



**The Philip Weinberg Forum**  
**The Rockefeller Drug Laws:**  
**What Should Be Done Next?**  
**Presented by John R. Dunne**

*October 6, 2004*

*Richard P. Nathan:*

I'd like to welcome you to this forum. This is part of a series of forums that we hold at the Rockefeller Institute to give people a chance to talk about and give a good airing to important national and state public policy issues. Those of you who are new to the Rockefeller Institute, my name is Dick Nathan. I'm very proud to be the director of the Rockefeller Institute, which is the public policy research arm of the State University of New York. I'm grateful to Michael Cooper, who is the key person working with me to arrange these regular forums. The idea of the forums is to bring especially thoughtful people together before your workday starts to give people a chance to talk about, as I said, critical policy issues that people in our community, in this region, care about. We thank you for coming and it is my honor to introduce our speaker. WAMC is here to broadcast today's proceedings. We'll call on our speaker to give his overview on this very timely subject — the Rockefeller Drug Laws: What Next? We'll invite you to ask questions and to interact with our speaker.

Now, it's my honor to introduce Senator John Dunne. He has a stellar record of public service. When I looked again at his biography I was, as I knew even before, impressed by how dedicated he has been in working on critical subjects in American government at the national level and at the state level. When I was teaching and I was counseling students, I used to say, "There two kinds of law schools: Yale and all the others." Senator Dunne is a Yale law school graduate and Yale has a special talent in



their law program, in my estimation, of producing people who are very dedicated to the country and to public service. John Dunne exemplifies that. He has 30 years of experience in the public sector at various levels in government, particularly his 24 years as a member of the New York State Senate and as a

leader in the State Senate. He's also served in a very important position in Washington as the Assistant Attorney General for Civil Rights in the U.S. Department of Justice, where he headed up a large staff of lawyers and testified before appellate courts of the United States Judiciary and the United States Supreme Court. He is a caring and dedicated person. He was recognized for his work at the Justice Department by receiving the Edmond Randolph Award and the John Marshall Award for distinguished public service. When he was a member of the State Senate, he was deputy majority leader. He chaired several committees including the Judiciary Committee, the Environmental Protection Committee, the Insurance Committee, and, appropriately, the Prisons Committee or Corrections. He's published articles in law school law journals and is currently associated as counsel to the law firm in Albany, Whiteman, Osterman and Hanna. I told Senator Dunne I think it would be good for him to share his thoughts with us for whatever length of time he feels is appropriate and then one of us or both of us will invite your comments and questions. Again, we appreciate very much your coming and it is my honor to introduce and turn the microphone over to our speaker today, Senator John Dunne.

*John R. Dunne:*

Thank you, Dick, very much. Good morning. What a joy it is to be here at the Rockefeller Institute, named in honor of the man who will always be one of my heroes in terms of government service. As his running mate and very esteemed partner, former governor and lieutenant governor Malcolm Wilson, would have said, "how fortuitous it is" that we find ourselves in this building named for Nelson Rockefeller and immediately adjoining us a building named in honor of Malcolm Wilson.

There is an old saying from early days of government in the state of Virginia, “politics makes strange bedfellows.” These two “strange bedfellows” being Nelson Rockefeller, a man of enormous wealth, a man who was forward looking and an innovative activist and described, if you won’t spread it beyond this room, a liberal republican. There aren’t too many of us left. I still enjoy having that label of being a Rockefeller Republican. Compared with Malcolm Wilson, a traditionalist, a sound lawyer, and deeply religious individual and very conservative. What was so wonderful about the success that they achieved not only in the political arena but also in providing service to the public was that they had a shared commitment to achieving what is known as the common good even though it cost them, at times sacrificing and giving up some of their own prerogatives and traditions. For example, Malcolm Wilson, at the same time Nelson Rockefeller sought the nomination for governor back in 1958, also sought to become the governor of the state. Yet, he saw in Nelson Rockefeller the type of individual who could have a broad-based appeal to the people of New York State and he not only set aside his own ambitions but he offered to put on the table and assist Nelson and his quest for governorship the use of the many political IOUs he had upstate and his reputation for being credible with the people of upstate New York. He, as many of you know, said, “How about you and I traveling in my Buick upstate and meeting the people who can make it possible for you to get a nomination?” Putting his own interests aside, deferring them so that he could achieve the benefit for his political party. Nelson Rockefeller, time and again, carefully, judicially, and, yes, even in a calculated fashion, was one of the few elected officials on the political scene in New York or perhaps across the country who was willing to gamble or risk his own political fortunes in support of programs which he knew were not absolute sure winners. But he was willing to take a chance to improve the quality of the life of New York State and I think the legacy which he left and which you have honored by naming this institution after him are most obvious. So, it makes a lot of sense for the two buildings adjoining one another to represent the partnership, which I think has enriched the lives of so many of us here in New York State.

Let's turn to the issue, which is on the table for us this morning, and that is reforming the drug laws known as the Rockefeller drug laws. I prefer to refer to them as the Rockefeller-Wilson-Carey-Cuomo-Pataki drug laws because they have been changed or tried to be changed by those individuals in many ways. They were people who were not only responsible for the laws but also had a major voice in considering any proposed change in those laws. But for the sake of discussion, we'll talk about the Rockefeller drug laws. To paraphrase an expression, which is often used in Christian circles, "What would Jesus do?," I suggest that we ask ourselves today, "What would Nelson do" if he found this situation, which was a legacy of the laws which he so strongly challenged over 30 years ago? There are a variety of biographies that keep popping up about Nelson Rockefeller to help us explain this very unusual man. But I think the best source to go to, to try to figure out what Nelson Rockefeller might have done today is a letter which appeared in *The New York Times* just about a year and a half ago written by his brother, Lawrence Rockefeller. Nelson and Lawrence were probably as close as two brothers could be. And he opined in a letter to the editor of the *Times*:



In New York, harsh drug laws are associated with my brother, Nelson. In light of what was known 30 years ago as governor, Nelson advocated such laws. But I am convinced that in light of current knowledge, he would today be open to a fresh look at the issue. Above all, he was a practical and humane leader. The losses in this war are now well known. We have far too many people in jail for far too long for relatively minor offenses. Families are destroyed, creating yet another generation of dysfunction. The economic cost of the war is huge. Enforcement and imprisonment have become major components of federal and state budgets to the neglect of other pressing needs. Overly harsh laws and punishments have reduced faith in government, which is essential to the functioning of a democracy. And so I suggest, encouraged by that insight, we might want to take a look at these laws.

What has been discussed not only in the past, but very currently, particularly here in Albany County in light of the outcome of the primary for district attorney two weeks ago? Let's just look quickly at the history. How did we get to where we are? How was it

that Nelson Rockefeller proposed legislation, which seemed to fly in the face of a proposal before the Legislature to reconstruct our criminal procedure laws? These proposals came out of the so-called Bartlett Commission, a temporary state commission, which had been created in the middle of 1960s to totally rewrite the penal law as well as the criminal procedures law for our state. And fundamental to the proposal, which came before the Legislature in 1973, in this comprehensive change in the criminal procedures law was to open up the opportunities for judges to provide alternatives to rigid, fixed sentencing formulae. That was fundamental to give the courts, but particularly focusing on the judges, adequate resources to address the individual problems involved with criminal wrongdoers, so that if there was a chance for rehabilitation that would be pursued. If there was a case clearly deserving imprisonment for considerable periods of time, that flexibility and discretion was to be available to judges. Now those harsh laws, in contrast, the Rockefeller drug laws, which the governor proposed were counter to that basic principle.

But how did it come about that a man of such reason and insightful leadership such as Nelson was, could have made that proposal? I always believed it was out of a sense of frustration. Governor Rockefeller never shied away from a problem and he rarely ever shied away from spending money on the problem. He created the Narcotic Addiction and Control Commission, which was a revolutionary idea, at least in New York State, and that would be the civil commitment of drug addicts. Not criminal wrongdoers but those who were addicted to the use of drugs who should better be handled in drug treatment facilities away, out of sight, even against their will. It was not voluntary commitment but to be committed by the court. This idea was to be carried out by having intensive counseling and treatment working with identified addicts to try to get them to overcome their addiction and commit to a more productive life. The unfortunate aspect of it was that it just plain cost too much money and did not have the impressive record of success. In fact, I don't know if it was confidential, but heretofore a report was issued and a study done of what it actually cost to treat each one of these inmates. The astounding figure of \$230,000 a year per resident compared with then \$22,000 a year to house a person in a place of criminal confinement. So that program was abandoned.

Program two, the Methadone Maintenance Program, Once again New York was the leader. It spent more money and had more addicts enrolled in the Methadone Maintenance Program, the synthetic drug blocks the craving but does not have the effects of narcotics. That program was embarked on and yet we saw no significant or really any reduction in addiction and the crimes resulting from that addiction. And so, in a sense of frustration, the governor came very forcefully to the Legislature seeking enactment of laws, which were intended, by reason of severe penalties, to deter the use of illegal drugs and to drive the traffickers from the street. Unfortunately, these measures were adopted after long debate before the Legislature (just as an aside, I'm sure you're not legislature watchers such as I have been over the years, but it was the only time that Nelson Rockefeller ever appeared before a legislative committee to press the adoption of one of his program measures). I can remember sitting there one day when the two committees of the Assembly and the Senate joined to listen to his presentation, an indication of how he was so committed to this program. Unfortunately, the result of these measures has not reduced drug abuse. It has not driven the dealers from the streets. Maybe they've driven them off the streets and into some other location, but the drug traffickers are still in full bloom. But what it did do, as we know, it has destroyed many lives and has filled our prisons to over capacity. So it is that groups have come forward from various disciplines and various parts of our community to urge the reform of the drug laws, an effort which has gone on for the last seven or eight years. It has received the attention of the legislature and that of the governor. In fact, early in January of this year, the governor declared, "once and for all let's reconcile our differences and reform the failed Rockefeller drug laws." The leader of each house of the legislature being interviewed thereafter concurred. But each house has addressed and adopted varying measures of reform but the requisite three-way agreement has eluded their efforts.

Perhaps the failure to respond to this has been a failure to recognize what the people are really thinking. Perhaps they ignored the Zogby poll, which was conducted in New York that showed that 51 percent of those polled would be more likely to vote for a legislator who supports a bill to reduce drug sentences. Twenty-five percent responded they would not be likely. Fifty-one percent to 25 percent. Of those same being polled, 63

percent said would not consider as soft on crime a legislator who votes for reducing prison terms for drug offenders.

Why is this issue of such interest here today? Well, the ultimate happened. Two weeks ago here in Albany County, which certainly does not have a reputation for being soft on crime or soft on drugs, a county whose officials and judges have been very rigorous in enforcing the laws, particularly in terms of its criminal penalties. And yet, when there was a primary for the Democratic nomination for district attorney, the challenger — a young, former assistant district attorney — made the keystone of his campaign a need to reform the drug laws. A very curious position because for years the single reason why New York State has not addressed on an agreed basis the reform of the drug laws is the consistent, strong opposition by the New York State Association of District Attorneys. All 62 signed on to their continuous, strong, militant objection to any meaningful reform and yet this challenger made reform of the Rockefeller drug laws the keystone of his campaign. You all know what happened. When they opened and started counting the votes, three to two, the people in this county voted to remove their incumbent district attorney and support this new, young choice urging change in those laws. I think it's very significant because much of the resistance to the reform of the laws by the Legislature is the thought that people really don't care about this and they don't want to expose themselves to the charge of being soft on crime and soft on drugs. Well, I think that this is Exhibit A of how the attitudes have changed, not just here in Albany County but across the state as well. Consider, for example, the editorial in the *Post Standard* in Syracuse. They said the voters in Albany sided with the challenger, giving him 62 percent of the votes compared to 38 for the sitting district attorney. In fact, the voters nearly matched the 70 percent majority of New Yorkers who opinion polls indicate are in favor of reforming the laws. It seems that the people are ahead of their elected representatives! If you can believe this, the *New York Post*, which has been the single most strident opponent to reforming the drug laws of our state, low and behold, on the 13<sup>th</sup> of last month came out with an editorial the bottom line of which was “scrap the Rockefeller laws.”

The time is really now for the Legislature to face up to what many of us have been calling for many, many years. That is, taking a balanced approach, not going as far our friends at the *New York Post* say to scrap the laws but to look at them, find their weaknesses, how to reform them, how to improve them, and how to come a little closer to the prospect of true justice. Let me just make one final point with regards to the outcome of last month: the centerpiece of the challengers campaign was to change these laws. As they stated in the editorial, people of Albany have spoken loud and clear and all the district attorneys in New York State need to hear them. Curious that the incumbent district attorney after the results of the poll said that the drug reform issue is quote “something of a red herring” because the governor and the state Legislature, not the state’s 62 district attorneys, set drug laws. At best, a disingenuous statement because there is no question in anybody’s mind who has been involved in this issue that it is the voice of the New York State Association of District Attorneys which has been almost the sole but the controlling voice with regard to whether or not there should be reform of these drug laws. Their position has been consistent. They have not been as candid as I think they might in a fair and open discussion. But I think the time has come to recognize that change must come and it should be with the participation and contribution of the district attorneys.

I guess I’m speaking here today as the leader or the organizer of an organization known as the Campaign for Effective Criminal Justice. We formed this group about six or seven years ago for the purpose of changing and reforming the drug laws. Who are these people who are in the campaign? Former legislators — Warren Anderson, who was the Senate majority leader in 1973 when these laws were passed and he shepherded them through the Senate; former Senator Doug Barclay, who was the chairman of the Codes Committee and was the principal sponsor of the Rockefeller drug laws in 1973; Dick Bartlett, dean of Albany Law School and in 1973 he was Governor Rockefeller’s principal criminal law advisor, had been the first administrator of the court system, he is part of this campaign. From the religious community — both the Reverend Calvin Butts, the leading clergyman in Harlem; and Reverend Floyd Flake, congressman, they are part of this campaign. Two of our former court of appeals judges — Stuart Hancock, Richard

Simons, who had the opportunity to review the constitutionality of these laws and despite the fact that they didn't like them they were found to pass constitutional muster. Milton Mollen, the presiding judge of the appellate division 2nd department of Brooklyn, known mostly for the Mollen Commission, which investigated the New York City Police Department. He's a member of this campaign. Whitney Seymour, the former United States attorney for the Southern district of New York. I say these things not to just be a namedropper, but while I'm dropping names, Bishop Howard Hubbard, Bishop of the Albany Diocese, who has been a leading voice in criminal justice matters is part of that campaign. It's a group of interested, concerned, experienced individuals who really believe that it is time and well passed the time in order to consider the problems that have been brought upon our community by these laws.

Basically, what we are talking about at the present time in the context of what is being seriously discussed for the Legislature. We're talking about changes in the law with regard to options which a sentencing judge would have when he has or she has standing before the court a nonviolent, addicted drug law offender who wants to go into treatment rather than into prison. The issue here is who should make that decision. Under present law, the district attorney has the veto power over whether a judge should have the authority to divert a nonviolent, addicted drug offender to treatment rather than going to prison. It is our position that justice demands sentencing laws that are fair to the nonviolent, addict drug offender and which will at the same time enhance public safety.

Let me, perhaps, state it in philosophical terms. Our current laws today really amount to retributive justice — retribution. Retributive justice, which only punishes. It is a retaliatory system, which pays back in terms of years or months of pain by incarceration of a person who clearly has violated the laws. Let us, instead of adhering to a retaliatory system, which primarily focuses on punishment, adopt a principle of restorative justice based on healing. When a crime is committed, the peace and security of the community is broken. It is smashed, trust is gone, and trust needs to be reestablished and put back into place. Restorative justice begins that process, working with human beings, both the victim and the perpetrator. In retributive justice, the state becomes the victim and the

actual victim upon whom the crime was committed is sidelined and often used as a prosecutorial witness. While in theory, the state is offended by the facts that the law has been broken, the focus is on the wrong thing. We are focusing on law breaking, whereas crime is really victim harm. Yes, our laws must be respected but we must focus upon the victim and try to help the victim working with the courts to try to find some help.

Now just what is our agenda for change? Our drug laws must be reformed so that prison terms will no longer be mandated for drug offenders convicted of the least serious crimes. These laws must be modified to give judges the flexibility and sentencing discretion to tailor appropriate prison or alternative sentences based on the nature and circumstances of the offense and the history and character of the offender. Let me for purposes of clarity distinguish what we're talking about in terms of discretion. There's discretion with regard to how long a term should a person be sent away for, if indeed the court determines that imprisonment is appropriate. There is discretion with regard to diverting an individual who has pleaded guilty, whether to divert that person to treatment rather than to prison. It is that second aspect of discretion that we have been focusing most of our attention. While we do believe, obviously, that the mandatory aspects of imprisonment other than for so-called A-offenses, serious offenses, which carry a 15 to 25 year minimum and up to a maximum of life, other than that one special category, that mandatory sentence provisions should be changed so as to restore discretion to the judge.

But I want to really focus this morning on our consideration of discretion to divert to treatment, which has been proven more effective to overcome addiction. It has been proven less expensive than incarcerating in our state prisons and to find out if we can do something to restore to the courts the right to make that decision. Judges must be allowed to do what they are trained to do. The final decision as to whether to divert a defendant to treatment rather than commitment to prison should be made, as it has traditionally been made, by the trial judge. This discretion, however, should not be exercised without the full consultation and the advice of the district attorney who is the principal official charged with the state's compelling interests in law enforcement. But prosecutorial power at its zealous use are only a part of justice. Eliminating the element of justice and of

judgment will not make the criminal justice system work better. Absolute rules assure certainty but they can also assure injustice. What better evidence have we than we have of the action of Governor Pataki last year when he granted clemency to four women inmates serving in Bedford Hills, serving long state prison sentences for drug law violations. In doing so, granting clemency, he simply substituted his judgment for what should have been that of the original sentencing judges, who present law does not permit to weigh background and character of the defendants, the factors surrounding the crime, and the likelihood of recovery from addiction — the very same factors, which the governor took into consideration. Since we are in an academic hall, let's talk about separation of powers. We have the anomalous situation here where with the prosecutor, who has a basic fundamental responsibility for enforcing the laws and protecting the safety of the community, which everybody acknowledges is appropriate, intruding upon, conditioning, and limiting the authority of a separate branch, the judicial branch, in determining, in light of all the factors and considerations behind the wrongdoer as well as the crime itself. Taking that power away from the judiciary, reserving to themselves by reason of their veto power in terms of access to conversion, you find an intrusion by the legislative branch into the judicial powers. And lo and behold, we find that the clemency exercised by the executive is based and often times exercised on the same rules that the judicial branch, in its traditional role of determining what is appropriate as a sentence, has considered. In these four cases of the four women who are granted clemency, the governor recited facts and circumstances, which should have been and could have been part of a judge's decision in fashioning his sentence whether it was to a term of years or to a diversion, which he should have been able to take into consideration, but he was not authorized to do. Reform of the drug laws and restoration to judge's of their traditional role of sentencing discretion would still allow judges to sentence drug offenders to long prison terms when they felt it was appropriate. They would also have the option to sentence offenders to alternatives, which could include drug treatment at far lower costs. Now, let me, if I may, just tell you what our agenda is. Basically, as I mentioned before there should be judicial discretion for trial judges to deviate from mandatory sentences



and to divert nonviolent, addicted defendants to drug treatment programs instead of prison. Nobody has more respect for the district attorney and the difficult job that he or she must perform in this state. But we must recognize that they are only one part of the justice system and once the district attorney, as is his/her proper authority, arranged for a plea for disposition of a case has had enormous power in terms of the pressure that can be brought upon parties to enter into a plea of guilt. He/she then only becomes a player in, participant, and a strong voice in what is the appropriate sentence. The position that the District Attorneys Association has taken is that “they know best.” They know better than the courts what is the appropriate punishment for a given individual. They want in their own terms to be the “gatekeeper” with regard to who has access to the discretionary diversion into treatment rather than prison. I think that’s wrong. It is a concept, which even Governor Pataki in one of his proposals said that with regard to lower level crimes the district attorney should not have a veto power over it. He ought to be listened to because who really knows more than the district attorney? But there is no reason why that knowledge cannot be shared with the judge exercising his discretion.

Second point, we’ve heard a lot about DTAP, Drug Treatment as an Alternative to Prison. To their credit for the last decade, the district attorneys around New York State have innovative programs, which provide for treatment rather than imprisonment. They have proven it to be successful — money saving, life saving — beneficial across the board. But their position has been, “These are my programs. I know what’s best. I know who’s best suited for it and I want to keep control.” Let me suggest to you, remember Dr. Jonas Salk? Remember that miraculous discovery he made with regard to polio? Can you imagine Jonas Salk, after that miraculous discovery, saying, “Hold on now, I’ll decide who gets to use this serum and who doesn’t?” I mean there would have been a public outrage. The district attorneys have provided a great service to this state by demonstrating that there is legitimacy, there is hope, and it is appropriate in certain cases to divert to treatment rather than mandatorily sentence someone to prison. It’s time that this whole system be opened up and let the power to determine who should go to treatment and who should go to prison be left with the courts. Unfortunately, under existing law, unless the

D.A.'s agree to that program, the courts are handcuffed with regard to setting to diversion.

Second, there ought to be judicial review of sentences. Not only those who are being currently serving in many cases very long sentences but also the opportunity for people sentenced in the future to go to the appellate division as they would in any other appellate review to see if the court in its review what the court has done has imposed a sentence which is "unjust and a miscarriage of justice." Indeed, a tough standard to meet but it is one, which I think in appropriate cases, an appellate court would address. That's sentencing. Give back to the court their discretion to determine who gets diverted to treatment without the strictures of mandated penalties and to provide some sort of judicial review of the sentences that are imposed.

There is almost complete agreement that there should be an increase in the weight thresholds of the sentences which constitute illegal possessions. Current law defines a degree of a drug crime on the basis of aggregate weight of a mixture containing some amount of a controlled substance, not the pure uncut drug. Once again, the competing proposals, which address this issue, are in agreement that the defining weights should be doubled and this measure is recommended. Such a modification would not interfere with the imposition of the most severe penalties on large drug dealers who may not rise to the level of drug kingpins. And speaking of drug kingpins, all of the conflicting legislative proposals provide for the heaviest penalties for individuals who engage in what the proposed statute refers to "conducting a controlled substance organization." That is the existing penalties for A-1 offenses for as much as 25 years to life. While there is not agreement on the exact language to describe a controlled substance organization and its members, strong and precise language is necessary to cast a net over the most serious drug offenders.

Finally, item number five, as we campaign for federal criminal justice program is increased funding to drug treatment programs. Every study and the account of every treatment program confirms that deferral to drug treatment programs as an alternative to prison is less costly than imprisonment and has the potential for enormous savings of

public funds. A report recently issued by the Legal Action Center indicates savings from diversion programs could save the state and localities tens of millions of dollars each year. Such savings were also predicted by Chief Judge Kaye's state commission on drugs and the courts. While diversion to treatment has potential of great savings, any reform legislation must include funding for new start-up and expanded programs. But the prospect of substantial relief from the state's current fiscal crisis, funding of treatment programs must be viewed for their potential for extended as well as immediate benefits and adequate provision must be made to make the program possible.

But money is not the only resource we need in our version of the war on drugs. We need additional troops, seasoned, knowledgeable, experienced players who have regrettably to date been missing in action or rather have not been part of the action. Let me name names. Let me identify the players we need. We need to hear from Association of the Justices of the State Supreme Court. Now some might say, "Well, wait a minute. They're judges. They're up on this Olympian position. They shouldn't be involved in politics and legislation." Well, I can tell you as a legislator, I would hear from the Supreme Court Judges Association when they were looking for legislation to increase their salaries. When I fought for many years to merge the trial courts so that they would operate on a more efficient basis, specifically merging the Family Court into the Supreme Court, there was strong resistance from that association because they felt it was inappropriate for Supreme Court judges to handle the matters of the Family Court. We know now that there was nothing more important that comes before the courts than the problems of families and children. We've only seen recently that the Supreme Court Judges Association intervened in federal court in an action brought by the Brennan Law Center to challenge as unconstitutional New York's law which provides that Supreme Court judges should be nominated by judicial nominating conventions. A diversion or departure from what has been the basic way of putting candidates before the public for election. So, they can't hide behind "we don't get involved in politics." There may be lurking in the back of their minds that the work of the drug courts and diverting nonviolent, addicted offenders to drug courts, carefully supervised and very closely watched, is hard work. As our president reminded us this year, the business of

government is hard work. I suggest if you wonder what's its like maybe you go to Brooklyn on a Friday afternoon, go into Supreme Court building, and see the dedicated judges who are already involved with the drug courts. They bring those offenders in there every Friday afternoon. They question them. They look at the reports from the supervisors. They challenge them. But by the same token, they don't say, "One strike and you're out." They work with them and they help them. And the success of those programs has been remarkable.

Where have been the drug treatment organizations? Those who have been the leaders for 30 years in New York State, who in over the course of those 30 years, have discovered new techniques and successful ways of working with addicted offenders. Where are they? We haven't heard from them. It could be enormously beneficial to legislators and others who are going to make these decisions to know of their successes as well as their failures, so that a sensible, balanced judgment could be made by the legislature and the governor as to what direction we should go in reform. These organizations, which are funded principally by state and federal money, should be heard from. And if sensible legislation is adopted for diversion, they among others will benefit from the increased number of people seeking their treatment. But we need their voice to be heard and it has been silent.



Where have the correction officers been? The job of correction officer today in state prisons is a very difficult job at best. It is filled with all kinds of tension and turmoil. I have a very sympathetic feel for them. But yet, if you consider that Governor Pataki's proposal for increased drug treatment called for it to be done exclusively within the state prisons, what a great opportunity for correction officers with training to maybe get a notch up and a little better job to work with the inmates, to provide a little more hope in their job, a new phase or aspect of it in order to enhance

their life, which is a very difficult one in carrying out the responsibilities of a correction officer. We haven't heard from them at all.

We've heard from bar associations and other groups. They put out these wonderful resolutions, but they aren't talking on a grassroots level with legislators who they know on a personal basis to urge them to give consideration to change these laws, which are so essential. Finally, I think we have to hear a different message from the district attorneys and the District Attorneys Association. I'm encouraged that the district attorney Robert Morgenthau in New York County, who is considered the spiritual leader of the District Attorneys Association, responded very favorably when the Senate Minority indicated that they were going to hold hearings on and seek ways to perform these drug laws. It's very interesting, Mr. Morgenthau, facing the election next year, has been challenged by a fairly prominent judge making reform of the Rockefeller drug laws a keystone of her campaign.

I think what happened here in Albany was more than just a wakeup call. It was a final recognition that what we have to do is face up to a very, very serious problem. A problem which goes beyond simply addicted, nonviolent offenders which is the immediate agenda of the Campaign for Effective Criminal Justice. We've got to address the underlying social issues, which bring about such a heavy level of addiction, particularly in the African-American and Latino communities. If we don't address that and we want to turn our backs to the fact that nearly 95 percent of those who were sent to prison in 2002 on drug violation charges were either from the Latino or the African-American community. We've got to look in the mirror and ask ourselves what's wrong with this? Why is this happening? Particularly, when you consider that most responsible studies indicate that drug abuse is just as heavy in white communities as it is in communities of color. I would commend for your attention this book, *Life on the Outside*, which was written about Elaine Bartlett who was convicted here in Albany County for attempted sale of a significant amount of drugs. She was sentenced to 20 years to life and Governor Pataki granted her clemency only recently, citing the very same circumstances and conditions which the trial judge, if he were not handcuffed by mandatory imposition

of penalties, could have considered. It's a very telling book. Having come from a suburban Long Island community, representing the folks in my district for 24 years, I guess I didn't fully understand what life is really like in New York City and other major metropolitan areas. Consider Elaine Bartlett. She has a little chart here in this book; she was one of seven siblings. One brother died of AIDS; another brother was imprisoned and has seven children; a sister battling drug addiction and is HIV positive; another brother is in prison and presently has two children and a grandson; another sister is raising her five children and four of one of her sister's children; her other brother, Frank, was gunned down on the street perfectly innocently. He was the one of the seven who was really earning a living and supporting a family. Elaine goes off to prison leaving four young children. In the 16 years, their only contact with her was the visiting room at Bedford Hills. This is perhaps an agenda for another day. But we must recognize that drug addiction as well as other antisocial criminal activity is born out of communities which have been under-funded, under-served, and have been to a great extent ignored, perhaps out of ignorance and lack of knowledge. But it's a problem that is not going to go away. What I'm urging at this point is that we take the initial step to get our priorities in order, to reorder in its proper role the responsibilities of the legislative, the judicial, and the executive branches, so that we can realize a little more fully the concept of justice for the community. I'll concede to you that it's difficult to be involved in this issue and not get kind of emotional and passionate about it. All you have to do is read about life on the edge and begin to understand the problems that are faced not by society as a whole but those who come within the grips of our criminal justice system. The wakeup call in Albany is a clarion call for the rest of the state to recognize that we must be about the serious business and the hard work of addressing the problems which are visiting such suffering upon the community.

*Richard P. Nathan:*

Very good. I'm going to now give people a chance to ask question or comment upon what Senator Dunne has covered in his talk. I'll start it off, John. Other people, I urge you to join in. We've got the dean of the Criminal Justice School up here. I at various times

have talked to Judge Traficanti about the drug courts and how they work. And you mentioned the drug courts in what you're saying and I wonder if you could put them into context of the wakeup call or change that you presented to us?

*John R. Dunne:*



Drug courts are another indication of the respect and gratitude the people of New York State have principally to the district attorneys because they wouldn't be in existence if hadn't been part of the drug treatment as an alternative to prison program, which they innovated. Drug courts basically are carrying out what was the

theme or underlying principle of the 1973 revision of the Code of Criminal Procedure to provide alternatives for the justice system to address specific areas of the law, which required special consideration and treatment. As a result of that, Judge Judith Kaye, the chief judge, directed Judge Traficanti, her deputy, to go around the state and see that drug courts are established in every major court. What are drug courts? They are courts to which violations of the drug laws, either by misdemeanor information or by felony indictment are referred to a particular judge who has support services with regard to treatment, prosecution, the whole array of services that are necessary in addressing drug abuse, not just for the addicted but for those entirely caught in the web of the criminal justice system. To focus on and try to identify what is the best disposition of the individual standing before the court. The district attorney is essential, obviously, with regard to making that decision and advising the court. But this is not a separate courthouse building or creating a new entity. What we are doing in these drug courts is, by judicial fiat by administrative rule of the Office of Court Administration, identifying a particular forum for a particular type of problem may be brought for the focusing of special skills and ability. I think they are a great innovation. But with the district attorney, who's an important party to this overall picture, controlling who has access to that court

and the treatment, I think is inappropriate. So, therefore, we will continue to press for them to be a key player but not the gate keeping veto.

*Tyrone Benton:*

My name is Tyrone Benton. I work with the Black and Puerto Rican Caucus. I'm the executive director. I was a little confused by your statement that said that you hadn't heard from the corrections officers regarding this issue. Do you really think that corrections officers would support repeal of this because it supplies the prison industry?



*John R. Dunne:*

I'm not sure because we haven't heard from them. However, if I may, logic would indicate to me that if there were an opportunity for, let's say, an employee to improve his or her position and possibly increased compensation, they ought to be open to find out how it might be accomplished. We haven't heard from them and I'm sorry we haven't because they have become one the leading and one of the best financed lobbying groups in Albany with regard to matters of their interest. And I don't say that critically, they have every right to, as they should. But they haven't spoken on this issue. Yes, it might mean a reduction in the overall number of prison guards but there would be a significant increase in the number of personnel in the prison acting as advisors, consultants, and those who would be engaged in drug treatment programs. Programs, which I think many corrections officers could qualify for because, after all, they basically deal with communicating with people, understanding people's problems, and human nature. The difficulty is the corrections officers have, in something that has occurred in so many other phases of life, been looking out for their narrow interests and have moved away from what had traditionally been the role of a corrections officer as counselor and someone who helps the inmate to get through and do his time. This antagonism, I think, is

regrettable but I think that if we could get the corrections officers as well as the others into a dialogue and to be heard from. Legislators including myself have been there. We're babes in the woods with regard to the realities of drug treatment. Wouldn't it be helpful if those who have had years of experience dealing with these problems to sit down and say, "Now wait a minute, this sounds like nice idea but let me tell you what the consequences would be." Or, "let me tell you how you might consider improving whatever proposal comes before the Legislature." There's got to be a dialogue.

*Julie Horney:*

I'm Julie Horney from the School of Criminal Justice. We've discussed this a bit before but I think it's an important issue. Your group's proposals for reform focus on addicted offenders and drug treatment as an alternative. To what extent is that because you believe that that's where the major problem with the drug laws lie? And to what extent is that a political kind of decision about where you have the greatest chance to be effective?

*John R. Dunne:*



It's basically a political decision in the sense that I identify it as what is doable. There has to be sympathy for the drug addict. People just don't take up addiction because they want to do something different. It's oftentimes representative of serious underlying social problems for which legislators representing the community should have some sympathy and understanding. I cited the case of Elaine Bartlett. Now, there's a woman who had a job. She had a kind of adventurous lifestyle. Like so many people, she was pressed economically and someone said to her do you want to make a quick \$2,500 and carry this satchel of cocaine from New York City to Albany County? She should've chosen some other county. But she said yes. She was in it for the money. She was not addicted but she came from a community, which I outlined to you, now this is not just coincidence, of the

horrific family picture. She's not a poster child. We didn't go looking for her. She is one of thousands of people who are caught up in the toils of drug business, drug abuse, and that's going to be a tough sell. So, Julie, in response to your question, yes, we made a political decision. I mentioned who are joined with us in this effort — former judges, former legislators, religious leaders. They know what is going on out there in the community. They know what would be acceptable to the community and that is our first step. But I think it is an important and significant one. It not only right sizes justice but it also put aright the appropriate allocation of government authority — legislative, executive, and judicial.

*Julie Horney:*

Elaine Bartlett is a perfect example, I think, in the kind of problem that I'm thinking about. She wouldn't be helped with this specific proposal in her case.

*John R. Dunne:*

She would be helped with the proposal only at the other part of the discretion that we're urging is removal of the mandating of sentences. There should be no question if there is somebody really making his or her living in trafficking in drugs, they ought to be away for as long as the law will allow. But for those who are casually involved, there ought to be some discretion. The idea of sending this woman away with four little kids at home, a single parent, nobody to take care of them except another aunt who already has four children of another sibling. It's out of proportion to the way society should respond to a very serious problem.

*Julie Horney:*

And the judges should have the discretion to take all of this into account is what you're saying.

*John R. Dunne:*

Exactly. But what I find curious, a lot of the D.A.'s excuse is that, "We can't trust the judges." Well I made a little check and I found out a majority of the felony court judges in upstate were either D.A.'s or former assistant D.A.'s. So, you don't change from good guy to bad guy just because you put on the black robe. I think we have to recognize and respect the authority of the judges who we have entrusted and if we don't trust the judges maybe we should find another way of selecting judges. But that's a matter for another day.

*Richard Nathan:*

Another good subject that I thought of as you were talking, we should address and could address here. Any other questions or comments?

*Chloé Mister:*

My name is Chloé Mister (representing the *Legislative Gazette*). I'm actually from Chicago and only have been here a month but what I wanted to ask you was without the mandate, do you feel that there will be drug disparities with sentencing as far as race is concerned even without the mandate? For instance, I'm speaking specifically with people who are addicted not the sellers.



*John R. Dunne:*

Yes, there's no question there will be some disparities. Frankly, experience shows that it's a lot easier to apprehend drug abusers and sellers in minority communities than it is in so-called white or suburban communities. So, you're probably going to find a continually

disproportionate number of Latinos and African Americans brought before the bar on drug crimes. However, I believe that if you provide greater discretion for the courts, you will find a reduction in that disparity. It's the mandating that brings so many minorities into our prisons. Also, in defense of the system of sentencing, I worked for many years in the criminal court in Nassau County, the judge says, "Now, gee, what roots does this person have in the community? Does this person have a solid family that will provide backup and support and help to get away antisocial conduct? Is there employment? What is the education level?" Once you get into those, you realize there are so many failings of our society that have impacted on an identifiable group that we still have to address that. This is no panacea but I believe it will provide significant relief.

*John Caher:*

John Caher from *New York Law Journal*. You mentioned that the Judges Association ought to become more involved in this. What would that achieve? What would that do? We have many judges on record, including the chief judge, calling for reform. What would it do to get the association involved?



*John R. Dunne:*

I don't know what it would take to get them involved. But I think this may have been the first call publicly for them to be involved. Despite the fact that the judges are removed from politics, they still have significant personal contacts and influence with not only legislators but also community leaders. I firmly believe that if the association called upon its members to become actively involved in an effort to change these laws, they would have an enormous impact and effect.

*Kevin Webb:*

Yes, Kevin Webb, I'm legislative director to Senator Padavan, one of your former colleagues. I would be interested to hear your thoughts and comments on the work of the Conference Committee that was established to reconcile the differences between both houses' measures. I didn't attend any of the meetings but my experience in the Legislature is if you can at least achieve half or more than half of what you want in a negotiation that's a pretty good deal and you should take it. I just said I didn't attend these meetings but I understand there was a lot of agreement in the Conference Committee on what should be reformed but there was a couple little sticking points at the end, which I'll grant you, were significant ones which held up a measure of reform this year. Could we come back to the table next year and achieve the remainder of what needs to be done?

*John R. Dunne:*

One would certainly hope so that the two houses working together could bring about some agreement between them. But legislation is sort of like a three-legged stool — Assembly, Senate, and the governor. Until we get to a point where the governor is part of these intensive face-to-face sit down negotiations. I'm not talking about three men in a room. I'm talking about three men in a room deciding we've got to settle and address this issue. I know that has been done. I've been part when we settled issues of medical malpractice insurance. Whether we settled issues of acid rain legislation, which was the first in the country. Whether it was an issue of restricting the access to the Court of Appeals by those who were dissatisfied with a judgment in the appellate division. When the legislative leaders and the governor say to their staffs and those of us who are privileged to be part of those deliberations, "Go into that room, work out your differences, and come out with a bill that we can live with." We haven't gotten to that point yet. And until we do, there's not going to be any resolution. I think what the Legislature did is a step in the right direction. It emulates to a small degree the practice in the Congress because those results are usually pretty final. But I think that the next move that has to be done is the three-legged stool.

*Shero Malik:*

My name is Shero Malik and I representing a group called Physicians for Human Rights today. This is a comment as well as a question. My comment is our report that we had placed outside. For those who haven't received it, please feel free and approach me afterwards and I can send it to you. Our statement is part of what you had discussed, which is highlighting the poverty and public health implications that exist as far as the Rockefeller drug laws are concerned. Considering that we are a Boston-based organization, we don't necessarily have a lay of the land; the next piece now that we have released this report in collaboration with the Fortune Society is to do an advocacy piece. So, my comment is that once this is said and done, if any of you have comments or suggestions that you can feed back to me it would be much appreciated. Secondly, as far as being from Massachusetts and not knowing the lay-of-the-land as far as how the system works here in New York State, when do we actually see the reform coming up to legislation again and something actually being passed?

*John R. Dunne:*



Shero, thank you for that question. I've been there before when I've thought when people said, "I think the chances are this year?" I think all the stars in alignment and we're ready to do it. I think not only are the stars in alignment but people are beginning to look at them and watch them and be impressed by the light which has come from the various developments, not the least of which is the result in the Albany primary. Let me say to you Shero, ever since when I chaired the Prison Committee back in the 60s, I worked with the Fortune Society. That was the first group of its kind to work with ex-offenders upon their release from prison. They started in a pretty modest office sometimes square above a porno shop. (I can remember very well. I never stopped there.) But they were a very dedicated group and I was so impressed when that report came out and I commented so favorably on it.

Not only that a group of physicians would work with a knowledgeable group such as the Fortune Society but it brought one more aspect of those in this community who recognize the results of our present system of imprisonment under mandatory laws such as we have now. I look forward to your next report. But that is really a solid piece of work. It just provides to me one more example of hope.

The business of government is, as the president reminded us, “hard work.” It’s not the work simply of those who have the privilege of serving in office. It’s a responsibility of every responsible, concerned citizen who is seeking that goal, which I believe Nelson Rockefeller and Malcolm Wilson sought, the common good which will help all of us despite the fact that getting behind the search for a common good may involve sacrifice and giving up some immediate benefits in order to help others. Thanks again. What a delight to be with you.

*Richard Nathan:*

Let me as a final before I invite your recognition of this really interesting helpful discussion and talk today. These forums are named after Phil Weinberg who was a major person in state government in New York State and the Legislature set up this way to honor Phil Weinberg. It’s ironic I think this may be our first session this year that Senator Dunne was a law partner of Phil Weinberg. And I didn’t put that together.

*John R. Dunne:*

And my dearest friend.

*Richard Nathan:*

It’s particularly fitting and serendipitous that we arrived at this decision to have you be the first speaker. It was a really thoughtful, helpful chance for all of us to learn about your experience in this field and your caring commitment and your view of it. We thank you very much Senator for coming here and talking with us today.