent the zone statute, the defendants would likely serve less time behind bars.

## Drug-free zone defendants are sentenced to twice as long in jail



This extra prison and jail time translates into significant costs to taxpayers, not to mention the human and social costs of cycling young men and women of color through correctional facilities. These costs, however, likely represent the tip of the iceberg, since they include only the direct impact of the drug-free zone statute on those convicted under it and not the indirect impact on those who plead guilty to lesser offenses under threat of a zone enhancement.

### Application of school-zone enhancement to white, first-time defendants stirs controversy in Great Barrington

The Dorchester research highlighted the way that the Massachusetts drug-free zone law is sometimes applied with discretion by law enforcement to privilege white defendants over African Americans and Hispanics. A recent controversy over use of the law in Great Barrington illustrates the results when authorities insist on “equal application” of the law.

In the fall of 2004 an eight-month undercover investigation in Great Barrington culminated with the arrest of two dozen youths for possession and/or sales of small amounts of drugs. The drug purchases had mostly been made in a parking lot between a school and a nearby movie theater and surrounded by upscale shops and galleries. The picturesque downtown area is a popular hang-out for students when school is not in session.

When the Berkshire County district attorney announced that he was charging 17 of the youths – including seven charged only with sales of small amounts of marijuana – under the drug-free zone law, some residents expressed objections. An ad-hoc advocacy group was formed – Concerned Citizens for Appropriate Justice (CCAJ) – and members met with District Attorney David F. Capeless. The delegation expressed its concern that a two-year mandatory minimum term in prison was excessively harsh punishment, given that many of the defendants had no record of prior offenses.

The DA held fast, insisting that he was following a long-standing policy to pursue the school zone change whenever it applies. Capeless said he gives the same treatment to youths arrested in nearby Pittsfield, a larger, less affluent town where minority youths routinely face the school zone charge.



In June 2005 CCAJ members held a meeting near the site of the arrests. They criticized Capeless for failing to exercise appropriate discretion in the drug cases. They were joined by Whitney Taylor, director of the Drug Policy Forum of Massachusetts, who presented statewide data showing that school zone charges are rarely brought in marijuana sales cases. Taylor said that Capeless's charging practices were out of line with DAs elsewhere in the state.

CCAJ activists continued to pressure Capeless, collecting signatures on a petition for leniency and raising thousands of dollars for newspaper and billboard ads to educate Berkshire County residents about the harsh drug law. Some have vowed to support a challenger when Capeless comes up for re-election.

Kyle Sawin, a Taconic High School honors student, was the first to take his case to trial. Sawin was 17 in the summer of 2004 when he was arrested and charged with selling a total of nine grams of marijuana over three separate occasions to Felix Aguirre, a Berkshire County Drug Task Force undercover officer. He had no prior criminal record.

Sawin's first trial ended in a hung jury in July 2005. Capeless placed the case back on the trial docket for September. During the second trial Sawin took the stand to testify in his own behalf. He denied making one of the alleged drug sales, but he admitted selling marijuana to Aguirre on two other occasions. His lawyer argued he had been pressured repeatedly by Aguirre to make the sales. The prosecutor produced three other youths, also charged with sales to Aguirre, who testified that Sawin regularly sold marijuana to them. Sawin was acquitted after nine hours of jury deliberations.

Six more defendants from the parking lot sting who have no prior records have yet to be brought to trial. CCAJ spokesman Peter Greer warns that Capeless is bucking a national trend for alternatives to prison for people charged with low-level drug offenses. "The jury has spoken, and we hope he has heard them loud and clear."

Whitney Taylor says the situation in Great Barrington illustrates how mandatory minimum drug laws distort important public priorities. "The DA's blind application of the drug-free zone law is clearly detrimental to the health and safety of this community. Precious prosecutorial resources should be used for combating violent and serious crimes across Berkshire County." She thinks that the CCAJ campaign against rigid application of the school zone law could serve as a springboard for a broader campaign for reform at the state level.

# Illinois

Each year some quarter of a million juveniles are charged for prosecution as adults in the criminal courts. Youths convicted and sentenced in the adult courts are burdened with an adult criminal record. They may receive harsher sentences and be denied access to appropriate treatment. They may be detained or incarcerated in adult jails and prisons, may lose access to student financial aid, and in many states may lose their voting rights.

A major victory was won by youth justice advocates last year in Illinois when Governor Rod Blagojevich signed S.B. 283, which gives judges discretion to determine whether a youth will be prosecuted as an adult or a juvenile. Illinois law had provided automatic transfer of 15- and 16-year-olds charged with drug crimes within 1,000 feet of a school to adult criminal court without judicial review.

The “drug-free school zone” law initially met with broad public support due to concerns about youth crime and drug abuse. But youth advocates in Chicago were aware of the impact of these laws, thanks to data analysis by the Juvenile Transfer Unit in the Office of the Public Defender. They showed that, in Cook County, 99 percent of all the youth transferred to adult court were African American or Hispanic. The data analysis also showed that the majority of youth transferred had not previously received juvenile court services, and that most transferred youth simply received adult probation – making them eligible for all the collateral consequences facing adults but none of the services available to youth.<sup>30</sup>

Marshaling data to illustrate the sharp disparity in the treatment of white and non-white youth, the advocates worked to place the automatic transfer issue squarely on the policy screen for legislators, many of whom were disturbed by the findings. A national coalition, “Building Blocks for Youth,” took up the cause. A Justice Policy Institute report presented the Cook County data to a national audience, calling the Illinois school zone law “the most racially biased youth drug law in the nation.”<sup>31</sup> The charge was quickly picked up by the national media.

The advocates produced and distributed a video that framed the issue with interviews of judges opposed to the policy, as well as youth affected by the law. Youth-led advocacy groups amassed scores of young demonstrators dressed in graduation robes in front of the Cook County State’s Attorney’s office. The youths were presented with “diplomas” that read, “Congratulations – you have now graduated to become a felon.”

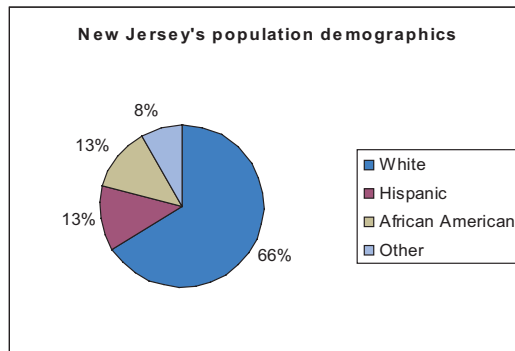
Advocates won a partial victory in 2002 when legislators agreed to allow youths charged with certain low-level drug offenses to petition adult court judges for a waiver to juvenile court. This year, citing research findings that juveniles placed in adult correctional facilities were more likely to become career criminals than those placed in juvenile facilities, advocates won a complete victory. A bill requiring that all drug cases involving juveniles commence in juvenile court was passed in both the House and the Senate by unanimous vote.

## New Jersey

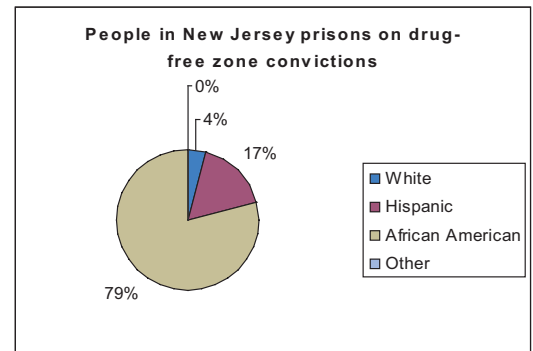
Zone size: 1,000 feet (schools and school buses)/500 feet (parks, public housing, etc.)

Locations: Schools (including vocational schools), school buses, parks, public housing, libraries, and museums

New Jersey has attained the dubious distinction of maintaining the highest percentage of people imprisoned for drug offenses in the country – 36 percent, compared to a national average of 20 percent.<sup>32</sup> New Jersey’s drug-free school zone law, which was established in 1987 as part of sweeping anti-drug legislation, has proved an influential model for other states. Since the law took effect, the proportion of blacks admitted to prison for drug convictions has risen four times faster than the proportion of whites incarcerated for drug offenses. Blacks and Hispanics make up 96 percent of those imprisoned for a drug-free zone offense.<sup>33</sup>



SOURCE: 2000 census data



SOURCE: NJ Commission to Review Criminal Sentencing

New Jersey’s school zone law [N.J.S.A. 2C:35-7] provides that distributing, dispensing, or possessing drugs with intent to sell on school property, within 1,000 feet of a school or a school bus, or while on any school bus, is a third-degree offense carrying a three-year mandatory minimum prison sentence. As such, it is virtually the only third-degree non-violent offense in the New Jersey Code of Criminal Justice which mandates a minimum term of imprisonment.

In 1998 a second law provided enhanced penalties for drug sales within 500 feet of public housing, parks, libraries, and museums.<sup>34</sup> This law does not provide a mandatory minimum prison term. Rather, it upgrades a third-degree drug sale to a second-degree offense, for which a prison term is the presumptive sentence.<sup>35</sup>

In determining whether a drug offense took place within a school zone, New Jersey law enforcement authorities have employed a very expansive definition of “school” to include daycare centers, vocational training centers, and so forth. New Jersey’s courts have determined that, to substantiate a charge of possession with intent to distribute in a drug-free zone, prosecutors must show that the defendant possessed the drugs in the zone with the intent to distribute, but not that he or she intended to distribute the drugs in a drug-free zone.<sup>36</sup>

Discussion of sentencing under the zone laws requires a quick review of New Jersey’s unique sentencing structure, best characterized as a “hybrid determinate model,” as it pertains to drug offenses. “Indictable offenses” (comparable to felony offenses in other jurisdictions) fall into four classes according to their level of seriousness. The sentencing structure allows judges to choose a prison term within statutory ranges set for each offense class. The normal ranges for prison terms at sentencing are as follows:

Offense class	Range
First degree	10–20 years
Second degree	5–10 years
Third degree	3–5 years
Fourth degree	Up to 18 months

First- and second-degree offenses carry a *presumption of incarceration* which can be overcome only when such a sanction would constitute a serious injustice of such magnitude that would override the need to deter others. In the case of a third- or fourth-degree offense, the *presumption favors a non-custodial sanction*, at least for an individual with no prior felony convictions.

**The Comprehensive Drug Reform Act – among the country’s toughest drug laws**

The Comprehensive Drug Reform Act (CDRA) consolidated all of the New Jersey’s criminal drug laws under one set of statutes and provided “strict punishment, deterrence and incapacitation” for drug offenses deemed to be especially dangerous. At the time of its adoption, CDRA is widely cited as one of the country’s toughest drug laws. Simple possession of drugs is generally a third- or fourth-degree offense for which there is a presumption of a non-incarcerative sanction. Weight thresholds that vary according to the type of drugs involved govern sentences for manufacturing, distributing, dispensing, or possessing drugs with intent to distribute. For first- and second-degree weights the presumption is for imprisonment, while the presumption shifts to a non-incarcerative sanction below the second-degree thresholds:

Threshold drug amounts under CDRA		
Type of Drug	Second Degree	First Degree
Heroin	0.5 ounce	5 ounces
Cocaine	0.5 ounce	5 ounces
LSD	Under 100 milligrams	100 milligrams
PCP	Under 10 grams	10 grams
Methamphetamine	0.5 ounce	5 ounces
Marijuana	5 pounds or 10 plants	25 pounds or 50 plants

Many drug offenses carry mandatory minimum penalties under CDRA. If a defendant is convicted of manufacturing, distributing, or possessing first-degree amounts of heroin, cocaine, or LSD with intent to distribute, the judge must impose a prison term of between 10 and 20 years, along with a term of parole ineligibility that can range from one-third to one-half of the sentence imposed. For example, if a judge sentences a defendant to a prison term of ten years (the shortest available term for a first-degree offense), he or she must then impose a mandatory minimum term from within a range of three and a third years (a third of the 10-year sentence) and five years (half of the sentence). The mandatory minimum term can be waived, but only by the prosecutor. The same is true of mandatory minimum penalty that applies to drug-free zone offenses.

**Twice-criminalized: Drug-free zone statute allows defendants to be charged twice for the same conduct**

The zone laws were intended to supplement the general provisions that criminalize distribution or possession with intent to distribute drugs. Thus a person who sells drugs within a school zone faces sentencing for two offenses: manufacturing, distributing, or possessing illegal drugs with the intent to distribute, which carries a penalty that depends upon the type and weight of the drug; and manufacturing, distributing, or possessing the same illegal drugs with intent to distribute while in a prohibited zone, which carries a three-year mandatory minimum. A person with no prior record who sells less than a half-ounce of heroin or cocaine outside a school zone would be sentenced for a third-degree offense which carries a presumption in favor of a non-custodial sanction.



Within a school zone, however, the person would face a three-year mandatory minimum prison term.

If the amount of drugs reaches a first- or second-degree threshold, the defendant will be charged with both a first- or second-degree drug offense and a school zone offense. If convicted, the charges may then be merged for sentencing – with the defendant receiving a higher base term of prison for the weight, coupled with a mandatory minimum blended in from the school zone charge.

### **The Brimage Guidelines: Prosecutors' framework for using harsh penalties to generate guilty pleas**

While New Jersey's drug-free zone laws are similar to those of other states, the way drug-free zone cases are disposed in the state is unique. The Brimage Guidelines – named after the case of *State v. Brimage*<sup>37</sup> – are the result of a landmark New Jersey Supreme Court decision requiring that the state's prosecutors adopt uniform plea policies for drug cases in order to reduce disparity in sentencing under CDRA between different jurisdictions.

The guidelines set basic parameters that all county prosecutors must follow when making plea offers. Decisions that are made locally and behind closed doors by prosecutors in other states are made more consistent and transparent in New Jersey under the tightly structured guidelines, which use a point system to factor in "special offense characteristics" and the defendant's prior criminal record.

The guidelines are designed to encourage early pleas by escalating the offer as the case matures. A typical defendant charged with a first-offense sale of a third-degree quantity of drugs in a school zone, without aggravating circumstances, could obtain a 12-month minimum by entering a guilty plea before indictment. A guilty plea made shortly after indictment could result in an 18-month minimum term. A final post-indictment plea offer in such a case could be a 21-month minimum. Critics of the guidelines point out that in addition to pressuring defendants for early guilty pleas, the structure scales penalties up for aggravating factors, but fails to reduce them for mitigating factors. A full explanation of this distinctive plea-bargaining structure can be found in Appendix II - New Jersey's Brimage Guidelines.

In 2004, the guidelines were revised after a review requested by Attorney General Peter C. Harvey. The revisions, which exempt certain people charged with school zone offenses from the normal guideline calculations, were said to be designed to make better use of available correctional resources. The new guidelines lessen punishment for some who qualify for restrictive waivers, while also stiffening punishment for others who receive "street-gang" enhancements or violate drug offender restraining orders, or where weapons are involved.

Critics of the school zone law were not satisfied with the Brimage revisions. The strict criteria essentially define a profile of the people typically sentenced to probation in suburban and rural areas where school zones are widely dispersed and drug enforcement is less concentrated. They offer little or no relief, however, for the drug-addicted people who are more typically charged with school zone offenses in urban areas where opportunities for effective drug treatment are few, and aggressive drug enforcement results in netting the same people time and again.

## Reform efforts in New Jersey

The issue of racial disparity is of great concern to many people and organizations that work for change on criminal justice issues in New Jersey. For more than three decades, the American Friends Service Committee's Newark office has maintained a criminal justice program that seeks to safeguard the rights of prisoners, to assist their successful reentry from prison, and to increase public awareness about inequities and human rights abuses in prisons.

*New Jersey has the highest percentage of people imprisoned for drug offenses in the country – 36 percent, compared to a national average of 20 percent.*

The New Jersey Institute for Social Justice works to challenge the causes and ameliorate the impact of disparities in the administration of justice. In April 2003 the New Jersey Reentry Roundtable convened policymakers, researchers, and service providers to examine how incarceration impacts economic and racial inequality in the state. Later that year the Hispanic Directors Association of New Jersey convened the Community and Corrections Working Summit to address overrepresentation of blacks and Hispanics in the prison system.

Families Against Mandatory Minimums (FAMM) established an office in New Jersey in 2003. FAMM is a national nonprofit organization that works to restore judicial discretion in sentencing. The group, which also focuses on the disproportionate impact of mandatory sentencing policies on people of color, has nearly 2,000 members in New Jersey.

NJ FAMM quickly organized a vigorous campaign to press for creation of a sentencing commission and to place the school zone issue front and center on the reform agenda. Sentencing commissions bring together elected officials and criminal justice stakeholders to examine outcomes and address problems with the administration of justice. In many states, they have helped to promote a more rational sentencing policy process by providing policymakers with information as well as a discussion forum that is less susceptible to political pressures than most legislative bodies.

## New Jersey's Sentencing Commission weighs in

The New Jersey Commission to Review Criminal Sentencing was established by the New Jersey legislature in January 2004 and was up and running by midsummer. Chaired by Barnett Hoffman, who served as presiding judge of the Middlesex County court until his retirement from the bench, the panel members represent the state's criminal justice leadership establishment, including law enforcement.

The commissioners elected the drug-free zone laws as their priority issue and launched an investigation of their impacts.

In January 2005 FAMM staff released results from a public opinion poll conducted by Rutgers' Eagleton Institute showing that 80 percent of New Jerseyans favor mandatory drug treatment over mandatory prison terms to save correctional costs. Three-quarters favor using drug courts, and allowing judges discretion to set mandatory prison terms aside if they deem it appropriate.

"New Jersey residents overwhelmingly support giving back judges' ability to impose sentences based on all the facts in an individual case, including the potential for rehabilitation," said Laura Sager, FAMM's national campaign director. "Based on the polling results, we were convinced that the state's citizens would support fairer and more cost-effective sentencing policies for nonviolent, low-level drug offenses. Support for

### New Jersey Commission to Review Criminal Sentencing

Hon. Barnett E. Hoffman, Chair

Hon. Peter C. Harvey  
Public Member

Attorney General  
of New Jersey

both judicial discretion and treatment programs is very strong across the state, including the suburban areas.”

### **The sentencing commission identifies an “urban effect” driving the laws’ “devastating disproportionate impact on New Jersey’s minority community”**

In the commission’s December 2005 report to the legislature, Judge Hoffman, the commission’s chairman, charged that these laws result in “a devastatingly disproportionate impact on New Jersey’s minority community.” According to the commissioners, the problem stems primarily from the “urban effect” of the law’s current zone configuration. They argue that the enormous racial disparity produced by the school-zone enhancement is a function of differing population density in communities where the majority of whites and people of color live.

*Blacks and Hispanics make up 96 percent of those imprisoned for a drug-free zone offense.*

As Judge Hoffman has described, “Giant unbroken drug-free zones...actually dilute the special protection the laws are supposed to offer.” He says such overlapping zones create “a net so large that we pull in every fish whether it’s the type of fish we’re looking for or not.” Robert Bernardi, who represented the state’s prosecutors on the commission, put it this way: “You’re virtually in a school zone from the time you step into the city. That would not be the case in the suburbs.”

New Jersey is the most densely populated state in the nation. The state’s dense urban areas are predominately populated by blacks and Hispanics, while the suburbs and rural areas are predominately white. As the number of schools, parks, and housing projects per square mile increases, so does the likelihood of being caught in a protected zone:

“[T]he more densely populated the area, the greater number of schools. The more schools per square mile, the greater number of drug-free zones. The greater number of zones in a municipality, the more the zones intersect with one another, creating oddly shaped, overlapping entities that leave little else unencumbered.”<sup>38</sup>

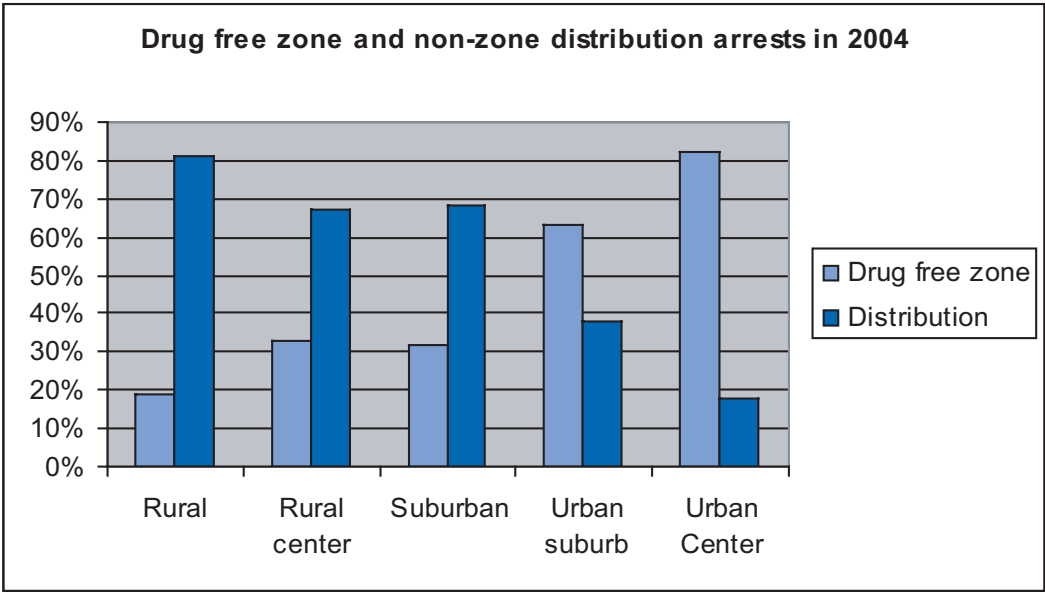
### **Drug-free zones blanket urban areas, covering 76 percent of Newark and over half of Camden and Jersey City**

The commission’s research team created digitized “geomaps” to aid their analysis of the zone perimeters for three of the state’s largest cities – Newark, Jersey City and Camden – revealing that these urban centers contain large areas where overlapping zones are uninterrupted.

Computer analysis of the geomaps indicated that if the city’s huge but unpopulated airport complex is excluded, 76 percent of Newark falls within a drug-free zone. Over half of Jersey City (54 percent) and Camden (52 percent) are blanketed by prohibited zones. In contrast, a geomap of rural Mansfield Township in Burlington County shows that just six percent of its area falls into a prohibited zone.

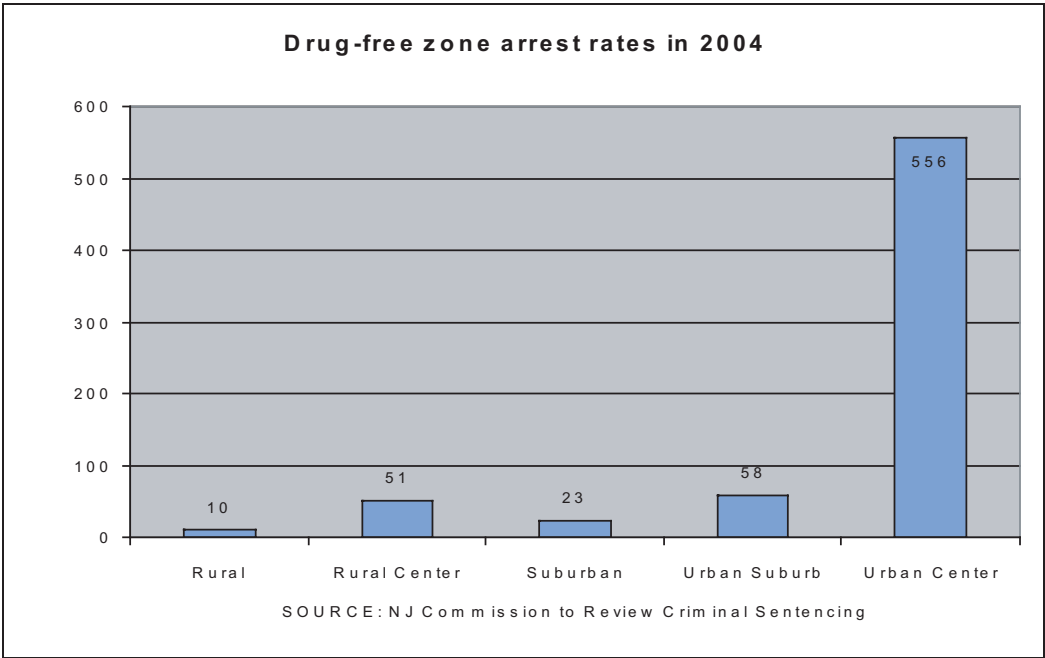
### **Drug-free zone arrests are concentrated disproportionately in urban areas**

Geographic data presented in the commission’s report support the argument that geography greatly affects the likelihood that a drug arrest will result in a drug-free zone charge. Just 19 percent of rural arrests take place in drug-free zones compared to 33 percent of arrests in rural centers, 32 percent in the suburbs, 63 percent of arrests in urban suburbs, and 82 percent of arrests in urban centers:



SOURCE: NJ Commission to Review Criminal Sentencing

The “urban effect” of the drug-free zone laws is amplified by the fact that drug enforcement efforts are largely concentrated in New Jersey’s urban centers, where they produce a very high rate of drug-free zone arrests:



Since New Jersey’s black and Hispanic population tends to be concentrated in the most densely populated areas of the state, blacks and Hispanics are disproportionately likely to fall within the reach of the law. Minority youths are, therefore, disproportionately subjected to harsh penalties while whites are largely exempt from them by virtue of geography.

**“Urban effect” or disparate treatment?  
Blacks are far more likely than whites to be arrested  
and convicted for drug-free zone offenses in urban and rural areas alike**

While the “urban effect” – the Commission’s term for the effect of population density on the likelihood of being arrested and convicted under the drug-free zone statute – is a necessary explanation for the laws’ racially disparate impact, it is not a sufficient explanation. If density alone were responsible for the laws’ impact, we would expect to see blacks and whites arrested and convicted at similar rates in rural, suburban, and urban areas, since the available research suggests that the race of drug users and sellers is likely to reflect local demographic patterns.

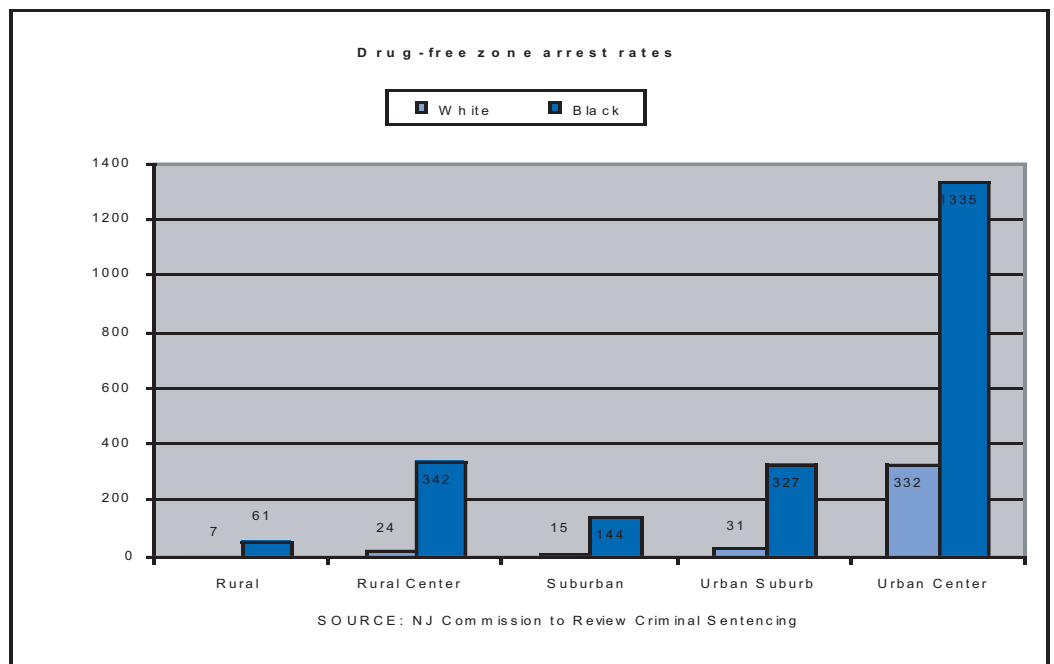
Reports from the federal Substance Abuse and Mental Health Services Agency on the prevalence of illicit drug use consistently show that blacks, whites, and Hispanics use at similar rates.<sup>39</sup> A National Institute of Justice study of drug purchase and use found that drug users most often obtain drugs from people with their own racial or ethnic background.<sup>40</sup>

Yet even after controlling for population density, blacks are far more likely than whites to be arrested and convicted for drug-free zone offenses. For example, blacks in suburban areas are nine times more likely to be arrested – and 19 times more likely to be convicted – for a drug-free zone offense than whites.<sup>41</sup> The disparity is even greater in rural centers, where blacks face a 14-times greater risk of arrest and 24-times greater risk of conviction than their white counterparts.

In fact, blacks in *rural* areas are twice as likely to be arrested for drug-free zone offenses as are whites in densely populated *urban suburbs*. Likewise, blacks in *rural centers* were more likely to be convicted of drug-free zone offenses than whites in *urban centers* where the zones are much more pervasive.

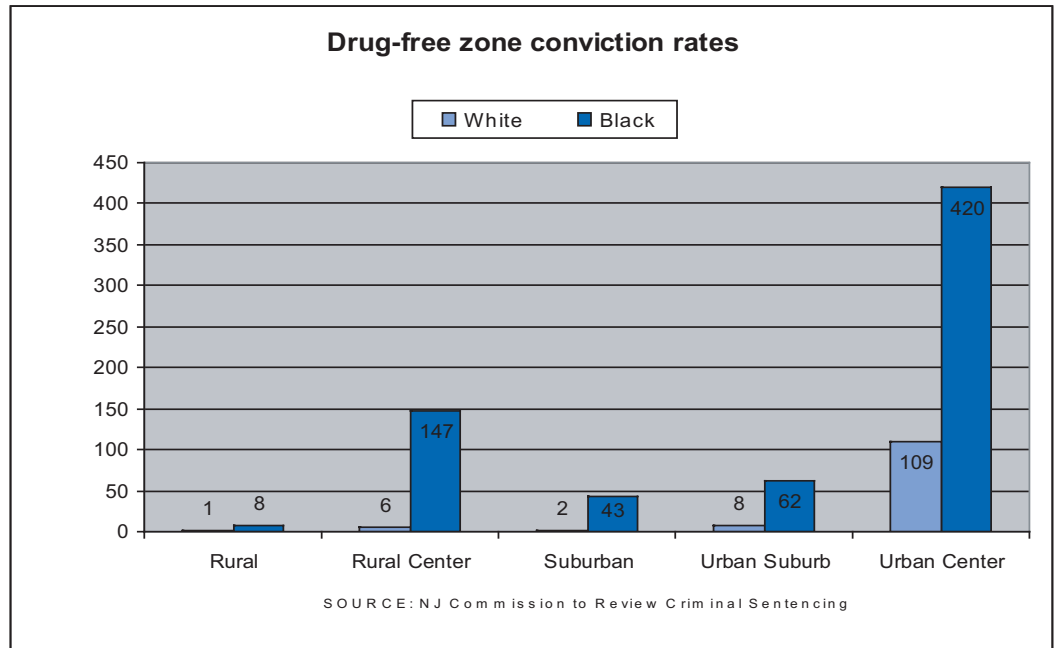
The disparities are most severe in less-densely populated rural and suburban areas, where school-zone arrests and convictions are less common. This raises questions about whether the disparities built into the drug-free zone laws are being exacerbated by disparate enforcement patterns.

**Blacks face four- to 14-times greater likelihood of drug-free zone arrest than whites after accounting for the type of jurisdiction**





**Blacks face four- to 24-times greater likelihood of drug-free zone conviction than whites after accounting for the type of jurisdiction**



*Sentencing commission chairman: "Giant unbroken drug-free zones...actually dilute the special protection the laws are supposed to offer."*

It is possible that these patterns of disparity could be attributable to differences among blacks and whites in terms of their level of involvement in drug activity or the likelihood of being present in a drug-free zone. But it is difficult to square national findings that suggest that blacks and whites have relatively similar levels of involvement in illegal drug activity with disparities in conviction rates that reach as high as 20 to one.

Instead, the data raise serious questions about the exercise of police and prosecutorial discretion in application of the state’s drug-free zone statutes. New Jersey’s history of problems with racial profiling is well known. Unfortunately, the report does not tackle the questions raised by the Dorchester study regarding the frequency with which white defendants who are eligible for drug-free zone charges are in fact charged with lesser offenses.

**Outside the Brimage Guidelines: What happens between arrest and conviction?**

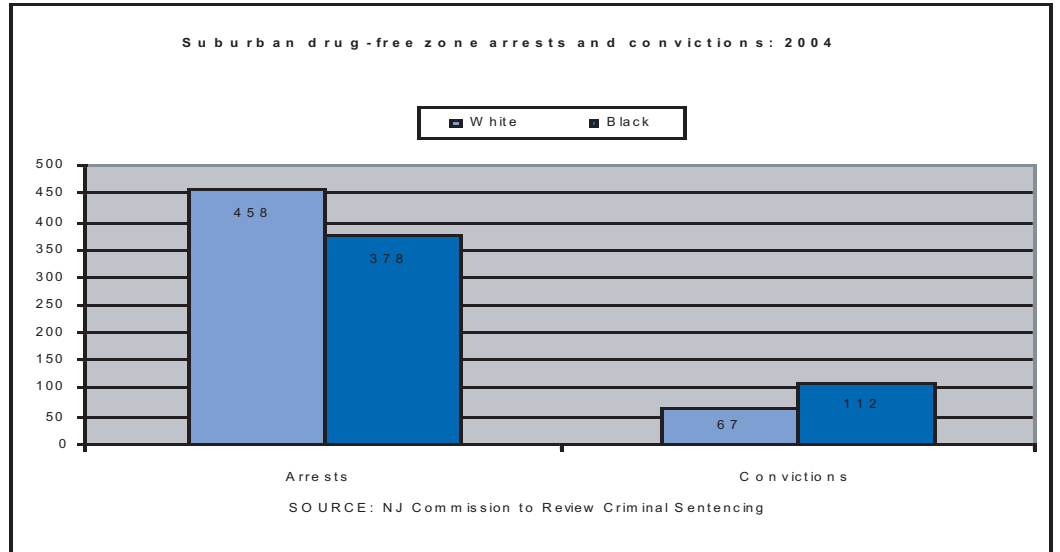
The data presented in the commission’s report comprise a one-year snapshot, and as a consequence, the arrest and conviction figures reflect an overlapping but different set of cases. Without being able to examine arrest and conviction data for a single set of drug-free zone cases, it is impossible to draw firm conclusions about how case disposition differs by jurisdiction. However, it is interesting to note that the ratio of drug-free zone arrests to convictions is much higher in rural and suburban areas than in urban centers.

In 2004, there were seven drug-free zone arrests for every drug-free zone conviction in rural areas, and nearly five in suburban areas, compared to just three arrests for each conviction in urban centers. While the difference could reflect year-to-year changes in arrests, it may also suggest that rural and suburban drug-free zone cases involving white defendants are more likely to be dismissed, diverted, or reduced to a lesser charge.

Of particular concern is the fact that, in suburban areas the ratio of arrests to convictions for whites was seven arrests to one conviction – compared to 3.5 arrests to one

conviction for blacks.<sup>42</sup> Despite the fact that whites were arrested in greater numbers in 2004 for suburban drug-free zone offenses, blacks ended up with nearly twice as many drug-free zone convictions that year:

**Whites arrested in greater numbers for suburban drug-free zone offenses but twice as many blacks convicted under statute**



The cumulative result of geography, demographics, and enforcement is the disproportionate rate of black and Hispanic confinement for drug-free zone offenses. While these two groups of people make up 26 percent of New Jersey’s residents, they comprise 96 percent of the people serving time for drug-free zone offenses in New Jersey’s prisons.

**Did New Jersey drug sellers “get the message?”  
Not according to drug-free zone arrest patterns**

Having determined that New Jersey’s drug-free zone laws are a major source of racial disparity in the state’s prisons, commission members then turned to the question of whether the laws are reaching the policy objective of shielding schools and other designated property from drug dealing activity. They concluded that, as presently written, the laws are not capable of doing so.

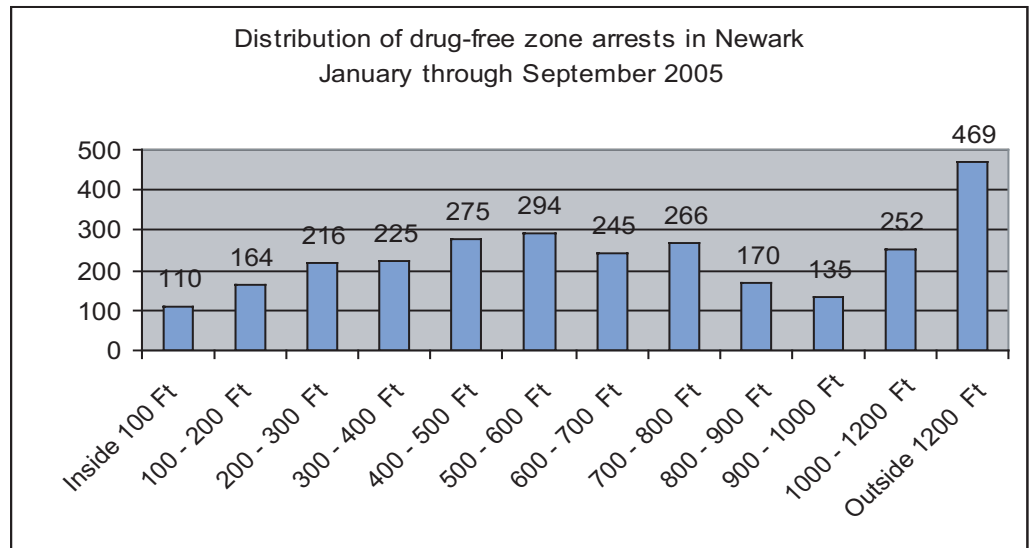
*Substance Abuse and Mental Health Services Agency: blacks, whites, and Hispanics use drugs at similar rates.*

The commissioners reasoned that if the school zone law was effective, its enforcement should have reduced the number of such offenses over time. The number of school zone arrests surpassed 9,000 in 1989 – two years after the law took effect – before beginning a slow decline that brought the figure down to just under 8,000 in 1993. But instead of continuing to fall as drug sellers “got the message,” arrests began to climb rapidly after 1993, peaking in 2002 with over 14,000 drug-free zone arrests.

Further, the commissioners reasoned that for these laws to act as an effective deterrent, individuals who engage in drug dealing should be both aware of the zoned locations and able to avoid doing business within them – and they suspected that neither condition was operating in New Jersey’s urban areas.

To test this thesis the research team obtained data for all drug distribution arrests made in Newark during the first nine months of 2005. They were able to geo-code the location of 84 percent (2,821) of the arrests, and to determine their proximity to a school.

If the zone laws were effective they would expect to see a large number of arrests made immediately outside the 1,000-foot perimeter. In fact, fewer than nine percent of distribution arrests were made between 1,000 and 1,200 feet from a school:



SOURCE: NJ Commission to Review Criminal Sentencing

### The reform: Enhancing deterrence and reducing disparity by “right-sizing” drug-free zones

The commissioners decided that the problem with the school zone law was its geographic over-breadth. They determined that the overlapping effect of the zones in urban centers actually dilutes the protective barrier that legislators intended to create for schoolchildren. They concluded that the solution was self-evident:

“[R]educe the surface area of the zones to establish smaller, more discrete and therefore more recognizable areas around those facilities entitled to greater protection.”

They recommended that the legislature should reduce the scale of both the school- and public-zone areas from 1,000 or 500 feet to just 200, arguing that the reform would result in “several salutary effects, including:

- “ensuring that the zones themselves are clearly recognizable by potential law breakers by approximating a line-of-sight approach;
- “minimizing arrests, charges, and convictions for transactions that clearly fall outside of the law’s original intent;
- “reducing, if not eliminating, the overlap of multiple zones that directly contributes to the previously discussed “urban effect,” thereby . . . .
- “substantially mitigating rural-suburban-urban sentencing disparity, along with its unintended consequence of disproportionately higher numbers of poor people and minorities in state prison.”

*National Institute of Justice: drug users most often obtain drugs from people with their own racial or ethnic background.*

The commissioners recommended elimination of the three-year mandatory minimum prison term required by the school zone statute. They argued that this measure strips judges of their traditional authority to take account of particular circumstances and considerations in individual cases.

Instead, they proposed upgrading the narrowly drawn measure to a second-degree indictable offense. This would subject those convicted of selling drugs within 200 feet of a school to a longer *presumptive* prison term – five to 10 years’ duration – but leave judges discretion to impose a lesser prison term or probation in cases where mitigating circumstances are found. They also recommended that because the new second-degree zone law would be subject to a significantly increased sentence range, a conviction should not qualify as a trigger for future mandatory enhanced punishment,<sup>43</sup> though judges would retain the discretion to impose extended terms for repeat offenders and mandatory terms of imprisonment when warranted.

Commissioners assert that, taken together, their recommendations would greatly reduce the number of drug-free zone arrests and convictions, while those convicted of selling drugs within 200 feet of schools, parks, and public housing would serve somewhat longer terms in prison. The recommendations were unanimous, endorsed by each and every member.

*Assemblywoman Mary T. Previte (D-Camden):  
“Drug dealing has been as prevalent inside the school zones as outside them. This legislation is not being soft on crime. It’s being smart on crime.”*

The commission’s bill, A4465, was sponsored by Assemblywoman Mary T. Previte (D-Camden) and Assemblyman Peter J. Barnes (D-Middlesex), chairman of the Assembly Committee on Law and Public Safety during the 2005 legislative session. “Drug dealing has been as prevalent inside the school zones as outside them,” according to Assemblywoman Previte. “This legislation is not being soft on crime. It’s being smart on crime.”

At the bill’s first hearing Assemblyman Barnes said enactment of the bill would place New Jersey as a leader among many states where policymakers are adopting more effective drug policies. “The national trend is to do exactly what we are doing here today.”

Testimony in support of A4465 was provided by the New Jersey Council of Churches, the National Council on Drug and Alcohol Dependency, Families Against Mandatory Minimums, the New Jersey Institute for Social Justice, and Integrity House – the largest substance abuse treatment program in the state. The bill won a majority vote in the committee. The bill is expected to be reintroduced this year. A senate bill, S278, which incorporates the commission’s recommendation for reform of drug-free zones, has been introduced by the senate majority leader, Bernard F. Kenny, Jr. (D-Hoboken).

## Connecticut

Zone size: 1,500 feet

Locations: Schools, day care centers, and public housing

Offenses: Distribution or possession with intent to distribute; simple possession

Connecticut ranks at the top in the nation in the degree of disparity between the rates of incarceration for whites and blacks.<sup>44</sup> Many who advocate for racial justice believe that the state's mandatory minimum drug laws – including statutes that enhance penalties for offenses that take place in prohibited zones – play a major role in fostering that racial disparity.

Connecticut's drug-free zone laws affect manufacture, sale, and possession of a drug or drug paraphernalia within 1,500 feet of a school, day care center, or public housing unit. The mandatory penalties were designed to operate as sentencing enhancements, and are imposed on top of whatever sentence a person receives for the underlying drug offense.

A three-year mandatory minimum sentence is provided for a non-drug-dependent person who sells drugs within 1,500 feet of an elementary or secondary school, a public housing project, or a licensed child day care center.<sup>45</sup> A mandatory two-year prison term is provided for anyone, other than a student enrolled in the school, who possesses illegal drugs in, on, or within 1,500 feet of an elementary or secondary school or licensed child day care center.<sup>46</sup>

Connecticut's first drug-free zone law was enacted in 1987. It provided a two-year mandatory minimum prison term for anyone convicted of selling drugs within 1,000 feet of school property. In 1989 legislators boosted the mandatory prison term to three years. In 1992 they increased the scope of the zones to 1,500 feet and increased the number of zones by adding public housing projects along with schools. In 1994 they expanded the scope of the laws again by adding licensed day care centers.<sup>47</sup>

Criticism of mandatory minimum drug laws led legislators to request studies of the state's drug policies in 1993. A Legislative Program Review and Investigations Committee report on substance abuse policies for juveniles and youth recommended that mandatory minimums be repealed. A second study, issued in 1997 by the Connecticut Law Revision Commission, also urged legislators to consider their elimination.<sup>48</sup>

In 1999 the legislature amended the parole eligibility statute to make prisoners serving mandatory minimum sentences eligible for parole release. In 2001 the state budget crisis, coupled with growing awareness about racial disparities, sparked a debate about Connecticut's drug-free zone laws.

Rep. Michael Lawlor (D-East Haven), Chair of the House Judiciary Committee, reported that drug-free zone laws were producing relatively severe sentences for blacks and Hispanics in cases involving sale or possession of small amounts of drugs:<sup>49</sup>

“Informal analysis of court outcomes demonstrated heavy reliance on the school zone mandatory minimums to gain advantage in plea bargaining. In many cases extraordinary high bail amounts forced defendants to bargain while in custody in the hope that a prosecutor would substitute a non-school-zone charge as part of a plea agreement. In the vast majority of these prosecutions, the defendant both belonged to a minority group and resided in one of the state's urban areas.”

Lawlor believes that racial disparities in prisons and jails, while unintended, are the inevitable consequence of legislators in his state responding to crime problems with directives to “fight the drug war in urban areas.” In discussions with police, prosecutors, and defense lawyers, Lawlor ascertained that these laws, which require no nexus between a drug offense and the groups legislators intended to protect (schoolchildren and public housing tenants), were being enforced without regard to the circumstances of the offense:



“Arrests at 3:00 a.m., or during school vacation, or involving middle-aged junkies selling drugs to one-another were charged the same way as actual sales to schoolchildren.”

### **Prohibited zones blanket communities where blacks and Hispanics live but are few and far between in communities where whites predominate**

Sarah Bray, a post-doctoral fellow at the Yale Center for Interdisciplinary Research on AIDS, conducted research on Connecticut’s drug-free zone laws for A Better Way Foundation in 2001. She was concerned that laws intended by legislators to protect schoolchildren were exposing the drug users who happen to live within such zones to a greater risk of mandatory prison terms than drug users who live elsewhere.

*Legislative Program Review and Investigations Committee: “mandatory minimum sentencing laws achieve few of their stated substantive objectives and do not work.”*

She tallied the number of drug-free zones in 166 cities and towns and used land-area data to calculate the density of the zones for each locality. Then she compared demographic data for each locality and found clear correlations between racial and ethnic composition and the frequency of the zones. She found that localities where more than 25 percent of residents were black or Hispanic had zone densities that averaged more than six times higher than the average for localities where less than 10 percent of residents were black or Hispanic (3.3 compared to 0.5 zones per square mile). Hartford, Bridgeport, and New Haven – where blacks and Hispanics are in the majority – had 5.3 zones per square mile, with each zone occupying at least a quarter of a square mile.

Bray emphasized that Connecticut’s zone laws do not apply to drug dealing alone – they also provide a mandatory minimum prison sentence for possession of drugs.<sup>50</sup> “It is abundantly clear,” according to Bray, “that the distribution of drug-free zones is not simply an urban-suburban issue: it is a race issue.”

Arguments such as these led legislators to modify the mandatory minimum sentencing statutes for most drug sale offenses – in effect, turning the mandatory minimum terms into a presumptive sentence. Now, in cases involving a first sale offense, judges are granted discretion to depart from the prescribed term at sentencing if they state, for the record, the justification for imposing a lesser sentence.

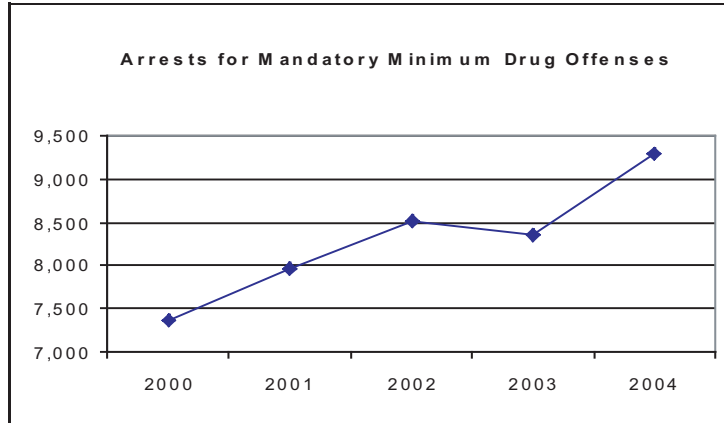
### **“Mandatory minimum sentencing laws achieve few of their stated objectives and do not work”**

In 2005 the Legislative Program Review and Investigations Committee undertook another study of mandatory minimum sentencing. In their preliminary briefing report, committee staff asserted that Connecticut’s mandatory minimum sentencing laws are failing their intended purposes, but serve as a tool for prosecutors in plea bargaining:

*“Mandatory minimum sentencing laws were intended to deter offenders and thereby reduce crime (and curb drug use). Criminal justice research and sentencing experts have found and Connecticut criminal justice administrators agree, however, that mandatory minimum sentencing laws achieve few of their stated substantive objectives and do not work. However, mandatory minimum penalties are an effective and efficient prosecutorial tool to negotiate pleas and sentences and, as a result, very few offenders are actually convicted of offenses subject to mandatory minimum penalties.”<sup>51</sup>*

In their final report the committee staff noted that there has been no appreciable decline in drug use or drug trafficking since the introduction of mandatory drug laws.<sup>52</sup> Further, the number of arrests for these offenses is on the rise.

## No deterrence: Mandatory minimum drug arrests keep climbing

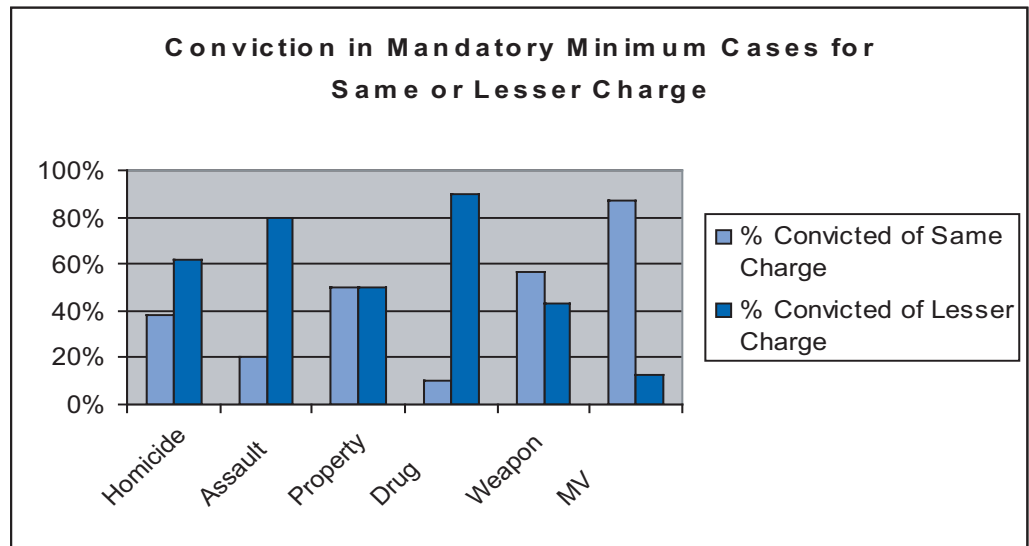


SOURCE: Program Review and Investigations Committee

Half of those arrested for mandatory minimum drug offenses are black and another 13 percent are Hispanic.

The impact of Connecticut's mandatory minimum drug laws is largely felt through the plea bargaining process. Ninety percent of those arrested on mandatory drug charges and convicted are convicted on a lesser charge. Defendants arrested on non-drug mandatory charges had a much higher likelihood of being convicted on the original mandatory charge.

## Mandatory drive plea bargaining for drug cases: 90 percent plead to lesser charge



SOURCE: Program Review and Investigations Committee

## Of 300 mandatory minimum drug sale cases, 95 percent took place in prohibited zones

The committee staff drew a sample of 300 mandatory minimum drug sale cases to look at recent case processing and disposition patterns. Almost all of the arrests – 95 percent – took place in drug-free zones.

The staff found that mandatory minimum drug sale arrests result from routine police patrol or drug investigations, rather than victim or citizen complaints. None of the drug sale arrests directly involved a victim who reported the crime to the police, and no victims were reported by police as part of drug sale cases. In a few cases the drug arrests resulted from increased police patrols in response to general citizen complaints about illegal drug activity, but in only one case was the arrest directly initiated in response to a citizen complaint.

*Lorenzo Jones, A Better Way Foundation:  
Because of the way the zones overlap in poor urban neighborhoods, they don't work effectively to protect our kids.*

### **The “urban effect” in Connecticut: Cities are blanketed by sprawling, hard-to-distinguish zones while the law’s impact in suburban and rural areas is minimal**

The committee staff made a special effort to study how mandatory minimum drug arrests are distributed across different localities. They created maps of the drug-free zones in 12 municipalities that ranged from urban, “urban-like” suburban, suburban, and rural in their demographic characteristics.

While almost 90 percent of arrests are made by municipal police, the staff found that data from these agencies were not available. They were, however, able to obtain arrest data for drug sales and possession between July 1, 2004 and July 31, 2005 from the Division of State Police, which coordinates Connecticut’s statewide narcotics task force and patrols the state’s highways. The mapping of these drug arrests led to several conclusions:

- The drug-free zones tend to overlap, particularly in larger municipalities, which have many more schools often in less space than suburban and rural towns.
- A significant percentage of the total geographical areas of urban areas and “urban-like” suburbs municipalities are “drug-free” zones. Bridgeport, Hartford, and New Haven are almost totally covered with drug-free zones.
- Drug-free zones in suburban municipalities tend to cluster in or near the downtown areas. These zones also tend to be located along major highways and roads, and many of the drug crime arrests made by state police occurred on a state highway.
- Rural municipalities tend not to have public housing, and the drug-free zone areas account for a low percentage of total area. The drug-free zones in rural areas cluster around schools.
- Drug sellers and users are not likely to be able to identify whether they are actually in a drug-free zone.
- Almost all drug crime arrests made by the state police in urban and “urban-like” suburban municipalities are within drug-free zones and therefore are subject to mandatory minimum penalty enhancements.
- Almost all drug crime arrests made by the state police in suburban and rural municipalities are outside drug-free zones.

### **Seven in eight arrests occurred outside traditional school hours, and just three cases were linked to schools**

Moreover, the Legislative Program Review and Investigations Committee showed no patterns in the circumstances of these arrests that provided a nexus to the legislative intent of the of the drug-free zone laws:

- Drug arrests were not more likely to occur during the traditional school year than other months (July through August).
- Most drug crime arrests (78 percent) occurred between 4:00 p.m. and 12:00 a.m. Ten percent occurred between 12:00 a.m. and 6:00 a.m. Just 12 percent occurred during the traditional school hours of 7:00 a.m. to 4:00 p.m.

*Connecticut ranks at the top in the nation in the degree of disparity between the rates of incarceration for whites and blacks.*

- In the majority of cases the illegal drug activity occurred in a housing project in which the arrestee lived or a private residence in a “drug-free” zone.
- Except for three cases in which students were arrested on drug charges at their schools, none of the arrests occurring in “drug-free” school zones were linked in any way by the police to the school, a school activity, or students.

Spurred by grassroots activists pressing forcefully for reform, Connecticut legislators have begun to see that with their state ranked number one for racial disparity in incarceration rates, drug policy reform is a critical issue for those working for racial justice. In 2005 the Connecticut Alliance, a statewide grassroots campaign, targeted elimination of disparity between the weight triggers for crack and powder cocaine as the top priority. Legislators responded by enacting crack/powder equalization.

This year the Alliance is focused on reform of Connecticut’s drug-free zone laws. HB 5780, “An act concerning safe schools,” is under consideration in the Judiciary Committee. The bill would narrow the scope of the zones from 1,500 to 200 feet for the perimeter of the prohibited structures and locations, and would require the posting of signs to mark the boundaries of the drug-free zones.

Lorenzo Jones directs A Better Way Foundation, an organization in the forefront of efforts to shift Connecticut drug policies from incarceration to substance abuse treatment and public health. He says that the primary goal of drug policy reform effort has to be racial equity. “Whether you agree with the theory behind the school zone laws or not, the fact that these laws are really only enforced in urban areas where poor people live raises big issues for us. Because of the way the zones overlap in poor urban neighborhoods, they don’t work effectively to protect our kids. But they are one of the reasons why almost 70 percent of the people in our prisons are black and Latino.

“The laws aren’t effective in the rural areas and the suburbs either, because the police hardly ever make school zone arrests in those places. Meanwhile, almost 80 percent of those who die from a heroin overdose in Connecticut are white people who mostly live in the suburbs. We can create a policy that would actually address these problems effectively. If we narrowed the zones to 200 feet we could reduce the problem of racial disparity, spend less money locking people up, and have more money to spend on addiction treatment programs and public health.”

# Utah

In Utah, the chair of the Board of Pardons and Parole has cited the state's drug-free zone enhancements as the drug policy issue that is most deserving of legislative attention. Utah's zone statute is among the most all-encompassing in the nation, applying to both possession and sale of drugs within 1,000 feet of schools, childcare facilities, parks, churches, shopping malls, sports facilities, or parking lots. A second statute applies within 500 feet of residences, places of business, and schools and churches, providing a penalty enhancement for manufacture, or aiding manufacture, of prohibited drugs, and for possession or sale of lab equipment where there is reasonable cause to believe they will be used for a clandestine laboratory operation.

The effect of these enhancements is to increase the normal drug penalty by one degree. For example, in Utah a first-offense sale of any amount of cocaine is a second-degree felony with a penalty range of one to 15 years in prison. But if the offense is committed within a specified zone it becomes a first-degree offense with a penalty range of five years to life. Parole board members are troubled that the resulting sentences are disproportionately long, reflecting a penalty range traditionally reserved for those convicted of first-degree offenses – rape, armed robbery, and murder.

Utah's zones tend to overlap, encompassing much, if not most, of the land within populated areas. Board members charge that because of its overreach, the statute has a perverse effect that is unrelated to the harms the legislature intended to prevent. Most of those charged under an enhancement have only an accidental or incidental connection to any of the locations cited in the statutes.

The Utah Sentencing Commission has determined that most drug offenses that qualify for an enhancement actually occur within a residence which simply happens to be located in a 1,000-foot zone. They also noted that few of these offenses are committed in the presence of children.

Most of those who are charged with a penalty enhancement either live or work within a zone, and would find it difficult to avoid the area of prohibition. They also cite instances where law officers have deliberately lured people inside a zone in order to make an arrest that will trigger the enhancement.

Parole board members argue that the enhancement is counterproductive and unfair. It coerces many defendants into pleading guilty to weak cases that might have otherwise been challenged or dismissed at trial. The long sentences that result are not conducive to rehabilitation – prolonging the process at a high cost to the public and the prisoners, their families, and communities. The board recommends that legislators replace the drug-free zone enhancement with a narrowly tailored enhancement for those convicted of selling or manufacturing drugs in the presence of children. While no action was taken during the 2006 legislative session, the issue will be reviewed in the interim.

"There's virtually no place in urban Utah where this penalty enhancement can't be used by prosecutors to pile on time for drug offenders or coerce defendants to plead to a deal that hurts their interests while burnishing the resumes of prosecutors. Worse, this enhancement has failed utterly to do what it intends – protect children," says Steve Erickson, director of the Citizens Education Project.

## Washington

Zone size: 1,000 feet

Locations: Schools, school bus stops, parks, public housing, and designated civic centers

Offenses: Distribution or possession with intent to distribute

Under Washington's penal code, manufacturing, selling, delivering, or possessing drugs with intent to sell in a school, on a school bus, within 1,000 feet of a school bus route stop, within 1,000 feet of the perimeter of school grounds, in a public park, in a public housing project designated as a drug-free zone, at a civic center, or within 1,000 feet of a civic center designated as a drug-free zone subjects a person to a two-year enhancement of the standard sentence range and doubles the penalties authorized by statute. The drug-free zone provision was enacted as part of the 1989 Omnibus Drug Act which also doubled prison sentences for dealing heroin and cocaine. The public park and public housing provisions were enacted in 1996 and 1997.

### **Inclusion of school bus stops extends the reach of drug-free zones to rural and suburban areas**

Washington appears to have the distinction of being the only state in the nation to apply a 1,000-foot drug free zone to school bus stops around the clock. According to the NAMSDL survey, just four states draw drug-free zones around bus stops. Among the other three states, two have statutes that limit application of the law to times when schoolchildren are likely to be present.<sup>57</sup> Pennsylvania, like Washington, has established a 24-hour drug-free zone surrounding school bus stops. But the radius of the zones is limited to 500 feet – just half the size of the 1,000-foot zone that surrounds Pennsylvania's schools.

School bus stops – defined in Seattle to include public transit stops because some students ride city buses to their schools – are far more numerous and widely dispersed than schools, parks, and public housing projects. As a consequence, court officials say, drug-free zones are nearly ubiquitous – not only in the state's urban areas but in many suburban and rural areas as well. According to Russell Hauge, the prosecuting attorney for Kitsap County which lies across the Puget Sound from Seattle, his prosecutors can almost always find a school or school bus stop within 1,000 feet of the site of a drug transaction.

From the standpoint of driving drug activity away from schools and other designated locations, the near omnipresence of prohibited zones in Washington state would seem to make the law unworkable. As both Brownsberger and New Jersey's sentencing commissioners point out, drug sellers have no incentive to move their business away from schools if they face the same enhanced penalties no matter where they ply their trade.

### **Drug-free zones or "due process free zones"? Prosecutors wield law to secure guilty pleas**

Washington state prosecutors and defenders alike acknowledge that the principal function of the drug-free zone enhancements is not to sanction those who sell drugs in the presence of children but instead, in the words of one prosecuting attorney, to "clear the trial calendar." He says that if a drug defendant rejects a plea offer made by an assistant DA early in their case, the charge will be amended to include a drug-free zone enhancement where applicable.

Analysis of sentencing data provided by the Washington State Sentencing Guidelines Commission provides support for the view that, especially in large urban courts, the "deterrent" effect of the drug-free zone law is to persuade drug defendants to plead guilty rather than to exercise their right to a trial.

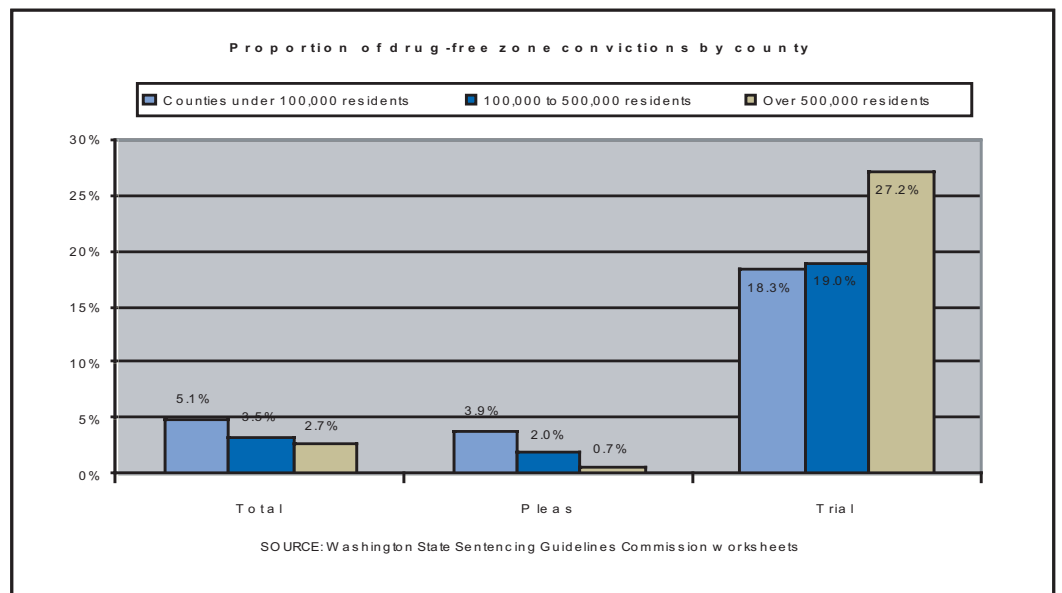
The data records from felony cases sentenced between July 1, 1999 and October 13,



2005 show that, on the whole, less than four percent of drug cases resulted in a drug-free zone conviction. Although drug-free zone convictions account for 3.5 percent of all drug cases, and just 1.8 percent of drug cases disposed by plea agreements, among cases disposed at trial, 22 percent resulted in a drug-free zone enhancement. In the three largest counties (King, Pierce, and Snohomish), 27 percent of cases disposed at trial resulted in drug-free zone enhancements. These patterns support practitioners' claims about the drug-free zone statute: that it is routinely used as a "trial penalty" which helps to persuade defendants that they should plead guilty rather than risk facing an enhanced prison term.

Further, unlike in New Jersey – where drug-free zone convictions are generated at much higher rates in densely populated urban areas – Washington's *least* populous jurisdictions appear to make the greatest use of the drug-free zone enhancement. In the smallest counties, those with resident populations of 100,000 or less, 5.1 percent of drug case sentences include the enhancement, while in the three largest counties the enhancement appears in just 2.7 percent of sentenced drug cases. Annual drug-free zone conviction rates are also highest in the least populous counties (2.1 convictions per 100,000 residents) and lowest in the most populous counties (0.7 per 100,000 residents).

### The trial penalty: Drug defendants who go to trial are four to 30 times more likely to get drug-free zone enhancement



The use of the drug-free zone statute to "hammer" out guilty pleas raises disturbing questions about whether "drug-free zones" have in fact become "due-process-free zones." It is not hard to see how the process not only erodes the due process rights of individual defendants but can also subject entire communities to high levels of incarceration. The Tulia cases cited above vividly demonstrate that, while it may not happen often, drug-free zone laws can be used to blackmail innocent people into pleading guilty.

### Reform: King County revises charging guidelines to restrict use of the enhancement

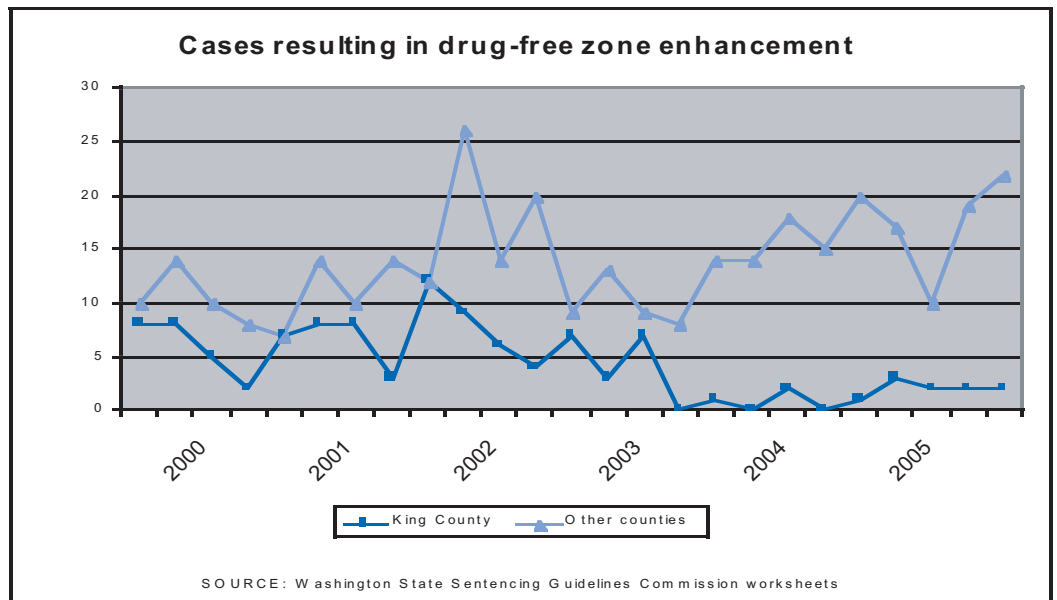
It is refreshing, therefore, to find that at least one prosecutor's office recently adopted a less cynical and more rational approach to enforcement of the drug-free zone statute. In 2002, Norm Maleng, the prosecuting attorney for Seattle's King County, issued a set

of plea negotiation guidelines that restrict use of the drug-free zone statute. Prosecutors are instructed not to add the enhancement in cases where the location of a drug sale was selected by law enforcement; where there no nexus existed between the intent to deliver and the location of a sale; or, in bus stop zone cases, if the offense took place before 7:00am or after 6:00pm.

Mark Larson, Maleng’s chief deputy for the Criminal Division, explains that the decision to limit drug-free zone prosecutions was taken in 2002 at a time when both the prosecutor’s office and state policymakers were taking a broad look at whether drug law enforcement was meeting the desired objectives. “We recognized that the enhancements could be more surgically applied to carry forward legislative intent.”

The sentencing commission data show that the change in charging policy corresponded to a sharp drop in the number of King County cases that result in a drug-free zone enhancement – from between 20 and 30 each year to fewer than 10. The period in question also saw an overhaul of the state’s drug sentencing structure, so it is possible that other factors also contributed to the drop in drug-free zone prosecutions. As the chart below demonstrates, however, elsewhere in the state the number of cases sentenced with drug-free zone enhancements has been growing, which suggests that the trend has more to do with shifting practices in King County than with changes in state law.

### Use of drug-free zone enhancement falls in King County while rising elsewhere in the state



### The drug-free zone “trial penalty” fell harder on blacks than whites

Blacks make up just three percent of the state population in Washington. But they are heavily overrepresented in the state’s correctional facilities, where they account for one in five prisoners, as well as the state’s criminal courts. The disproportion in felony sentencing is slightly greater for drug offenses, where blacks comprised 16 percent of defendants in fiscal year 2005 compared to 14 percent of defendants in non-drug cases.

Perhaps as an ironic consequence of the “bus-stop effect,” which exposes a greater proportion of rural and suburban residents to drug-free zones, the drug zone laws do not

appear to be driving racial disparity in incarceration rates in the same way that they do in states like New Jersey. However, analysis of drug-free zone enhancements imposed in the state’s largest jurisdictions shows some evidence that blacks are more likely to be sentenced under the law.

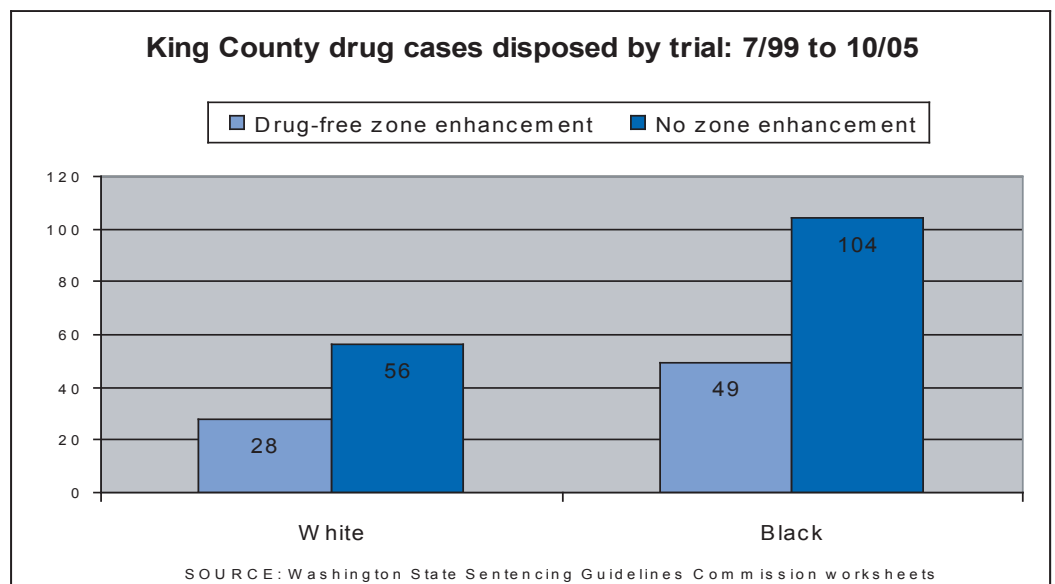
In Washington’s small and mid-sized counties (with populations up to 500,000), the proportion of black and white drug defendants sentenced with a drug-free zone enhancement is roughly equal (5.3 percent and 5.1 percent, respectively, in the smallest counties and 3.4 percent each in the medium-sized counties). In the largest counties, however, the proportion of black drug defendants sentenced with a drug-free zone enhancement was twice as large as the proportion of whites (4.1 percent and 1.9 percent respectively).

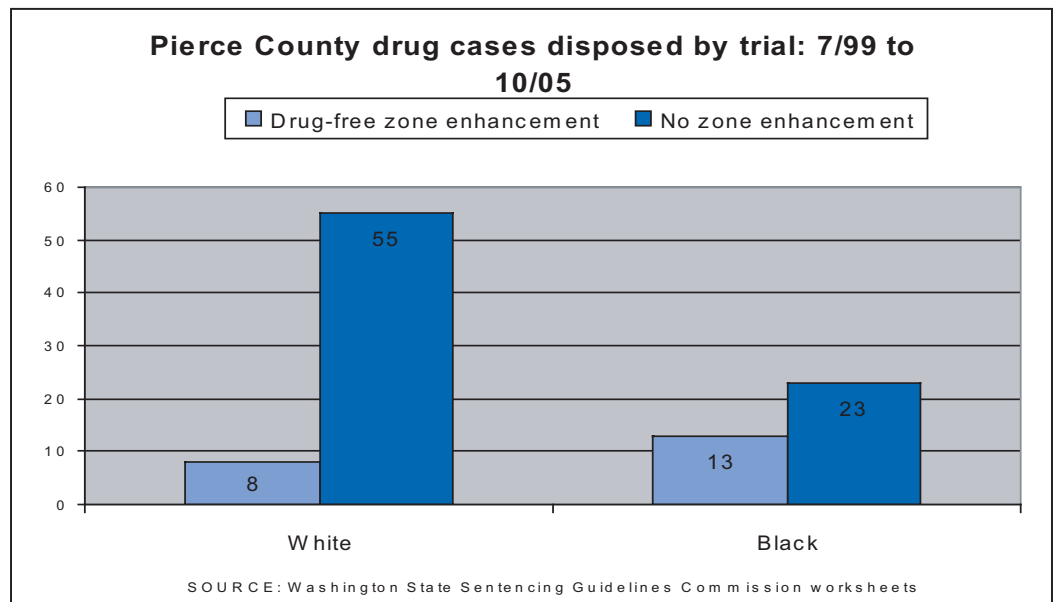
In part, this appears to be a consequence of the fact that the “trial penalty” fell harder on black defendants who were more likely to take their cases to trial. In King County, 11 percent of black drug defendants were convicted at trial compared to seven percent of whites. In Pierce County, eight percent of blacks and six percent of whites were convicted at trial.

Looking only at defendants who were convicted at trial, it becomes clear that, in King County, blacks and whites sentenced for drug offenses were equally likely to have received a drug-free zone enhancement (32 percent and 33 percent, respectively). On the other hand, in Pierce County, blacks who went to trial and were convicted of drug offenses were nearly three times more likely than their white counterparts to have received the school-zone enhancement (36 percent and 13 percent, respectively).

Without making a close analysis of the cases in question, it is impossible to know whether the disparity found in the Pierce County cases was warranted by the conduct of the defendants in question or other relevant factors. But given the evidence of disparities in the enforcement of drug-free zone laws found in Dorchester – not to mention the sharp disparities in arrest and conviction rates in New Jersey – however, it is a question that deserves close scrutiny.

**In King County (Seattle) , blacks and whites were equally likely to receive a drug-free zone enhancement if they went to trial. But in Pierce County (Tacoma), blacks who went to trial were more likely to receive the enhancement than whites**





### Reform: A legislative proposal to shrink the zones

*Prosecuting attorney for Kitsap County: prosecutors can almost always find a school or school bus stop within 1,000 feet of the site of a drug transaction.*

Reflecting growing concern over the law’s broad reach, last year Senator Adam Kline (D – Seattle) introduced a bill to reform Washington’s drug-free zone statute. SB 5258 would have decreased the space restriction around school grounds and school bus route stops from 1,000 feet to 200 feet, and would have specified that the restrictions would apply, respectively, during regular school hours and during the time that students are waiting for a bus or being discharged.

Jennifer Shaw, Legislative Director for the American Civil Liberties Union of Washington, believes that, although the legislature did not act on Kline’s bill in the 2005-06 session, the drug-free zone issue will be back. “Our drug-free zone laws are failing kids while placing a heavy burden on communities and taxpayers. Senator Kline’s bill represents a pragmatic approach to protecting children from drug activity, and we think support for reform will grow as the public learns more about how the law is really being used.”

Russell Hauge, who represents the state’s prosecuting attorneys in Olympia, is less sanguine about proposals to scale back Washington’s drug-free zone laws. Instead, Hauge indicates that he and other prosecutors would like to see treatment-based approaches such as drug treatment courts be given an opportunity to work.

## Conclusion

A substantial body of evidence from research and policy studies indicates that drug-free zone laws, as they are typically configured, are not effective in reducing the sale or use of drugs, or in protecting school children – and the role these laws play to increase unwarranted racial disparity is well documented. The case studies detailed in this report demonstrate that policymakers in jurisdictions from coast to coast are moving to reform or replace drug-free zone laws with more effective measures. These include:

### 1) Shrinking the size of the zones to 200 feet

- **New Jersey:** The sentencing commission recommended that lawmakers narrow the zones to 200 feet: “[R]educe the surface area of the zones to establish smaller, more discrete and therefore more recognizable areas around those facilities entitled to greater protection.” Bill S 278 incorporates the commission’s reform recommendation.
- **Connecticut:** HB 5780, “An act concerning safe schools,” is under consideration in the Judiciary Committee. The bill would narrow the scope of the zones from 1,500 to 200 feet from the perimeter of the prohibited structures and locations, and would require the posting of signs to mark the boundaries of prohibited zones.
- **Washington:** Senator Adam Kline (D – Seattle) introduced a bill to reform Washington’s drug-free zone statute (SB 5258). Kline proposed that decreasing the space restriction around school grounds and school bus route stops from 1,000 feet to 200 feet, and specifying that the restrictions apply, respectively, during regular school hours and during the time that students are waiting for a bus or being discharged.

### 2) Replacing drug-free zone laws with laws that target the problem

- **Utah:** The parole board recommends that legislators replace the drug-free zone enhancement with a narrowly tailored enhancement for those convicted of selling or manufacturing drugs in the presence of children.
- **Illinois:** Illinois law had provided automatic transfer of 15- and 16-year-olds charged with drug crimes within 1,000 feet of a school to adult criminal court without judicial review. In 2005, Governor Rod Blagojevich signed SB 283 – giving judges discretion to determine whether a youth will be prosecuted as an adult or a juvenile for drug offenses.

*Seattle King County prosecutor: “We recognized that the enhancements could be more surgically applied to carry forward legislative intent.”*

## **Appendix I - Methodology**

Our research entailed compilation and analysis of data and findings from several important studies that address the lack of efficacy of drug-free zone laws, and well as their racial impacts, in Connecticut, Massachusetts, and New Jersey. Additional data was drawn from the annual report of the Massachusetts sentencing commission, and from the electronic case files generously shared by the staff of the Washington State Sentencing Commission. Our analysis of available data was greatly informed by interviews with researchers, reform advocates, and criminal justice officials in Connecticut, Massachusetts, New Jersey, New York, Utah, and Washington.



## Appendix II- New Jersey's Brimage Guidelines

New Jersey prosecutors are allowed to waive the statutory term in exchange for a plea of guilty unless the person actually sold drugs to a minor or on school property. In 1998 the New Jersey Supreme Court decreed in *State v. Brimage*, 153 N.J. 1, that allowing each county prosecutor's office to adopt its own plea policies for drug cases resulted in inter-county disparity, thus violating the state's predominant goal of uniformity in sentencing. The Attorney General's office responded by formulating uniform guidelines that set forth basic parameters that all county prosecutors must follow when making plea offers.

The Brimage Guidelines require prosecutors to fill out a complex "plea negotiations worksheet" that translates relevant factors in a drug case to a point system. A prosecutor decides whether there are any "special offense characteristics" (i.e. the amount of drugs involved; whether a firearm or other weapon was possessed or used). A point value is assigned to each aggravating or mitigating factor, and a point system is used as well in scoring a defendant's prior criminal history. These calculations are used to determine the appropriate sentence from a grid-style matrix that contains "authorized plea offers."

The matrixes are designed as a hammer to encourage early pleas. The vertical axis of the matrix presents a ranked set of "offense descriptions" and the horizontal axis presents "criminal history categories." As can be seen in this table that governs plea offers in school zone cases, plea offers are structured to escalate as a case matures:

		Criminal History Category					
OFFENSE DESCRIPTION	TIMING	I Minor	II Significant	III Serious	IV Extended Term	V Enhanced Extended Term	
A. 2C:35-7 less than 1 oz. of marijuana no weapons	Pre-Indictment	270* 364* 9	364* 9 12	9 12 18	18 24 30	24 30 36	
	Initial Post-Indictment	364* 9 12	9 12 18	12 18 24	24 30 36	30 36 42	
	Final Post-Indictment	9 12 15	12 15 21	15 21 27	27 33 39	33 39 45	
B. 2C:35-7 less than 1 oz. of marijuana weapons	Pre-Indictment	9 12 18	12 18 24	18 24 30	30 36 42	36 42 48	
	Initial Post-Indictment	12 18 24	18 24 30	24 30 36	36 42 48	42 48 54	
	Final Post-Indictment	15 21 27	21 27 33	27 33 39	39 45 51	45 51 57	
C. 2C:35-7 other than less than 1 oz. of marijuana no weapons	Pre-Indictment	9 12 18	12 18 24	18 24 30	30 36 42	36 42 48	
	Initial Post-Indictment	12 18 24	18 24 30	24 30 36	36 42 48	42 48 54	
	Final Post-Indictment	15 21 27	21 27 33	27 33 39	49 45 51	45 51 57	
D. 2C:35-7 other than less than 1 oz. of less marijuana weapons	Pre-Indictment	12 18 24	18 24 30	24 30 36	36 42 48	42 48 54	
	Initial Post-Indictment	18 24 30	24 30 36	30 36 42	42 48 54	48 54 60	
	Final Post-Indictment	21 27 33	27 33 39	33 39 45	45 51 57	51 57 63	
E. 2C:35-7 2nd degree amount no weapons	Pre-Indictment	12 18 24	18 24 30	24 30 36	36 42 48	42 48 54	
	Initial Post-Indictment	18 24 30	24 30 36	30 36 42	42 48 54	48 54 60	
	Final Post-Indictment	21 27 33	27 33 39	33 39 45	45 51 57	51 57 63	
F. 2C:35-7 2nd degree amount weapons	Pre-Indictment	18 24 30	24 30 36	30 36 42	42 48 54	48 54 60	
	Initial Post-Indictment	24 30 36	30 36 42	36 42 48	48 54 60	54 60 66	
	Final Post-Indictment	27 33 39	33 39 45	39 45 51	51 57 63	57 63 69	

\*Denotes days in county jail as a condition of probation (no parole ineligibility). If the offense involves a first-degree amount of methamphetamine or marijuana, use Table #3 (See Special Offense Characteristic #3 in Part IV.)

As depicted here, plea agreements in school-zone cases can result in substantial reduction of the three-year statutory mandatory minimum. The mid-range number applies unless the totaled point values for aggravation or mitigation indicate that the offer should be increased or decreased within the specified range (e.g., nine to 18 months in a pre-indictment plea).

A typical first-time defendant charged with selling a third-degree quantity of drugs in a school zone, without aggravating or mitigating circumstances, could obtain a 12-month minimum by entering a guilty plea before indictment. A guilty plea made shortly after indictment could result in an 18-month minimum term. A final post-indictment plea offer in such a case could be a 21-month minimum. In some instances, however, the recommended sentence is longer than the mandatory minimum required by the drug offense statutes.

A second drug conviction would trigger an “extended term” plea offer. “Special application and enhancement features” will also increase the plea offer in certain types of cases (e.g., if an adult distributes drugs to children they must receive twice the sentence that would otherwise apply). For first-degree cases the plea offers are increased if the case involves a “substantial quantity” of drugs (i.e., 50 ounces or more of heroin or cocaine; 250 pounds of marijuana).

A “downward adjustment” of up to three months below the minimum range may be made by a prosecutor after considering “the likelihood of obtaining a guilty verdict” at trial. Prosecutors can make a “downward departure” from the Brimage Guidelines if the defendant provides “substantial cooperation” to law enforcement. Reasons for the departure must be explicit, but are given *in camera* or under seal to protect the defendant.

Prosecutors are required to state on the record their reasons for waiving or not waiving any statutory mandatory minimum prison term, or for seeking an extended prison term. They must also make a record that explains the reasons for any departures from the guidelines.

In 2004 the guidelines were revised after a review requested by Attorney General Peter C. Harvey. The revisions, which exempt certain people charged with school zone offenses from the normal guideline calculations, were said to be designed to make better use of available correctional resources. Two types of standardized waivers are required when prosecutors handle cases involving the lowest-level defendants charged under the school zone law.

The first type of waiver entails a “flat offer” of three years in prison, but makes the person eligible for parole, which – under normal parole policies – may make him or her eligible for release in as little as nine months. To qualify, the drug charge must be a third-degree offense, and the person must not have any prior drug sales convictions; any prior first- or second-degree convictions, or any third-degree convictions other than for drug possession; any convictions involving a firearm; or any juvenile adjudications for firearms that would qualify as first- or second-degree if they were an adult. Additionally, the person must not have committed the offense while under any form of criminal justice supervision; must not have violated any “drug offender restraining order”; must not have distributed drugs to a pregnant woman or a child; must not have possessed a firearm; and cannot have any pending weapons charges, or charges subject to the No Early Release Act (NERA), or charges for eluding arrest while operating a motor vehicle. Even if all these criteria are met, a candidate is disqualified if they are deemed to be involved in street gang activity.

The second type of waiver entails an “open plea” in which the prosecutor agrees to waive the mandatory minimum and allow the judge full discretion to sentence the person to prison or to a split sentence of jail and probation. To qualify, all “flat offer” requirements must be met and, additionally, the person must not have sold the drugs to an undercover officer, an informant or cooperating witness; must not have committed the offense while released on bail; must not have any pending charges; must either be younger than 26 or have sold less than one-quarter of the amount that would establish the charge as a second-degree offense; must have no more than two prior drug possession convictions; must have made no attempt to flee when arrested; and must agree to submit to a drug or alcohol assessment and participate in treatment if it is deemed appropriate.

While lessening punishment for some who qualify for the restrictive waivers, the revised guidelines also stiffen punishment for others. New “street gang” enhancements provide additional terms of parole ineligibility in first-degree drug crimes, for example. Increased parole ineligibility also results if a person has violated a drug offender restraining order. And in certain circumstances involving weapons, prosecutors must require a person to plead guilty to a separate weapons offense in addition to the drug charge, resulting in two convictions with consecutive sentences.

- <sup>1</sup> "Drug-Free Zones State Statutory Analysis." National Alliance of Model State Drug Laws. January 4, 2001. Unpublished draft.
- <sup>2</sup> While some effort was made to verify that the information from the survey remains current and accurate, a complete update of the NAMSDDL analysis was not possible within the scope of the research reported here.
- <sup>3</sup> In Minnesota the zone extends 300 feet or one city block, whichever is greater.
- <sup>4</sup> Mississippi's drug-free zones extend 1,500 feet from buildings or outbuildings and 1,000 feet from the property line of covered locations.
- <sup>5</sup> Missouri establishes 2,000-foot zones surrounding schools and universities and 1,000-foot zones surrounding public housing developments.
- <sup>6</sup> Oklahoma's 2,000-foot zones apply to drug distribution while smaller 1,000-foot zones apply to simple possession.
- <sup>7</sup> Iowa and Oregon also provide specific penalties for drug possession in a drug-free zone, but Iowa's statute simply requires that individuals convicted of the offense perform community services, while Oregon's statute classifies possession of marijuana in a school zone as a misdemeanor offense.
- <sup>8</sup> Individuals convicted of drug possession for the third time in Arizona are still subject to the school-zone law, however at that point the impact of the enhancement is overshadowed by an even harsher repeat-offense enhancement.
- <sup>9</sup> For a comprehensive summary of case law on drug-free zone statutes, see Bateman, Tracy. "Validity, Construction, And Application Of State Statutes Prohibiting Sale Or Possession Of Controlled Substances Within Specified Distance Of Schools, 27 ALR 5th 593 (2005).
- <sup>10</sup> Courts required that offenses be merged in *State v. Gonzalez*, 123 N.J. 462, 588 A.2d 816 (1991); and *State v. Blow*, 123 N.J. 472, 588 A.2d 821 (1991).. Courts did not require the offenses to be merged in *State v. Maldonado*, 137 N.J. 536, 645 A.2d 1165 (1994) because different facts were involved.
- <sup>11</sup> See *McGee v. State*, 607 So. 2d 344 (Ala. App. 1992); and *Burks v. State*, 611 So. 2d 487 (Ala. App. 1992).
- <sup>12</sup> See *State v. Vasquez*, 80 Wash. App. 5, 906 P2d 351 (1995).
- <sup>13</sup> See *State v. Morales*, 224 N.J. Super. 72, 539 A.2d 769 (1987); *State v. Ward*, 92 Ohio App. 3d 631, 637 N.E.2d 16 (1993); and *State v. Dobbins*, 67 Wash. App. 15, 834 P2d 646 (1992).
- <sup>14</sup> See *Commonwealth v. Alvarez*, 413 Mass. 224, 596 N.E.2d 325 (1992); *State v. Moore*, 782 P2d 497, 120 Utah Adv. Rep. 10 (Utah 1989); and *State v. Graham*, 68 Wash. App. 878, 846 P2d 578 (1993).
- <sup>15</sup> See *State v. Altick*, 82 Ohio App. 3d 240, 611 N.E.2d 863 (1992).
- <sup>16</sup> *State v. Rodriguez*, 225 N.J. Super. 466, 542 A.2d 966 (1988).
- <sup>17</sup> *Harrison v. State*, 560 So. 2d 1124 (Ala. App. 1989).
- <sup>18</sup> Respectively: *State v. Burch*, 545 So. 2d 279, 14 Fla. L. W. 382 (Fla. App. D4 1989); *Steelman v. State*, 602 N.E.2d 152 (Ind. App. 1992); *Commonwealth v. Taylor*, 413 Mass. 243, 596 N.E.2d 333 (1992); and *State v. Ward*, 92 Ohio App. 3d 631, 637 N.E.2d 16 (Hamilton Co. 1993).
- <sup>19</sup> See *Pridgeon v. State*, 569 N.E.2d 722 (Ind. App. 1991); and *State v. Andrews*, 171 Wis. 2d 217, 491 N.W.2d 504 (1992).
- <sup>20</sup> *State v. Roland*, 577 So. 2d 680, (Fla. App. D4 1991); *French v. State*, 778 N.E.2d 816 (Ind. 2002); and *Com. v. Burke*, 44 Mass. App. Ct. 76, 687 N.E.2d 1279 (1997).
- <sup>21</sup> See *Steelman v. State*, 602 N.E.2d 152 (Ind. App. 1992).
- <sup>22</sup> *State v. Thomas*, 68 Wash. App. 268, 843 P2d 540 (1992).
- <sup>23</sup> *State v. Ogar*, 229 N.J. Super. 459, 551 A.2d 1037 (1989).
- <sup>24</sup> *People v. Trusty*, 53 P3d 668 (Colo. App. 2001)
- <sup>25</sup> *State v. Regan*, 564 So. 2d 1208, (Fla. App. D2 1990).
- <sup>26</sup> The minimum area of Connecticut's 1,500-foot zones is just over seven million square feet, while the minimum area covered by a 1,000-foot zone is a bit more than three million square feet.
- <sup>27</sup> Brownsberger, William. "An Empirical Study of the School Zone Law in Three Cities in Massachusetts," online at [http://www.jointogether.org/resources/pdf/school\\_zone.pdf](http://www.jointogether.org/resources/pdf/school_zone.pdf)
- <sup>28</sup> Keough, Robert. "The Color of Justice," online at [http://www.massinc.org/index.php?id=349&pub\\_id=1029](http://www.massinc.org/index.php?id=349&pub_id=1029)
- <sup>29</sup> "Survey of Sentencing Practices FY 2004." Massachusetts Sentencing Commission. April 2005.
- <sup>30</sup> The Sentencing Commission's report does not contain a table that combines the underlying offense, prior criminal history group, and court department for drug-free zone cases, so it is impossible to make exact matches between zone defendants and non-zone counterparts sentenced in the same court department with the same criminal history designation for the same drug offense. However, it is possible to arrive at a minimal measure of the impact by assigning drug-free zone cases to the grid cells where the probability of incarceration was highest absent the zone enhancement. For example, the commission reports that 55 of 198 district court defendants convicted with a drug-free zone enhancement were categorized in prior criminal history group "A". Since the underlying offense (Distribution Class A, B, etc.) was not known in each case, all 55 were arbitrarily assigned to the "Distribution Class A" cell where the likelihood of incarceration was greatest (47 percent compared to 36 percent for Class B and 20 percent for Class D). This technique provides a conservative estimate of the possible impact of the drug-free zone statute on sentencing.
- <sup>31</sup> Law Office of the Cook County Public Defender, Juvenile Transfer Advocacy Unit, October, 1999 through September, 2000.
- <sup>32</sup> Ziedenberg, Jason. "Drugs and Disparity: The Racial Impact of Illinois' Practice of Transferring Young Drug Offenders to Adult Court." Washington, DC: Building Blocks for Youth. May 2002.
- <sup>33</sup> Greene, Judith A. "New Jersey Sentencing and a Call for Reform." November 2003. Online at [http://www.famm.org/pdfs/82750\\_NewJersey.pdf](http://www.famm.org/pdfs/82750_NewJersey.pdf); Schiraldi, Vincent and Ziedenberg, Jason. "Cost and Benefits: The Impact of Drug Imprisonment in New Jersey." Washington, DC: Justice Policy Institute. November 2003.
- <sup>34</sup> "Report on New Jersey's Drug Free Zone Crimes & Proposal For Reform." Trenton, NJ: The New Jersey Commission to Review Criminal Sentencing. December 2005. Online at <http://sentencing.nj.gov/publications.html>
- <sup>35</sup> N.J.S.A. 2C:35-7.1
- <sup>36</sup> Sale of less than an ounce of marijuana is excluded from upgrade, remaining a third-degree offense.
- <sup>37</sup> See *State v Ivory* (1991) 124 NJ 582, 592 A2d 205.
- <sup>38</sup> 153 N.J. 1
- <sup>39</sup> *Ibid.* page 12.
- <sup>40</sup> Table 1.28B Illicit Drug Use in Lifetime, Past Year, and Past Month among Persons Aged 12 or Older, by Demographic Characteristics: Percentages, 2003 and 2004, online at <http://www.oas.samhsa.gov/NSDUH/2k4nsduh/2k4tabs/Sect1peTabs1to66.htm>, shows that whites, blacks, and Hispanics used illicit drugs in the past year at rates of 15.0 percent, 14.6 percent, and 12.9 percent respectively.

- <sup>40</sup> Riley, Jack K. "Crack, Powder Cocaine, and Heroin: Purchase and Use Patterns in Six Cities." National Institute of Justice and Office of National Drug Control Policy. 1997.
- <sup>41</sup> Drug-free zone arrest and conviction rates have been calculated from the arrest, conviction and population data presented in the sentencing commission's report. The figures presented here are likely to overstate arrest and conviction rates for non-Hispanic whites because the arrest and conviction data do not distinguish between Hispanic and non-Hispanic whites.
- <sup>42</sup> Some of these differences may be due to differences in drug type or in the prior criminal record of defendants. Further research would be needed in order to pinpoint the effects of factors such as these; however, it is not likely that these factors would account for more than a portion of such stark disparities as are shown here.
- <sup>43</sup> N.J.S.A 2C:43-6f provides mandatory enhanced punishment for repeat drug offenders.
- <sup>44</sup> Program Review and Investigations Committee "Findings and Recommendations," December 20, 2005.
- <sup>45</sup> CGS § 21a-278a(b)
- <sup>46</sup> CGS § 21a-279(d)
- <sup>47</sup> Lawlor, Michael. "Reforming Mandatory Minimum Sentences in Connecticut." *Federal Sentencing Reporter*, Volume 15, Number 1. October 2002.
- <sup>48</sup> Connecticut Law Revision Commission Drug Policy Report, available online at <http://www.cga.ct.gov/lrc/DrugPolicy/DrugPolicyRpt1.htm>
- <sup>49</sup> Lawlor, Michael. "Reforming Mandatory Minimum Sentences in Connecticut." *Federal Sentencing Reporter*, Volume 15, Number 1. October 2002.
- <sup>50</sup> The New Haven Advocate. "Zoned for Racism," April 5, 2001.
- <sup>51</sup> Program Review and Investigations Committee. "Staff Briefing," September 22, 2005.
- <sup>52</sup> Program Review and Investigations Committee. "Findings and Recommendations," December 20, 2005.
- <sup>53</sup> UCA §58-37-8 (4)
- <sup>54</sup> UCA §58-37d-5(d)
- <sup>55</sup> 2005 Annual Report of the Utah Sentencing Commission, online at <http://www.sentencing.utah.gov/Policy/Sentencing2005.pdf>
- <sup>56</sup> Letter from Michael R. Sibbert, Chairman of the Board of Pardons and Parole, to Senator D. Chris Buttars and Representative DeMar "Bud" Bowman, July 20, 2005.
- <sup>57</sup> In Nevada, the eligible offense must take place during school transport or school hours – one hour before school begins until one hour after it ends – while in Virginia the provision only applies to hours when students are waiting to be picked up or being dropped off.
- <sup>58</sup> NERA restricts parole eligibility for a range of first- and second-degree violent or dangerous offenses (murder; aggravated manslaughter or manslaughter; vehicular homicide; aggravated assault; disarming a police officer; kidnapping; aggravated sexual assault; sexual assault; robbery; carjacking; aggravated arson; burglary; extortion; booby traps; drug-induced deaths) and any offense where the offender used or threatened to use a deadly weapon, or caused the death or bodily injury of the victim.

